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[2] 1 January 2016

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SUSAN SANDERS BARBOUR, STEWART 1996 FAMILY LIMITED PARTNERSHIP, NEUSE TREE FARM, LLC, AND E. WAYNE STEWART, TRUSTEE OF THE VELMA H. STEWART IRREVOCABLE TRUST, PLAINTIFFS

v.

JANE HARRIS PATE, AND HUSBAND PRAYSON W. PATE; MAE O. (PARKER) BOLES, AND PHYLLIS PARKER MASTROCOLA, SINGLE; DEFENDANTS

No. COA13-227

Filed 20 August 2013

1. Easements—implied by prior use—implied by necessity—scope improperly limited

The trial court erred in a case concerning plaintiffs' rights to use a farm path on defendants' property by limiting the scope of their easement implied by prior use and by necessity to farming and timber management uses only. The trial court's findings of fact and conclusions of law did not reflect that the court considered all of the necessary legal principles that determine the scope of implied easements. The portion of the trial court's judgment which limited the scope of plaintiffs' implied easements was vacated and remanded for additional findings of fact and conclusions of law.

2. Appeal and Error—preservation of issues—failure to enter notice of appeal

Defendants' argument that plaintiffs failed to establish the necessary grantor element for an implied easement was not addressed where defendants did not enter a notice of appeal of the trial court's judgment.

3. Easements—by prescription—misapprehension of law—hostile use

The trial court erred by concluding that plaintiffs were not entitled to an easement by prescription. The trial court's findings of fact reflected a misapprehension of the law regarding the hostile use element of an easement by prescription. This portion of the trial court's judgment was vacated and remanded for additional findings of fact and conclusions of law.

Appeal by plaintiffs from judgment entered 22 August 2012 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 June 2013.

Thomas S. Berkau, P.A., by Thomas S. Berkau, and Spence & Spence, P.A., by Robert A. Spence, Jr., for plaintiff-appellants.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by John W. Narron and W. Thurston Debnam, Jr., for defendant-appellees.

CALABRIA, Judge.

Susan Sanders Barbour ("Barbour"), Stewart 1996 Family Limited Partnership, Neuse Tree Farm, LLC, and E. Wayne Stewart, Trustee of the Velma H. Stewart Irrevocable Trust (collectively "plaintiffs") appeal from the final judgment of the trial court. The trial court's judgment granted plaintiffs easements implied by prior use and by necessity, but limited the scope of their uses, and additionally denied plaintiffs an easement by prescription. We vacate and remand.

I. Background

Jane Harris Pate, her husband Prayson W. Pate, Mae O. (Parker) Boles, and Phyllis Parker Mastrocola (collectively "defendants") own property located in Smithfield Township, Johnston County, North Carolina. This case concerns plaintiffs' rights to use a farm path ("the Watson-Parker path" or "path") on defendants' property. Plaintiffs and defendants are owners in fee simple of certain tracts of land of varying sizes, all of which may be traced to a common owner in the nineteenth century. Dr. Josiah O. Watson ("Dr. Watson") purchased the land now owned by plaintiffs and defendants for use as a plantation sometime between the 1820s and the 1840s. Dr. Watson's plantation comprised more than 1,500 acres.

The Watson-Parker path began at the plantation's northern boundary, River Road (now Brogden Road), and continued in a straight,

perpendicular line for approximately three-fourths of a mile to the plantation home, which was built around 1820. The path then veered west to follow the high ground along a causeway leading down to the Neuse River, the plantation's southern boundary. Use of the path was necessary for travel through portions of the plantation because of the creeks, wetlands, and swamps on the property.

When Dr. Watson died in 1852, he left the entire plantation to his nephews William H. Watson ("William") and Henry B. Watson ("Henry") as tenants in common. The nephews divided the plantation by judicial land division in 1853 ("the division"). Henry received Lot #1, the eastern portion of the property, approximately 827 acres that included the plantation home and all those lands now owned by plaintiffs. William received Lot #2, approximately 691 acres comprising the western portion of the plantation, including the lands now owned by defendants. Both tracts were valued equally at $2,764.00. However, Lot #2 was the more valuable tract per acre, because Lot #1 included more swampland.

No roads or paths appear on the 1853 judicial land division, but the Watson-Parker path extending from River Road to the Neuse River was known to have previously existed. At the time the land was divided, Henry did not have a legally enforceable right of access to River Road.

Dr. Watson and his successors in interest through his nephews used the Watson-Parker path to benefit the land now held by plaintiffs and defendants for farming, timber management, cutting firewood, hunting, fishing, and other recreational uses. Following the nephews' land division, continued use of the path was necessary for the enjoyment of Henry's land.

Plaintiffs and defendants trace their ownership through subsequent divisions of the nephews' lands. Plaintiffs trace their property through the Henry B. Watson chain of title. Barbour is Henry's great-granddaughter. Defendants are not direct descendants of the Watsons, but they are successors in interest to the William H. Watson farm created by the division.

On 5 March 2012, plaintiffs filed an amended complaint against defendants in Johnston County Superior Court seeking to establish the nature and scope of their right to use the Watson-Parker path. Plaintiffs alleged that they possessed a prescriptive easement, an implied easement by necessity, an implied easement by prior use, and an easement by estoppel in the Watson-Parker path. The parties waived a jury trial. On 22 August 2012, the trial court entered a judgment concluding that plaintiffs were entitled to an implied easement by prior use and an easement by necessity, but limited these easements to the historical uses of

farming and timber harvesting and management. The trial court denied plaintiffs' requests for an easement by prescription and an easement by estoppel,[1] concluding they had failed to prove either one by a preponderance of the evidence. Plaintiffs appeal.

II. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)).

III. Limitations on Plaintiffs' Easement Implied by Prior Use and Easement by Necessity

Plaintiffs argue that the trial court erred by limiting the scope of their easements implied by prior use and by necessity. Specifically, plaintiffs contend that the trial court's findings do not support its conclusion that these easements should be limited to only farming and timber management uses. We agree.

A. Easement Implied by Prior Use

An easement implied by prior use is established when:

> (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was "apparent, continuous and permanent," and (3) the claimed easement is "necessary" to the use and enjoyment of plaintiffs' land.

*Metts v. Turne*r, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002)(citation omitted). "[A]n 'easement from prior use' may be implied 'to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer.' " *Knott v. Washington Housing Authority*, 70 N.C. App. 95, 97-98, 318 S.E.2d 861, 863 (1984) (quoting P. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary*," 58 N.C. L. Rev. 223, 224 (1980)). Since the purpose of an easement implied from prior use

1. Plaintiffs do not appeal the trial court's denial of an easement by estoppel. Defendants did not appeal the trial court's judgment.

is to protect the expectations of the grantor and grantee, "its scope and extent is measured by the scope and extent of the use of the land involved which gave rise to the quasi-easement." 1 James A. Webster, Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15.22, at 15-56 (6th ed. 2011)("*Webster's*"); *see also* Restatement (Third) of Property (Servitudes) § 4.1 cmt. e (2000)(The circumstances under which an implied easement is created "may also give rise to inferences as to the intended or reasonably expected terms of the servitude. If the intentions or expectations of the parties can be ascertained, they determine the scope and terms of the servitude.").

In its judgment, the trial court made the following relevant findings regarding the prior use of the Watson-Parker path:

> 20. The Watson-Parker path led to the 1820 plantation home and then followed the high ground along a causeway down to the Neuse River. Josiah O. Watson and his successors in interest through both William H. Watson and Henry B. Watson used the Watson-Parker path to benefit the land now held by the plaintiffs and defendants for farming, timber management, cutting firewood, hunting, fishing, and other recreational [uses] since the 1820's.
>
> . . .
>
> 25. The Watson-Parker path from River Road to the Neuse River was known to have existed prior to the division of the Josiah Watson plantation and the path was used for farming and timber management.
>
> . . .
>
> 51. The historical uses of the Watson-Parker path by the plaintiffs or their predecessors in interest were for farming and timber management.

Based upon these findings, the trial court concluded that "[t]he plaintiffs are entitled to an implied easement by prior use across the lands of the Defendants along the Watson-Parker path for agricultural purposes and for timber harvesting and management, the primary historical purposes of the prior use."

Contrary to the trial court's conclusion, the appropriate standard for determining the scope of an implied easement, as set out above, is not the "primary historical purposes" of the prior use of the easement, but rather "the probable expectations of the grantor and grantee that an

existing use of part of the land would continue after the transfer." *Knott*, 70 N.C. App. at 97-98, 318 S.E.2d at 863 (internal quotation and citation omitted). It is unclear from the trial court's findings which uses of the Watson-Parker path the parties intended to continue after the division. The trial court's findings reflect that, at the time the land was subdivided, plaintiffs' predecessors in interest were using the path for hunting, fishing, and other recreational uses in addition to farming and timber harvesting, and that all of the listed uses have continued "since the 1820's." If the parties expected all of these uses to continue after the property was divided, they necessarily must be included as part of the easement implied by prior use. *See id.*

Thus, we must vacate the portion of the trial court's judgment limiting plaintiffs' easement implied by prior use and remand for findings and conclusions regarding "the use of the land involved which gave rise to the quasi-easement," *Webster's*, § 15.22, at 15-56, at the time the land was divided in 1853, rather than the "primary historical purposes" of the easement. *See 42 East, LLC v. D.R. Horton, Inc.*, ___ N.C. App. ___, ___, 722 S.E.2d 1, 11 (2012) ("[I]t is well established that [f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." (internal quotations and citation omitted)). In making these findings and conclusions, the trial court should be guided by "the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer." *Knott*, 70 N.C. App. at 97-98, 318 S.E.2d at 863.

B. Easement by Necessity

"In order to establish an easement by necessity, one must show that: (1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became 'necessary' for the claimant to have the easement." *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996)(internal quotations and citations omitted).

> [I]t is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it . . . .

Smith v. Moore, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961). "Additionally, necessity may be established if the easement is necessary

to the beneficial use of the land granted, and to its convenient and comfortable enjoyment, as it existed at the time of the grant." *Woodring v. Swieter*, 180 N.C. App. 362, 374, 637 S.E.2d 269, 279 (2006) (internal quotations and citations omitted).

In the instant case, the trial court made the following findings relevant to plaintiffs' claim of easement by necessity:

> 22. The use of the Watson-Parker path was necessary because the creeks, wetlands, and swamps that existed throughout the plantation made travel impossible except along the Watson-Parker path that followed a terrace on the upper part of the plantation and a causeway along the lower part of the plantation to the Neuse River.
>
> . . .
>
> 26. At the time of the division of the property between William H. Watson and Henry Bulls Watson, Henry Bulls Watson did not have a legally enforceable right of access to River Road.
>
> 27. The Watson-Parker path was necessary for the enjoyment of the Henry Bulls Watson land.

Based upon these findings, the court concluded that "[t]he easement claimed by the plaintiffs along the Watson-Parker path was reasonably necessary to the enjoyment of the plaintiffs' land by the plaintiffs and by their predecessors in interest" and that "[t]he plaintiffs are entitled to an easement by necessity across the lands of the defendants along the Watson-Parker path for agricultural purposes and for timber harvesting and management."

The limitations on plaintiffs' easement by necessity again appear to be based upon the trial court's conclusion that the "primary historical purposes of the prior use" of the Watson-Parker path were agricultural purposes and timber harvesting. Nevertheless, as previously noted, the trial court found that the Watson-Parker path was used for additional purposes both prior to and after the division. The trial court's findings do not include a determination of the uses of the Watson-Parker path at the time of the division that "would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it." *Smith*, 254 N.C. at 190, 118 S.E.2d at 438-39. Moreover, while the trial court concluded that use of the Watson-Parker path "was reasonably necessary to the enjoyment of the plaintiffs' land by the plaintiffs,"

it does not conclude which uses of the path were reasonably necessary for plaintiffs' "convenient and comfortable enjoyment, as [the uses] existed at the time of the grant." *Woodring*, 180 N.C. App. at 374, 637 S.E.2d at 279. Consequently, we must also vacate this portion of the trial court's judgment and remand for findings of fact and conclusions of law regarding the scope of plaintiffs' easement implied by necessity which utilize the standards set forth above.

C. Defendants' Argument

[2] In their brief, defendants attempt to argue that plaintiffs failed to establish "the necessary grantor element for an implied easement." However, defendants did not enter a notice of appeal of the trial court's judgment and thus cannot challenge the trial court's determination that valid easements implied by prior use and by necessity exist. *See CDC Pineville, LLC v. UDRT of N.C.*, LLC, 174 N.C. App. 644, 657, 622 S.E.2d 512, 521 (2005). Accordingly, we decline to address defendants' argument and the portion of the trial court's judgment which concluded that plaintiffs established valid implied easements remains undisturbed.

IV. Easement by Prescription

[3] Plaintiffs also argue on appeal that the trial court erred by concluding that they were not entitled to an easement by prescription. We agree.

> In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981) (citation omitted).

In the instant case, the trial court made the following findings regarding plaintiffs' claimed easement by prescription:

> 38. The use of the Watson-Parker path by the heirs of Henry Bulls Watson was so well established that anyone in the community, including the successors in interest to the William H. Watson land, knew or should have known that the heirs of Henry Bulls Watson used the Watson-Parker path.

> 39. The use of the Watson-Parker path by the heirs of Henry Bulls Watson has been both continuous and uninterrupted.
>
> 40. The Watson-Parker path has been in the same location as shown on the 1908 QUAD map since the 1820's[.]

Thus, the trial court found that three of the elements of an easement by prescription had been met. However, the trial court did not find that plaintiffs had established the final element, hostile use. Instead, the trial court found:

> 48. Though she claims a right to use the Watson-Parker path, plaintiff Barbour stated in her deposition that she had never exhibited a hostile or rude attitude towards the defendants or their predecessors in title and that she did not know of her father or mother exhibiting such an attitude.

This finding suggests that the trial court misapprehended the meaning of hostile use as used in the context of an easement by prescription.

This Court has previously explained that

> [t]o establish a hostile use of another's land, *it does not require a heated controversy or a manifestation of ill will*; rather, a hostile use is a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.

Deans v. Mansfield, 210 N.C. App. 222, 226, 707 S.E.2d 658, 662 (2011) (emphasis added and internal quotations and citation omitted). Accordingly, the trial court's finding that Barbour and her parents "had never exhibited a hostile or rude attitude towards the defendants or their predecessors in title" is immaterial to a determination of whether the use of the Watson-Parker path was hostile.

The trial court additionally found:

> 49. In 1979, plaintiff Barbour's sister, Elizabeth Sanders, requested permission from the defendants to use the Watson-Parker path by asking the defendants to sign a timber deed to allow a timber company to use the Watson-Parker path to remove the timber on the plaintiff Barbour's family property as shown in Book 869 Page 213 Johnston County Registry. In 2000, plaintiff Barbour herself requested permission from the defendants to

> use the Watson-Parker path by asking the defendants to sign a timber deed to allow a timber company to use the Watson-Parker path to remove the timber on the plaintiff Barbour's property as shown in Book 1950 Page 108 Johnston County Registry.
>
> 50. These requests of the defendants to allow the timber companies to use the Watson-Parker path are contrary to the claim of adverse use by the Plaintiffs.

While the trial court's findings would support a conclusion that the use of the Watson-Parker path by plaintiffs and their predecessors was not hostile in 1979, there are no findings which would allow us to determine if any hostile use occurred during the nearly 130 years prior to Elizabeth Sanders' request for permission. In order to establish their prescriptive easement, plaintiffs and their predecessors in interest only needed to engage in a hostile use of the path that was "continuous and uninterrupted for a period of at least twenty years." *Potts*, 301 N.C. at 666, 273 S.E.2d at 287-88. If plaintiffs had done so prior to 1979, an easement by prescription would have been created, and Sanders' request for permission, standing alone, would not extinguish that easement. The trial court's findings demonstrate that plaintiffs continued to use the Watson-Parker path after the request for permission and that those uses exceeded the actual use requested. Ultimately, the trial court's findings do not definitively establish whether plaintiffs and their predecessors in interest engaged in a hostile use of the Watson-Parker path for a period of at least twenty years after the division. Thus, we must vacate the portion of the trial court's judgment which concluded that plaintiffs failed to prove the existence of an easement by prescription and remand for findings of fact and conclusions of law regarding whether plaintiffs or their predecessors in interest ever engaged in a hostile use of the Watson-Parker path for a continuous period of twenty years or more after the division.

V. Conclusion

The trial court's findings of fact and conclusions of law which limited plaintiffs' easement implied by prior use and easement by necessity to only selected historical uses do not reflect that the court considered all of the necessary legal principles that determine the scope of implied easements. As a result, we must vacate the portion of the trial court's judgment which limited the scope of plaintiffs' implied easements and remand for additional findings of fact and conclusions of law regarding

the scope of plaintiffs' easement implied by prior use and easement implied by necessity.

The trial court's findings of fact also reflect a misapprehension of the law regarding the hostile use element of an easement by prescription. We must also vacate that portion of the trial court's judgment and remand for additional findings of fact and conclusions of law regarding whether plaintiffs or their predecessors in interest ever engaged in a hostile use of the Watson-Parker path for a continuous period of twenty years or more after the division.

On remand, "the trial court [is] free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). However, we note that our vacatur of specific portions of the trial court's judgment does not affect the remaining portions of the judgment. The remainder of the judgment was not challenged on appeal, and therefore, it remains undisturbed. *See Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay*, 70 N.C. App. 264, 266, 318 S.E.2d 895, 896 (1984)(When "the propriety of [a] portion of the court's order is not challenged by th[e] appeal, . . . we accordingly affirm it."). Since neither the trial court's findings establishing the existence of implied easements by prior use and by necessity nor the trial court's findings regarding the remaining elements of a prescriptive easement were challenged on appeal, the trial court is bound by those findings on remand. *See 42 East*, ___ N.C. App. at ___, 722 S.E.2d at 12 (On remand of a vacated order, the trial court is generally "free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, . . . [but] the trial court [i]s bound on remand by any portions of the . . . order affirmed by this Court." (internal quotations and citation omitted)).

Vacated and remanded.

Judges STROUD and DAVIS concur.

IN RE FORECLOSURE OF RAYNOR

[229 N.C. App. 12 (2013)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY TIMOTHY W. RAYNOR AND NICOLE W. RAYNOR DATED JUNE 12, 2008, RECORDED IN BOOK 5323, PAGE 2749, NEW HANOVER COUNTY REGISTRY

No. COA12-1116

Filed 20 August 2013

Mortgages and Deeds of Trust—foreclosure—HAMP regulations—equitable defense—res judicata

A trial court order concluding that it lacked jurisdiction to hear the homeowners' Home Affordable Modification Program (HAMP) defense in a mortgage foreclosure action was affirmed. Even if the appeal from the clerk was remanded to the superior court for consideration of the homeowners' defense, the superior court would be barred from hearing their argument by *res judicata*.

Appeal by respondents from order entered 8 June 2012 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 13 February 2013.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Taylor T. Haywood, for petitioner-appellee.

Shipman & Wright, LLP, by W. Cory Reiss, for respondents-appellants.

HUNTER JR., Robert N., Judge.

Timothy W. Raynor and Nicole W. Raynor ("Respondents" or "Homeowners") appeal from an Order to Allow Foreclosure Sale permitting the substitute trustee to foreclose under a deed of trust securing a debt held by Wells Fargo Bank, N.A. ("Petitioner" or "the Bank"). On appeal, Homeowners contend that the trial court erred in concluding it lacked subject matter jurisdiction to hear Homeowners' defense to foreclosure. For the following reasons, we affirm.

I. Factual & Procedural History

On 12 June 2008, the Bank made a loan of $221,777 to Homeowners. The loan was insured by the Federal Housing Administration, an agency under the United States Department of Housing and Urban Development ("HUD"). The loan was secured by Homeowners' residence in Wilmington pursuant to a deed of trust recorded with the New Hanover County Register of Deeds.

Under the note and deed of trust, Homeowners were to make equal monthly installment payments of principal and interest in the amount of $1,329.67 to the Bank beginning on 1 August 2008 and continuing thereafter for 30 years. The note also contained the following provision:

> **6. BORROWER'S FAILURE TO PAY**
>
> . . . .
>
> **(B) Default**
>
> If Borrower defaults by failing to pay in full any monthly payment, then Lender may, *except as limited by regulations of the Secretary in the case of payment defaults*, require immediate payment for the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. *In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations.* As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(Emphasis added.)

In addition, the deed of trust securing the Bank's loan in pertinent part read:

> **9. Grounds for Acceleration of Debt.**
>
> **(a) Default.** Lender may, *except as limited by regulations issued by the Secretary*, in the case of payment defaults, require immediate payment in full all sums secured by the security instrument[.]
>
> . . . .
>
> **(d) Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. *The security instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.*

(Emphasis added.)

In October 2009, Homeowners failed to make their required payment under the note. In response, the parties entered into two separate forbearance agreements. The first of these was executed in December 2009. Under this agreement, Homeowners were not required to make any payments to the Bank until April 2010. The second forbearance agreement, entered into in May 2010, required Homeowners to make four monthly payments of $650. Homeowners were able to satisfy the terms of both forbearance agreements. During this time Homeowners applied to the Bank for a loan modification. In a letter sent to Homeowners dated 16 September 2010, the Bank stated that it was "unable to get [Homeowners] to a modified payment amount [they] could afford per the investor guidelines on [their] mortgage."

In December 2010, the Bank sent Homeowners a demand for payment. The demand stated that Homeowners were in default, and gave Homeowners 45 days to cure their default by paying $25,097.54 — the amount past due on the note along with a late payment charge and inspection fee. The Bank also warned Homeowners that it would accelerate the note if Homeowners failed to cure their default. Homeowners failed to cure the default, and the Bank accelerated the note and instructed the trustee to foreclose as provided in the deed of trust. At the request of Homeowners, the Bank again reviewed Homeowners' account, along with financial information provided by Homeowners, but was unable to approve a modification under the federal government's Home Affordable Modification Program ("HAMP") or a traditional loan modification.

After Homeowners' failure to cure their default or pay the balance of the accelerated note, the substitute trustee commenced a special proceeding on 15 February 2011 seeking to exercise the power of sale in the deed of trust. At the same time, the Bank reviewed updated financial documentation submitted by Homeowners in an attempt to once again secure a modification. This time, the Bank was able to approve Homeowners for a traditional loan modification it determined would be affordable for Homeowners based on the updated information they provided. The Bank sent Homeowners loan modification documents on 17 February 2011, and suspended the foreclosure proceeding in light of Homeowners having been approved for the modification. However on 2 March 2011 Homeowners, through counsel, contacted the Bank and rejected the modification offer. Homeowners rejected the offer on the basis that, in their view, they were eligible for a more favorable modification under HAMP. The Bank expressed to Homeowners' counsel its view that Homeowners did not qualify for a HAMP modification, and thereafter resumed efforts to foreclose on the residence.

Homeowners contested the foreclosure at a hearing on 13 February 2012 on the grounds that the Bank failed to offer them a loan modification for which they qualified under the regulations promulgated by the HUD Secretary. The Clerk entered an order permitting foreclosure on 13 February 2012. Homeowners then posted the bond set by the Clerk to stay foreclosure and appealed to the Superior Court for a *de novo* hearing.

Concurrently, Homeowners filed a complaint against the Bank on 12 April 2012 in New Hanover County Superior Court alleging several causes of action, including: (1) unfair and deceptive trade practices on the part of the Bank, (2) fraud, (3) breach of fiduciary duty, (4) negligence, (5) negligent misrepresentation, and (6) breach of contract. Homeowners' complaint also sought a permanent injunction enjoining sale of their residence pursuant to N.C. Gen. Stat. § 45-21.34, on the "legal and equitable grounds" that the Bank failed to offer them a HAMP modification for which they qualified, in violation of federal regulations and the parties' contract.[1] The Bank filed notice of removal of the suit on diversity grounds in the United States District Court for the Eastern District of North Carolina on 16 May 2012.

Shortly thereafter, the superior court heard Homeowners' appeal from the Clerk's decision in the special proceeding. At the hearing Homeowners argued that in light of the language quoted above in the note and deed of trust, the Bank's compliance with HUD regulations

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1. In recent years, courts throughout the country have seen an increase in suits premised on a lender's alleged failure to comply with the provisions of HAMP. Although the federal courts seem to be in agreement that HAMP itself does not create a freestanding federal cause of action, there appears to be a split of authority with regard to state law claims premised on a lender's failure to comply with HAMP's provisions. The Fourth Circuit has recently noted, consistent with the position of the Seventh Circuit, that the fact that HAMP violations are not themselves actionable in no way abrogates state law causes of action premised on a lender's failure to comply with HAMP. *See Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 776 n.4 (4th Cir. 2013) ("Appellants repeatedly acknowledge that they have no federal claims under HAMP . . . . They also contend, correctly, that the mere fact that HAMP does not provide a private right of action does not mean that all state law claims affiliated with or related to an unsuccessful HAMP application are necessarily preempted."); *see also Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581 (7th Cir. 2012) ("The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law."). The Eleventh Circuit has reached the opposite conclusion, holding that because HAMP fails to create a private cause of action, plaintiffs lack standing to pursue state law claims premised on a lender's failure to comply with HAMP. *See Miller v. Chase Home Finance, LLC*, 677 F.3d 1113, 1116–17 (11th Cir. 2012) ("[Plaintiff] lacks standing to pursue his breach of contract, breach of implied duty of good faith and fair dealing, and promissory estoppel claims insofar as they are premised on an alleged breach of Chase's HAMP obligations."). This split may ultimately be resolved by the United States Supreme Court.

were contractual conditions precedent to the Bank's right to foreclose under the deed of trust. The trial court disagreed, and ruled that it lacked subject matter jurisdiction to consider Homeowners' defense. The court premised this decision on its conclusion that the defense raised by Homeowners was equitable rather than legal in nature, and thus outside the scope of review permitted by N.C. Gen. Stat. § 45-21.16. Accordingly, the trial court entered an Order to Allow Foreclosure Sale on 8 June 2012, in which it concluded that the conditions necessary for the Bank to foreclose had been met.

Homeowners filed timely notice of appeal to this Court on 18 June 2012. On 25 September 2012, the federal district court entered a Consent Preliminary Injunction Order in Homeowners' suit against the Bank. This injunction prohibited sale of Homeowners' residence until otherwise ordered by the federal court. On 18 February 2013, this Court entered a stay of proceedings in this appeal, pending (1) dissolution of the Consent Preliminary Injunction or (2) judgment, dismissal, or other final disposition of Respondent's suit against the Bank. On 12 June 2013, Homeowners notified this Court of the entry of a Joint Stipulation of Dismissal *with prejudice* of the federal suit.

II. Jurisdiction & Standard of Review

As Homeowners appeal from the final judgment of a superior court, we have jurisdiction over their appeal of right. *See* N.C. Gen. Stat. § 7A–27(b) (2011)."Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

III. Analysis

Homeowners argue on appeal that the trial court erred in concluding it lacked jurisdiction on the basis that Homeowners' defense to foreclosure is an equitable one, and thus outside the scope of review permitted by N.C. Gen. Stat. § 45-21.16. However we need not decide this issue, as the trial court would now be precluded from hearing Homeowners' defense because of the dismissal with prejudice of the federal suit and the doctrine of *res judicata*. Accordingly, we affirm the trial court's order on alternative grounds.

Under N.C. Gen. Stat. § 45-21.16(d), four elements must be established before the clerk can authorize a mortgagee or trustee to proceed with foreclosure by power of sale: " '(i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled to such . . . .' "

In re Bass, __ N.C. __, __, 738 S.E.2d 173, 175 (2013) (quoting N.C. Gen. Stat. § 45–21.16(d) (2011)) (alterations in original). The clerk's findings are appealable to the superior court for a hearing *de novo*; however, the superior court's authority is similarly limited to determining whether the criteria enumerated in N.C. Gen. Stat. § 45–21.16(d) have been satisfied. *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). Accordingly, the trial court must "declin[e] to address . . . argument[s] for equitable relief, as such an action would . . . exceed[ ] the superior court's permissible scope of review[.]" *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 raised in a hearing pursuant to [Section] 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 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)).

Relying on the language in the deed of trust and note, Homeowners argued before the trial court that the Bank's compliance with HAMP regulations regarding modification was a contractual condition precedent to the substitute trustee's "right to foreclose under the instrument." N.C. Gen. Stat. § 45-21.16(d)(iii). The trial court disagreed with this characterization, and concluded that the defense raised by Homeowners was equitable in nature, and therefore outside of its jurisdiction. However even assuming, but without deciding, that Homeowners' defense falls within the ambit of a Section 45-21.16 proceeding, the trial court currently lacks jurisdiction to hear Homeowners' defense.

North Carolina's jurisprudence on foreclosure provides for dual track defenses to foreclosure under a power of sale. A homeowner may (1) appeal from an adverse ruling by the clerk of court to a superior court judge for *de novo* review of legal defenses and/or (2) file a separate civil action in superior court to seek injunctive relief from foreclosure on equitable grounds.[2]

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2. For example, North Carolina courts have considered the following issues to be "legal" defenses falling within the ambit of a Section 45-21.16 proceeding, although the following list is not exhaustive: (1) whether or not the party seeking to foreclose has possession of the note and is thus "the holder of the debt," *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983), (2) sufficiency of both holder's and mortgagor's signatures, *In re Bass*, __ N.C. __, 738 S.E.2d 173 (holder); *Espinosa*, 135 N.C. App. 305, 520 S.E.2d

Homeowners availed themselves of both remedies in this matter. In their injunctive action, which the Bank removed to federal court, the parties litigated the specific issue of the Bank's failure to comply with HAMP. While the matter was pending in federal court, the Fourth Circuit acknowledged that mortgagors have no freestanding private right of action to sue for violations of the HAMP act. *See Spaulding*, 714 F.3d at 776 n.4.[3] Based upon this ruling and for other reasons satisfactory to the parties, Homeowners' complaint was dismissed with prejudice. Because this claim has been dismissed with prejudice in federal court, the specific issue of whether the bank violated HAMP regulations for purposes of *this lawsuit* has been decided.

"A final judgment, rendered on the merits by a court of competent jurisdiction, is conclusive as to the issues raised therein with respect to the parties and . . . constitutes a bar to all subsequent actions involving the same issues and parties." *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 711–12, 306 S.E.2d 513, 515 (1983). "In order for *res judicata* to apply, there must have been a prior adjudication on the merits of an action involving the same parties and issues as the action in which the defense of *res judicata* is asserted." *Id.* at 712, 306 S.E.2d at 515. For purposes of *res judicata*, a voluntary dismissal with prejudice is "a judgment on the merits." *Id. Res judicata* is applicable regardless of any differences in the manner in which the claims are asserted. *Id.*

After the trial court entered its order allowing foreclosure, Homeowners obtained a Preliminary Injunction from the federal court in its Section 45–21.34 suit preventing the Bank from foreclosing on Homeowners' residence. As noted above, Homeowners' suit sought a permanent injunction barring foreclosure on the basis of the Bank's alleged non-compliance with HUD regulations pertaining to modification of Homeowners' loan.

However, Homeowners have notified this Court of a Joint Stipulation of Dismissal with Prejudice in the federal suit. Therefore, even if we were

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108 (mortgagor), (3) forgery, *In re Hudson*, 182 N.C. App. 499, 642 S.E.2d 485 (2007), (4) whether the subject property is covered by provisions of a putative deed of trust, *In re Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 424 S.E.2d 385 (1993), (5) whether holder has produced sufficient evidence of proper endorsement, *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 711 S.E.2d 165 (2011), and (6) failure of consideration. *Foreclosure of Deed of Trust of Blue Ridge Holdings Ltd. P'ship*, 129 N.C. App. 534, 500 S.E.2d 446 (1998).

3. But see Judge Fox's recent opinion in *Robinson v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 1452933 (E.D.N.C. April 9, 2013), suggesting that mortgagors may have a claim for judicial review under North Carolina's implied contractual duty of good faith and fair dealing.

to agree with Homeowners, and remand this case to the trial court for consideration of Homeowners' defense, the trial court would be barred from hearing their argument. As a dismissal with prejudice is a judgment on the merits for the purposes of *res judicata*, *Id.*, Homeowners may not raise arguments identical to those before the federal court again before the superior court. Accordingly, we affirm the order of the trial court on alternative grounds.

IV. Conclusion

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

AFFIRMED.

Judges STEELMAN and GEER concur.

HARVEY D. KOHN, M.D., EVE AVERY, AND JILL KRIEGER, PLAINTIFFS
v.
FIRSTHEALTH OF THE CAROLINAS, INC.,
D/B/A MOORE REGIONAL HOSPITAL, DEFENDANT

No. COA13-168

Filed 20 August 2013

1. Hospitals and Other Medical Facilities—not a public utility—no violation of public utility doctrine

The trial court properly granted defendant hospital's motion to dismiss plaintiffs' claim for violation of the public utility doctrine for failure to state a claim upon which relief may be granted. Because defendant could not be considered a public utility under current law, it necessarily could not violate any requirements imposed on public utilities.

2. Appeal and Error—standing—issue not addressed

The Court of Appeals declined to address plaintiffs' argument that the trial court erred by dismissing the claims of plaintiffs Avery and Krieger on the grounds that they lacked standing where the Court's disposition of the previous issue on appeal left no claim for plaintiffs to pursue.

Appeal by plaintiffs from order entered 27 July 2012 by Judge Anderson D. Cromer in Moore County Superior Court. Heard in the Court of Appeals 6 June 2013.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellants.

Smith, Moore, Leatherwood, LLP, by William R. Forstner, Samuel O. Southern, and Matthew Nis Leerberg, for defendant-appellee.

CALABRIA, Judge.

Harvey D. Kohn, M.D. ("Dr. Kohn"), Eve Avery ("Avery"), and Jill Krieger ("Krieger")(collectively "plaintiffs") appeal the trial court's order dismissing, *inter alia*, their claim that Firsthealth of the Carolinas, Inc., d/b/a Moore Regional Hospital ("defendant") violated the public utility doctrine by denying Dr. Kohn staff privileges. We affirm.

I. Background

According to the allegations in plaintiffs' complaint, Dr. Kohn is a medical doctor specializing in obstetrics and gynecology ("OB/GYN"). Dr. Kohn earned his medical doctorate degree in Canada at the University of Toronto Faculty of Medicine and completed his internship and residency in OB/GYN at McMaster University in Hamilton, Ontario.

Defendant is the only secondary care hospital with full surgical specialty facilities in Moore County, North Carolina. Plaintiffs allege that many of Dr. Kohn's patients reside in Moore County and other nearby communities, and that defendant's hospital serves these patients.

Avery and Krieger, established patients of Dr. Kohn, have previously received services at defendant's hospital. Plaintiffs allege that in the event either Avery or Krieger were to need OB/GYN surgery or other OB/GYN procedures that must be performed in a hospital, they prefer to be treated by Dr. Kohn and hospitalized at defendant's hospital.

In 1999, Dr. Kohn applied for staff hospital privileges, but defendant did not accept his pre-application because he lacked certification by the American Board of Obstetrics and Gynecology ("ABOG"). Dr. Kohn later received certification as an obstetrician and gynecologist by the ABOG in 2006.

In November 2010, Dr. Kohn resubmitted his hospital staff privileges application to defendant. His application was again denied. This

time, the denial resulted from a provision in defendant's bylaws requiring "[s]uccessful completion of a residency program in the planned practice specialty, approved by the Accreditation Council for Graduate Medical Education . . . ."

Dr. Kohn responded by providing documentation to defendant that his residency program had been "recognized" by the Accreditation Council. Defendant maintained that mere recognition by the Council was insufficient to meet its requirements for hospital staff privileges.

On 19 January 2012, plaintiffs filed a complaint against defendant in Moore County Superior Court, alleging multiple causes of action, including a claim for "violation of the public utility doctrine." Defendant filed an answer and a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 19 March 2012. On 27 July 2012, the trial court granted defendant's motion to dismiss, *inter alia*, Dr. Kohn's claim for violation of the public utility doctrine for failure to state a claim upon which relief could be granted and all claims by Avery and Krieger due to lack of standing. After the trial court's 27 July 2012 order, Dr. Kohn voluntarily dismissed his remaining claims without prejudice. Plaintiffs appeal.

II. Public Utility Doctrine

Plaintiffs argue that the trial court erred by granting defendant's motion to dismiss plaintiffs' claim for violation of the public utility doctrine on grounds that it failed to state a claim upon which relief could be granted. We disagree.

"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).

In the instant case, plaintiffs' allegations in support of their claim include:

> 30. Defendant controls the provision of hospital services to the residents of Moore County, North Carolina, and beyond.

> 31. There are no other feasible alternatives by which residents of Moore County can obtain hospital treatment, including a number of obstetrical and gynecological surgeries and procedures.
>
> 32. Because of defendant's conduct described herein, it has unreasonably and unlawfully denied the public utility it controls to plaintiff Harvey D. Kohn, and to the plaintiffs Eve Avery and Jill Krieger and other patients of plaintiff Harvey D. Kohn.

Thus, plaintiffs assert that (1) defendant is a public utility and (2) based on its status as a public utility, defendant violated the public utility doctrine when it denied staff privileges to Dr. Kohn. Our Supreme Court has recognized that

> [a] public utility, whether publicly or privately owned, is under a legal obligation to serve the members of the public to whom its use extends, impartially and without unjust discrimination * * * A public utility must serve alike all who are similarly circumstanced with reference to its system, and favor cannot be extended to one which is not offered to another, nor can a privilege given one be refused to another.

Utilities Commission v. Water Co., 248 N.C. 27, 30, 102 S.E.2d 377, 379 (1958)(internal quotations and citations omitted). However, although plaintiffs discuss the service responsibilities of a public utility, nothing in either our General Statutes or the decisions of our Courts support classifying defendant as a public utility subject to this doctrine.

Pursuant to N.C. Gen. Stat. § 62-3(23), a public utility is defined as "a person . . . owning or operating in this State equipment or facilities for . . . electricity, piped gas, steam, or any other like agency . . . water . . . transport[ation] of persons or household goods . . . transport[ation] of gas, crude oil or other fluid substance . . . or communications . . . ." N.C. Gen. Stat. § 62-3(23) (2011). As a hospital, defendant clearly does not meet the requirements of this statutory definition.

Nevertheless, plaintiffs contend that an entity can still be considered a public utility even if it does not meet the requirements of N.C. Gen. Stat. § 62-3(23). Plaintiffs rely on *State ex rel. Utilities Commission v. Edmisten* to support their argument regarding whether a specific enterprise generally qualifies as a public utility. The *Edmisten* Court stated that "[o]ne test to determine whether a plant or system is a public

utility is whether the public may enjoy it by right or by permission only." 40 N.C. App. 109, 116, 252 S.E.2d 516, 520 (1979), *aff'd in part and rev'd in part on other grounds*, 299 N.C. 432, 263 S.E.2d 583 (1980). Plaintiffs contend that, pursuant to this test, the determination of whether an entity qualifies as a public utility depends upon whether "the enterprise holds itself out as engaged in supplying its services to the general public, as distinguished from serving only particular individuals." Plaintiffs assert that, under their definition, "a publicly owned secondary care hospital serving a significant geographical area, by necessity is a public utility." Plaintiffs are mistaken because *Edmisten* does not support plaintiffs' theory.

In *Edmisten*, the Court determined whether a corporation that owned and operated two electric generating facilities qualified as a public utility under N.C. Gen. Stat. § 62-3 (23). *Id.* at 113-16, 252 S.E.2d at 519-21. The Court specifically used the definition cited by plaintiffs to decide whether the corporation met the requirements of the public utilities statutes. *Id.* Contrary to plaintiffs' argument, nothing in *Edmisten* suggests that the Court judicially expanded the definition of a public utility beyond N.C. Gen. Stat. § 62-3 (23) to include any entity which supplies its services to the general public. Ultimately, neither the *Edmisten* Court nor any other North Carolina Court has ever described any entity as a "public utility" other than the entities that are included in the definition in N.C. Gen. Stat. § 62-3(23).

In the absence of any North Carolina statute or caselaw suggesting that a hospital should be considered a public utility, we decline to judicially impose such a designation on defendant. Any expansion of the term "public utility" to include entities such as defendant is the prerogative of the General Assembly, not of this Court. Since defendant cannot be considered a public utility under current law, it necessarily could not violate any requirements imposed on public utilities. Accordingly, the trial court properly granted defendant's motion to dismiss plaintiffs' claim for violation of the public utility doctrine for failure to state a claim upon which relief may be granted. This argument is overruled.

III. Standing

[2] Plaintiffs also argue that the trial court erred by dismissing the claims of Avery and Krieger on the grounds that they lacked standing. However, after our disposition of plaintiffs' claim for violation of the public utility doctrine, all of the claims in plaintiffs' complaint have been dismissed. Consequently, a determination of Avery and Krieger's standing is unnecessary. Assuming, *arguendo*, that Avery and Krieger had standing to bring

their original complaint, there are no longer any remaining claims for them to pursue. As a result, we decline to address this argument.

IV. Conclusion

Plaintiffs have provided no authority that would allow this Court to judicially designate defendant as a public utility. Therefore, defendant did not violate the public utility doctrine by denying Dr. Kohn staff privileges. The trial court properly granted defendant's motion to dismiss plaintiffs' claim for violation of the public utility doctrine pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The trial court's order is affirmed.

Affirmed.

Judges ERVIN and DAVIS concur.

DOUGLAS KIRK LUNSFORD, PLAINTIFF
v.
THOMAS E. MILLS., JAMES W. CROWDER, III, AND SHAWN T. BUCHANAN, DEFENDANTS

No. COA13-167

Filed 20 August 2013

1. Insurance—underinsured motorist coverage—multiple tortfeasors—all policies applicable to one underinsured highway vehicle

The trial court did not err by granting summary judgment in favor of plaintiff in a declaratory judgment action concerning underinsured motorist (UIM) coverage in connection with two motor vehicle accidents. In a motor vehicle accident resulting in injury to the insured caused by multiple tortfeasors, UIM coverage is triggered the moment that the insured has recovered under all policies applicable to one underinsured highway vehicle involved in the accident. Thus, plaintiff's UIM coverage was triggered the moment that all policies applicable to defendant Buchanan's vehicle had been exhausted.

2. Insurance—underinsured motorist coverage—pre- and post-judgment interest

The trial court did not err in a case involving underinsured motorists (UIM) coverage by awarding plaintiff costs and pre- and

post-judgment interest where the judgment was entered against the insurance company itself, not against its insured (plaintiff).

Appeal by Unnamed Defendant North Carolina Farm Bureau Mutual Insurance Company from order entered 13 November 2012 by Judge James U. Downs in McDowell County Superior Court. Heard in the Court of Appeals 5 June 2013.

Abrams & Abrams, P.A., by Noah B. Abrams, Douglas B. Abrams, and Melissa N. Abrams, for Plaintiff.

Nelson Levine de Luca & Hamilton, by David L. Brown and Brady A. Yntema, for Unnamed Defendant North Carolina Farm Bureau Mutual Insurance Company.

DILLON, Judge.

Unnamed Defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from the trial court's order granting summary judgment in favor of Douglas Kirk Lunsford (Plaintiff). We affirm.

I. Factual & Procedural Background

This appeal arises from a dispute between Farm Bureau and its insured, Plaintiff, concerning underinsured motorist (UIM) coverage in connection with two motor vehicle accidents that occurred on Interstate 40 in McDowell County on 18 September 2009. The first accident occurred when Defendant Thomas E. Mills lost control of his tractor trailer while traveling in the eastbound lane of Interstate 40, causing the vehicle to flip. At the time of this accident, Mr. Mills was acting within the scope of his employment with Defendant James Crowder.

Plaintiff, a volunteer firefighter with the Crooked Creek Fire Department, was the first to respond to the scene and parked his vehicle on the right shoulder of the westbound travel lane. Plaintiff crossed the freeway on foot to assist Mr. Mills and determined that "[Mr.] Mills was injured and that diesel fuel was leaking from" the tractor trailer. As Plaintiff attempted to carry Mr. Mills "over the concrete median [and] . . . across the westbound lanes of I-40 to safety, to perform an assessment of [Mr. Mills'] injuries," the second accident occurred when another motorist, Defendant Shawn T. Buchanan, who was traveling in the westbound lane, "was not paying attention to traffic in front of him which had slowed due to the wrecked tractor-trailer, nearly rear-ended a vehicle

in front of him and swerved suddenly to his left and struck Plaintiff." As a result of this collision, Plaintiff "suffered severe, permanent, and catastrophic injury."

At the time of these accidents, Mr. Mills and his employer, Mr. Crowder, were insured under a policy written by United States Fire Insurance Company (US Fire) providing liability coverage limits of $1 million. Mr. Buchanan was insured under a policy written by Allstate Insurance Company (Allstate) providing liability coverage limits of $50,000.00. Plaintiff held two insurance policies with Farm Bureau: (1) a business automobile policy with UIM coverage limits of $300,000.00; and (2) a personal automobile policy with UIM coverage limits of $100,000.00.

On 14 February 2011, Plaintiff filed a complaint in McDowell County Superior Court asserting negligence claims against the named Defendants and alleging that Defendants were jointly and severally liable for his injuries. All Defendants filed answers, and Defendants Buchanan and Crowder asserted crossclaims against one another seeking indemnification and contribution. In addition, Farm Bureau, which had not been named as a party in the action, filed an answer asserting that it was entitled to an offset with respect to Plaintiff's UIM policies for any damages recovered by Plaintiff through insurance policies held by the named Defendants.

On 24 May 2011, Allstate tendered to Plaintiff the $50,000.00 coverage limit for Buchanan's policy. The following day, counsel for Plaintiff notified Farm Bureau of Allstate's tender and demanded that Farm Bureau tender payment for Plaintiff's UIM claim. By letter dated 7 June 2011, Farm Bureau responded that it would "not advance the liability policy limits tendered to [Plaintiff] by Allstate" and that "[a]s for the demand for our [UIM] policy limits, we are currently reviewing the situation with counsel based on the apparent existence of other potential recoverable liability insurance policies and will respond to your demand at a later date." More than six months later, Farm Bureau still had not provided UIM coverage to Plaintiff when Plaintiff settled his claims against Mr. Mills and Mr. Crowder for $850,000.00, which was paid under their policy with US Fire. On 12 January 2012, an order was entered in McDowell County Superior Court approving the settlement of Plaintiff's claims against Defendants Buchanan, Mills, and Crowder; and, accordingly, all claims and crossclaims filed in Plaintiff's original action were dismissed with prejudice.

Farm Bureau, however, never tendered any monies to Plaintiff under Plaintiff's UIM policies. Instead, on 19 July 2012, Farm Bureau

moved for summary judgment, seeking a declaration that Plaintiff was not entitled to UIM coverage because the aggregate amount of Plaintiff's settlements - $900,000.00 - exceeded the aggregate amount of the UIM coverage - $400,000.00 – provided under Plaintiff's Farm Bureau policies. In response, Plaintiff filed a cross motion for summary judgment, contending that the policy limits under his Farm Bureau policies stack and that he was entitled to judgment against Farm Bureau in the amount of $350,000.00, which represented his aggregate UIM coverage *minus* the $50,000.00 that he had received pursuant to his settlement with Mr. Buchanan.

The matter of Farm Bureau's motion for summary judgment and Plaintiff's cross motion for summary judgment came on for hearing in McDowell County Superior Court on 15 October 2012. By order filed 13 November 2012, the trial court granted Plaintiff's motion for summary judgment, denied Farm Bureau's motion for summary judgment, and entered judgment in Plaintiff's favor and against Farm Bureau in the amount of $350,000.00, plus costs and pre and post-judgment interest. Farm Bureau appeals.

II. Analysis

[1] This appeal raises the question of *when* UIM coverage is triggered in instances in which the insured is injured in a motor vehicle accident caused by multiple tortfeasors. More specifically, we must determine whether Farm Bureau was obligated to provide UIM coverage to Plaintiff once Allstate had tendered its policy limits to Plaintiff on behalf of Mr. Buchanan, or, whether Farm Bureau was entitled to withhold coverage until Plaintiff had recovered (or attempted to recover) under the liability policies insuring the tractor trailer driven by Mr. Mills.

Farm Bureau argues that it was not required to provide coverage until all applicable policies – meaning all policies held by all the named Defendants – had been exhausted; that Plaintiff settled his claims against the named Defendants for a total of $900,000.00, an amount that far exceeded Plaintiff's total UIM coverage limits of $400,000.00; and that permitting Plaintiff to recover UIM coverage of $350,000.00 *in addition to* the $900,000.00 he had already received from the tortfeasors provided Plaintiff with a windfall.

Plaintiff counters that his $50,000.00 settlement with Allstate on behalf of Mr. Buchanan triggered Farm Bureau's obligation to provide UIM coverage in the amount of $350,000.00, the amount by which Plaintiff's $400,000.00 UIM coverage with Farm Bureau exceeded the settlement. Plaintiff argues that Farm Bureau could have recouped

its payment through a subrogation claim when Plaintiff subsequently received the proceeds of his $850,000.00 settlement with Mr. Mills and Mr. Crowder, but that Farm Bureau forfeited its subrogation rights by refusing to tender coverage at the time of Plaintiff's settlement with Mr. Buchanan.

"[T]he governing statute [concerning UIM coverage] is the version of N.C. Gen. Stat. § 20-279.21(b)(4) in effect at the time the policy was issued." *Vasseur v. St. Paul Mut. Ins. Co.*, 123 N.C. App. 418, 420, 473 S.E.2d 15, 16 (1996). N.C. Gen. Stat. § 20-279.21(b)(4) is a provision of the Financial Responsibility Act (the Act), which "is remedial in nature and must be liberally construed . . . in order to protect 'innocent victims who may be injured by financially irresponsible motorists.' " *Sanders v. Am. Spirit Ins. Co.*, 135 N.C. App. 178, 181, 519 S.E.2d 323, 325 (1999) (citation omitted). The applicable version of N.C. Gen. Stat. § 20-279.21(b)(4) provides, in pertinent part, as follows:

> Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of *the underinsured highway vehicle* have been exhausted.

N.C. Gen. Stat. § 20-279.21(b)(4) (2011) (emphasis added). This provision also defines an "underinsured highway vehicle" as follows:

> [A]n "underinsured highway vehicle["] means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

Id. As discussed below, we interpret the plain language of this provision to mean that UIM coverage is triggered the moment that an insured has recovered under all policies applicable to "a" – meaning one – "underinsured highway vehicle" involved in a motor vehicle accident resulting in injury to the insured.

We note that neither Plaintiff nor Farm Bureau offers any North Carolina case law addressing the rights and obligations of a UIM insurer in a situation involving liability policies covering multiple vehicles that

are potentially liable to the injured insured. This Court has, however, ruled on a UIM coverage issue involving multiple tortfeasors where the liability of one of the tortfeasors arose from the operation of a motor vehicle. *Farm Bureau Ins. Co. of N.C., Inc. v. Blong*, 159 N.C. App. 365, 583 S.E.2d 307 (2003). In *Blong*, the victim (Lawler) was killed by a drunk driver (Marvin) in an automobile accident. *Id.* at 366, 583 S.E.2d at 308. At the time of her death, Lawler was insured under a Farm Bureau policy which provided UIM coverage with limits of $100,000.00 per person, $300,000.00 per accident. *Id.* at 367, 583 S.E.2d at 308. Marvin's automobile insurance carrier tendered its policy limits of $50,000.00 "almost immediately after the accident"; however, that amount was insufficient to compensate Lawler (and the families of the other victims who had been killed in the accident) and thus "dram shop" lawsuits were filed against two local bars which had served alcohol to Marvin. *Id.* at 366-67, 583 S.E.2d at 308. The victims subsequently reached settlement agreements with both Marvin and the bars, and Farm Bureau, which had previously tendered its UIM limits under Lawler's policy, sought a declaratory judgment that it was entitled to an offset to the extent of the UIM coverage it had provided. *Id.* at 367-68, 583 S.E.2d at 309. On appeal, we affirmed the trial court's ruling that Farm Bureau was entitled to an offset and stated the following concerning the rights and obligations of a UIM insurer where multiple tortfeasors are involved:

> The UIM carrier pays out what it owes its insured after judgment or settlement has been reached with the underinsured driver. If there are parties that exist that may be made "legally responsible" through proper court channels, the UIM insurer may pursue them via their subrogation rights. As it happened here, such an offer was made, but refused by the insured. As the structure of the Act and definition of exhaustion provide, a UIM carrier cannot require an insured to pursue these parties before exhaustion can occur. Recovered proceeds from legally responsible parties can only flow back to the UIM carrier after the fact. There is no entitlement or subrogation by the UIM carrier to those proceeds unless payment to the insured was made when the underinsured vehicle's limits were exhausted, or otherwise in accordance with the Act. Money paid out by UIM insurer is to be recouped, not reduced then paid out. The fear . . . that insureds will be kept hanging in limbo as they are forced to sue any and all possible persons or organizations for years before they could recover their UIM

> benefits are [sic] unfounded. Such actions on the part of UIM carriers would be in the realm of bad faith.

Id. at 373, 583 S.E.2d at 312.

We see no reason why the rights and obligations of a UIM insurer should differ in the present case simply because the additional tortfeasor was a motorist covered under an automobile liability policy. In other words, we see no reason why insureds should "be kept hanging in limbo as they are forced to sue any and all possible persons . . . before they could recover UIM benefits" just because other potential tortfeasors also happen to be covered under automobile policies.[1] Here, Plaintiff's UIM coverage was triggered the moment that all policies applicable to Mr. Buchanan's vehicle had been exhausted; Farm Bureau was not at liberty to withhold coverage until Plaintiff reached settlement agreements with Mr. Mills and Mr. Crowder, as *Blong* clearly obligates the UIM carrier to first provide coverage, and later seek an offset through reimbursement or exercise of subrogation rights. We believe that this result comports with the Act's purpose which is "best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection* . . . from the negligent acts of an underinsured motorist." *Sanders*, 135 N.C. App. at 181-82, 519 S.E.2d at 325 (quoting *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 224, 376 S.E.2d 761, 763 (1989)) (emphasis in original). Moreover, Farm Bureau's contention that the trial court's order resulted in a windfall to Plaintiff is unavailing. Had Farm Bureau tendered its policy limits in accordance with this Court's mandate in *Blong*, it would have had the opportunity for reimbursement and there would have been no windfall. To hold otherwise would not only punish the insured, but also reward UIM insurers for withholding coverage when due.

[2] Finally, Farm Bureau contends that the trial court erred in awarding Plaintiff costs and pre and post-judgment interest "as provided by law." Farm Bureau cites *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), in support of its contention that "[a]n insurer has no statutory duty . . . to pay interest or costs in excess of its policy limits" and that "any obligation on the part of an insurer to pay such interest or costs is

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1. We note that decisions of courts in other jurisdictions are in accord with our holding. *See*, *e.g.*, *Gen. Acc. Ins. Co. v. Wheeler*, 221 Conn. 206, 214, 603 A.2d 385, 388-89 (1992) (holding that "the insured need only exhaust the 'liability bond or insurance policies' of one tortfeasor in order for the insured to be eligible to pursue underinsured benefits") (citing *Mulholland v. State Farm Mutual Automobile Ins. Co.*, 171 Ill. App.3d 600, 617, 122 Ill. Dec. 657, 527 N.E.2d 29 (1988), and *Motorist Mutual Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 223, 271 N.E.2d 924 (1971)).

governed by the terms and conditions of its policy." *Greene*, however, holds that the UIM carrier is not required to pay pre and post-judgment interest *on behalf of the insured* where the judgment has been entered *against the insured*, *id.* at 605, 407 S.E.2d at 498, and thus has no bearing on the case at hand, in which the judgment was entered against Farm Bureau itself, not against its insured (Plaintiff). This contention is without merit and is accordingly overruled.

III. Conclusion

For the foregoing reasons, the trial court's 13 November 2012 order is hereby

AFFIRMED.

Judges BRYANT and STEPHENS concur.

ROBERT PAUL MORRIS, PLAINTIFF
v.
SCENERA RESEARCH, LLC, AND RYAN C. FRY, DEFENDANTS

No. COA12-1481

Filed 20 August 2013

1. Employer and Employee—Wage and Hour Act—Retaliatory Employment Discrimination Act—bonus earned—bonus calculable

The business court did not err in a case concerning a dispute regarding compensation and ownership rights between plaintiff and his employer by denying defendants' motions for directed verdict on plaintiff's Wage and Hour Act (WHA) and Retaliatory Employment Discrimination Act (REDA) claims and for JNOV. Plaintiff presented more than a scintilla of evidence in support of his position that he earned the $675,000 in issuance bonuses under his employer's bonus policy. Furthermore, the question of calculability under the WHA was properly presented to the jury for review, the formula offered by plaintiff was at least one reasonable way to calculate those bonuses, and the evidence relied on for that formula was supported in the record.

2. Employer and Employee—Wage and Hour Act—liquidated damages—notice of change in bonus plan—lack of good faith or objective reasonableness

The business court did not err in a case concerning a dispute regarding compensation and ownership rights between plaintiff and his employer by awarding plaintiff $210,000 in liquidated damages under the Wage and Hour Act (WHA). Defendants failure to provide plaintiff with notice of the change in his bonus plan constituted sufficient evidence to support the business court's finding that defendants did not act in good faith or with objective reasonableness and, therefore, justified the business court's award of liquidated damages in this case.

3. Employer and Employee—Wage and Hour Act—liquidated damages—good faith and objective reasonableness

The business court did not err in a Wage and Hour Act (WHA) case by failing to grant liquidated damages in response to the jury's award of issuance bonuses for the 150 patents pending with the patent office. Defendant employer made a proper showing of good faith and objective reasonableness as to its failure to pay the issuance bonuses.

4. Damages and Remedies—treble—Retaliatory Employment Discrimination Act—no willful violation

The business court did not err by declining to treble plaintiff's $390,000 jury award under the Retaliatory Employment Discrimination Act (REDA). There was competent evidence to support the business court's determination that defendant did not willfully violate REDA.

5. Attorney Fees—Wage and Hour Act—Retaliatory Employment Discrimination Act—apportionment—common nucleus of facts

The business court's award of attorneys' fees in a Wage and Hour Act (WHA) and Retaliatory Employment Discrimination Act (REDA) case was reversed and remanded to the trial court for further findings of fact and conclusions of law regarding whether plaintiff's claims arose from a common nucleus of operative fact and, thus, whether he was entitled to all of his attorneys' fees.

6. Employer and Employee—Wage and Hour Act—election of remedies

The trial court erred in its summary judgment order in a Wage and Hour Act (WHA) case by foreclosing plaintiff's right to elect

between money damages or rescission of the patent assignments. The case was remanded to the trial court with instructions that plaintiff is entitled to elect between his WHA [damages] award or rescission of his patent assignments.

7. Appeal and Error—issue not reached

Plaintiff's final argument in a Wage and Hour Act (WHA) case was not reached because the Court of Appeals remanded the case on the question of election of remedies between rescission and damages.

Appeal by Defendants from order entered 27 June 2012 and judgment entered 14 May 2012 by Judge James L. Gale in Wake County Superior Court. Appeal by Plaintiff from order entered 27 June 2012, judgment entered 14 May 2012, and memorandum opinion and order entered 4 January 2012 by Judge James L. Gale in Wake County Superior Court. Heard in the Court of Appeals 21 May 2013.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., and Andrew P. Flynt, for Plaintiff.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and John M. Moye; and Womble Carlyle Sandridge & Rice, by Burley B. Mitchell, Jr., for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This case concerns a dispute regarding compensation and ownership rights between Plaintiff Robert Paul Morris ("Morris") and his employer, Scenera Research, LLC ("Scenera"), for inventions developed by Morris during his employment with Scenera. On 25 September 2009, Morris filed a complaint against Scenera and its chief executive officer, Ryan C. Fry ("R. Fry") — collectively, "Defendants" — in Wake County Superior Court, alleging violations of the North Carolina Wage and Hour Act ("WHA") and the Retaliatory Employment Discrimination Act ("REDA") as well as claims for fraud, unjust enrichment, and breach of contract. R. Fry is the son of Stan Fry ("S. Fry"), who founded Scenera under the name "IPAC, LLC."

On 6 October 2009, Defendants filed notice of removal to the United States District Court for the Eastern District of North Carolina. Sixteen months later, on 16 February 2011, the District Court remanded the case for lack of subject matter jurisdiction to Wake County Superior Court,

where it was designated a complex business case and assigned to the Honorable James L. Gale of the North Carolina Business Court ("the business court"). Defendants filed their second amended answer and counterclaims on 31 March 2011, denying Morris's material allegations and, *inter alia*, seeking declaratory judgments that Morris: (1) was not entitled to rescind any patent ownership assignment he had already made to Scenera, (2) was obligated to assign ownership of unassigned inventions to Scenera, and (3) had resigned his employment and was not entitled to further bonus payments. Scenera also asserted claims that Morris breached his fiduciary duties and breached his obligation to continue assigning patents to Scenera.

On 24 October 2011, Morris moved for partial summary judgment, and Scenera moved for summary judgment. Morris sought to dismiss certain of Scenera's counterclaims and defenses, and Scenera sought to have the business court declare that Morris was "hired to invent" and, thus, that Scenera owned the rights to the inventions Morris had developed while working there. Scenera also sought to dismiss Morris's claims of fraud, unjust enrichment, and retaliatory discrimination. The business court addressed those motions on 4 January 2012 and described the background facts as follows:

> {9} Morris was a former [International Business Machines Corporation] employee with substantial training in software. He later was employed by Flashpoint Technologies, a company founded by S. Fry. S. Fry had also formed a company . . . known as IPAC. IPAC later became known as Scenera. While employed by Flashpoint, Morris and IPAC entered a [c]onfidentiality [a]greement which included mutual non-disclosure obligations and pursuant to which any confidential information remained the property of the disclosing party. . . . Morris was not at that time an IPAC employee[,] but contracted with IPAC.
>
> {10} S. Fry hired Morris in 2004 as Scenera's first employee. Morris had a series of discussions with S. Fry preceding this employment, the extent, nature, and significance of which are disputed [as to Morris's ownership rights over the inventions he developed at Scenera]. Morris testified that he expressed an interest in inventing but was neither obligated to nor expected to invent as a part of the regular employment duties he would undertake for Scenera, and that his base salary was for the substantial duties other than inventing for which he was responsible.

{11} Morris and Scenera did not sign a written employment agreement. Morris contends that the [p]arties understood that the ownership provisions of the [c]onfidential[ity] [a]greement that Morris signed while employed by Flashpoint continued. Scenera contends that there was no such agreement and that once Morris was hired to invent for Scenera, he had no ownership rights in inventions made during the course of that employment.

{12} . . . It is undisputed that during certain times of Morris's employment, in addition to his base salary, Morris was entitled to receive up to $10,000.00 for each of his inventions on which Scenera pursued patents, with $5,000.00 being earned when a patent application was submitted and $5,000.00 being earned when a patent issued. . . .

{13} Morris proved to be a prolific inventor. By July 2009 when Morris's employment with Scenera ended, Morris contends that the unpaid amount that had accrued under his bonus compensation plan was $210,000.00. . . . While Morris concedes that he voluntarily suspended bonus payments beginning at the end of 2007 as Scenera undertook to formulate an alternative compensation program, he contends that the bonus program was not cancelled, and that he continued to make patent assignments during 2008 only because he knew he was entitled to compensation in addition to his base salary. Morris contends that R. Fry promised . . . the offered alternative compensation would be tied to Scenera's profitability[,] more favorably reflect Morris's contribution to that profitability, and better reflect Morris's risk and his reward.

{14} Morris alternatively claims that even if the bonus program had been terminated at year-end 2007, R. Fry in July 2008 promised that the bonus system would be re[-]implemented for Morris if Scenera did not meet certain conditions . . . , such as providing Morris with an individual written employment contract and an appropriate incentive compensation program, and that these conditions were then not met.

{15} Scenera contests Morris's recollection of these conversations, and further claims that if R. Fry made promises, he kept them by proposing a[n] employment contract and

> an employee incentive program. Ultimately, no agreement on any alternative compensation plan was ever reached and no written employment agreement was executed. Morris claims that these proposals did not satisfy promises R. Fry made and that other documents prove that R. Fry never had any intention of keeping his promises. Scenera claims R. Fry had never made promises specific enough to be enforceable[,] but rather had only agreed to make a proposal for further negotiation, which he did, and that essentially Morris seeks to enforce "an agreement to agree."
>
> {16} Morris testified to his frustration with the lack of progress toward the promised incentive plan and written employment agreement and that he began in 2008 to press R. Fry for progress. He continued to press in 2009, ultimately hiring a lawyer who threatened on Morris's behalf to bring a wage claim under [the WHA] . . . for the $210,000.00 bonus compensation that had accrued and which Scenera refused to pay after Morris's demand.
>
> {17} The parties disagree both on the facts leading up to the end of Morris's employment in July [of] 2009 and whether that end should be treated as a resignation or a termination. Morris claims that he was terminated in retaliation for his threat to bring a wage claim, which is a protected activity, such that he is entitled to recover under [REDA]. Scenera contends that Morris had made clear his intention to leave the company and his attorney had indicated that the only option was to negotiate a severance agreement, so that, as a result, Morris had ["]effectively resigned["] and Scenera accepted [this] resignation. Scenera alternatively contends that even if it had terminated [Morris], the termination was not retaliatory because [Scenera] had an independent right to terminate him because he refused to make any further invention assignments to Scenera while being legally obligated to do so.
>
> {18} Scenera further claims that Morris, during the course of his employment, breached fiduciary duties owed to Scenera . . . .

In that context, the business court denied Morris's motion for partial summary judgment in its entirety. It granted Scenera's motion on the

question of whether Morris was "hired to invent"[1] and on Morris's fraudulent inducement and unjust enrichment claims. The business court otherwise denied Scenera's motion.

The remaining claims — Morris's breach of contract, WHA, and REDA claims plus Scenera's patent ownership and breach of assignment counterclaims[2] — were tried before a jury beginning 30 January 2012. In its judgment entered after the trial, the business court described the evidence as follows:

> {3} . . . Morris was employed by Scenera and . . . his employment ended on July 10, 2009. . . . [B]oth Scenera and Defendant [R. Fry] were Morris's employers under the [WHA] and [REDA].
>
> . . .
>
> {5} . . . [O]n the date Morris's employment ended[,] July 10, 2009, Scenera had 150 pending patent applications on inventions for which Morris was the inventor. . . . Morris, by the time of trial, had assigned executed written agreements on all but a few of these inventions.
>
> {6} [A]ny . . . bonus which [was] owed qualifie[d] as "wages" under the [WHA]. . . . The evidence for both parties indicated that Morris and Scenera reached [an] agreement on some changes to be implemented as of January 1, 2008, in consideration of Defendants potentially implementing a company-wide incentive compensation plan. . . .
>
> {7} Morris contended that he [was] entitled to recover $210,000 for application and issuance bonuses which [accrued on 10 July 2009]. . . .
>
> {8} . . . [N]egotiations over disputed bonuses were undertaken in 2009 when Scenera requested that Morris execute a written employment agreement. [T]hroughout these negotiations, Morris consistently made clear his belief that he was entitled to bonuses that had continued to accrue after January 1, 2008. . . . [L]ate in the negotiations for an

1. Therefore, the business court reasoned, there would be a presumption at trial that the patents Morris created during his employment were owned by Scenera. Evidence of an agreement to the contrary would rebut that presumption.

2. As Defendants note in their brief, "Scenera voluntarily dismissed without prejudice its [additional] counterclaim for breach of fiduciary duty."

employment agreement[, however,] Morris also demanded that he [should] be paid future patent issuance bonuses irrespective of whether he remained employed. . . . [D]uring [those] negotiations[,] Scenera considered payment of [the] $210,000 without admitting that this sum was being paid as earned wages, but . . . refused to consider paying patent issuance bonuses on patents issued after Morris's employment ended. Rather, Defendants' evidence was that Scenera had a consistent policy [, which] applied to all employees, including Morris, that payment of issuance bonuses was conditioned on continued employment. . . .

{10} As related to the REDA claim, Morris presented evidence that he had during the term of his employment asserted claims that he was entitled to issuance bonuses irrespective of his continued employment. The evidence also established that he refused to assign further inventions or sign further patent applications until the wage dispute was resolved. [W]hen the parties could not agree on . . . terms . . . for a written employment agreement, Morris advised Scenera that an employment agreement appeared out of reach and that he would only consider a severance agreement whereby [he] would continue to support the patent portfolio as an independent contractor. Morris [also] suggested that he was entitled to challenge Scenera's ownership of patents or applications based on [his] inventions. Ultimately, Morris's employment ended and no independent contractor agreement was ever [established]. . . .

{11} Morris introduced evidence that Scenera has enjoyed a [90%] average rate of patents issued from patent applications, and that the success rate on applications for Morris's inventions was somewhat higher. . . .

{12} Morris's [WHA] claim was for the wages he contended were due, along with statutory penalties. His REDA claim was to recover damages from his retaliatory termination. Defendants denied any liability under [both].

{13} . . . Scenera . . . counterclaimed for damages because of Morris's failure to support Scenera's patent rights. Defendants . . . submitted expert evidence to prove their damages. Defendants further contended that Morris

> refused to seek alternative employment after July 10, 2009, such that any recovery for retaliatory discharge must be reduced for failure to mitigate damages.

At the close of all the evidence, the business court granted Defendants' motion for directed verdict on the issue of patent ownership and denied Defendants' motion for directed verdict as to Morris's WHA and REDA claims.

The jury reached a unanimous verdict on 15 February 2012, awarding Morris: (1) $210,000 in patent bonuses for patent applications filed or patents issued between 1 January 2008 and 17 June 2009[3]; (2) $675,000 in patent bonuses for patent applications pending as of 17 June 2009[4]; and (3) $390,000 under REDA after a reduction for Morris's failure to mitigate damages. Following that verdict, Morris requested judgment for the amount awarded plus supplemental relief, including liquidated damages and attorneys' fees under the WHA as well as treble damages and attorneys' fees under REDA.

On 14 May 2012, the business court issued its judgment on the jury award and Morris's motion for supplemental relief, declining to treble Morris's $390,000 in damages under REDA, but granting $450,000 for all attorneys' fees and $210,000 in liquidated damages under the WHA because "Defendants [did not] demonstrate[] good faith or reasonable grounds for a belief that their failure to pay application and issuance bonuses accruing during the period of January 1, 2008 through July 10, 2009 was not a violation of the [WHA]." The court also declared that: (1) "Scenera is the owner of each of the inventions, patent applications, and patents identified in . . . Morris's [c]omplaint [because o]wnership of those inventions vested in Scenera at the time of invention"; (2) Morris shall assign any unassigned patent applications to Scenera; and (3) Scenera will not recover any damages for its patent ownership and breach of assignment counterclaims. On 30 May 2012, Defendants moved for judgment notwithstanding the verdict ("JNOV") or, in the

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3. In its 14 May 2012 judgment, the business court included a copy of the jury verdict sheet which incorrectly listed this second date as 10 July 2009 — *i.e.*, the date Morris's employment ended — instead of 17 June 2009 — *i.e.*, the date Scenera informed its employees that it was canceling the original bonus program. This appears to be a clerical error resulting from an older version of Morris's proposed jury instructions. The finalized jury instructions, jury verdict, transcript, and parties' briefs confirm, however, that the correct date is 17 June 2009.

4. *See* footnote 3, *supra*.

alternative, for a new trial. The business court denied that motion on 27 June 2012. Both parties appealed.

Discussion

I. Defendants' Appeal

Defendants make three arguments on appeal. First, they contend that the business court erred in denying their motions for directed verdict on Plaintiff's WHA and REDA claims and for JNOV. Second, Defendants contend the business court erred by awarding $210,000 in liquidated damages under the WHA. Third, Defendants assert that, if the business court's judgment is reversed, its grant of attorneys' fees should be vacated. We find no error.

A. Directed Verdict and JNOV

[1] "The standard of review of directed verdict [or JNOV] is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citations omitted); *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498–99, 524 S.E.2d 591, 595 (2000). "[A n]on-movant's evidence which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. If, however, the non-movant shows more than a scintilla of evidence, the court must deny the motion." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990) (citation omitted); *see also Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998) ("The [JNOV] motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.").

i. Evidence that Morris Earned the Issuance Bonuses Under the WHA

In support of their argument that the business court should have granted their motions for directed verdict and JNOV, Defendants assert that Morris presented "no evidence" that he "earned [the $675,000 in issuance] bonuses under Scenera's bonus policy . . . ." We disagree.

"[T]he [WHA] requires an employer to . . . pay those wages and benefits due *when the employee has actually performed the work required to earn them*. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them," but for certain unrelated exceptions. *Kornegay v. Aspen Asset*

Grp., *LLC*, 204 N.C. App. 213, 229–30, 693 S.E.2d 723, 735–36 (2010) (citation omitted; emphasis in original). Defendants argue that Morris failed to present evidence that he "earned" the issuance bonuses under Scenera's policy because: (1) Scenera was only obligated to pay issuance bonuses after the patents issued, (2) the patents had not issued when Morris left, (3) Morris still had "a significant amount of additional work" to do after the initial patent application in order to ensure that the patents actually issued,[5] and (4) continued employment was the only means by which an employee working under the Scenera bonus policy could earn issuance bonuses.

In response, Morris points to his testimony that:

> When the patent was filed and I assigned [my rights in the patents to Scenera under] the assignment agreement, I was entitled to [the] $5,000 [issuance bonus]. . . . There was nothing as far as work with respect to the patent that I needed to do in order to earn that bonus.

He also cites to the testimony of Mona Singh ("Singh"), who worked for Scenera as an inventor. Singh agreed with the statement that "whatever bonuses applied to [an] agreement became earned and due at the time the patent was filed." Morris also calls our attention to evidence that his right to the issuance bonuses was not conditioned on continued employment with Scenera. Specifically, he notes that the bonus plans among Scenera's employees varied with each individual and cites to his testimony that no one ever told him he had to remain an employee to be entitled to an issue bonus. Morris supports this point with Singh's testimony that she had received "five or six" issuance bonuses *after* her employment with Scenera had ended, asserting that "Scenera did not[, therefore,] universally condition the payment of bonuses on continued employment."

After reviewing the testimony presented at trial and considering the evidence in a light most favorable to Morris, we conclude that Morris presented more than a scintilla of evidence in support of his position that he "earned" the $675,000 in issuance bonuses under Scenera's bonus policy. Indeed, the conflicting evidence offered by the parties is enough, on its own, to allow the matter to go to the jury. *See Citrini v. Goodwin*, 68 N.C. App. 391, 396, 315 S.E.2d 354, 359 (1984) ("[Defendant] introduced

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5. In support of this point, Defendants cite to Morris's testimony that Scenera expected him and other inventors to "continue to honor the support, enforcement, [and] prosecution of the patent, all the way through the issuance and beyond."

evidence of novation which *conflicted with* [Plaintiff's] oral testimony. The trial court thus erred in granting [Plaintiff's] motion on this affirmative defense and in taking the issue from the jury.") (emphasis added). Accordingly, Defendants' first argument is overruled.

ii. Whether Morris's Bonuses Were "Calculable" Under the WHA

Defendants next assert that, "[e]ven if Morris had earned the issuance bonuses" under the WHA, the business court should have granted their motions for directed verdict and JNOV because the bonuses were not "calculable" at the time of trial. We disagree.

Section 95-25.7 of the WHA provides the following instruction regarding "[p]ayment to separated employees": "Employees whose employment is discontinued for any reason shall be paid all wages due . . . . Wages based on bonuses . . . shall be paid on the first regular payday after the amount becomes calculable when a separation occurs." N.C. Gen. Stat. § 95-25.7 (2011). At trial, Morris argued that the amount of money owed by Scenera in issuance bonuses was "calculable" because 150 patent applications were pending with the U.S. Patent and Trademark Office ("the patent office") at the end of his employment. Having previously testified that approximately 90% of the patents he submitted to the patent office had successfully issued in the past,[6] Morris asserted that the following formula could be applied to "calculate" the issuance bonuses that Scenera owed him: 150 outstanding patents x $5,000 for each successfully issued patent x 90% success rate = $675,000 in issuance bonuses owed. Because the patents had not yet issued at the time of trial, the business court presented the issue of whether issuance bonuses for those patents were "presently calculable" to the jury, which ultimately awarded $675,000 in payment for issuance bonuses to Morris.

Before discussing the merits of Defendants' second argument, we address their preliminary contention that the business court erred in submitting the question of "whether the issuance bonuses are presently calculable" to the jury. Defendants contend this is a question of law, not fact, and should have been decided by the judge. Though this argument is not an element of Defendants' appeal of the denial of their motions for directed verdict and JNOV, it was properly preserved by objection. Accordingly, we address it here as a predicate matter.

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6. As discussed above, Morris's agreement with Scenera entitled him to $5,000 in bonus compensation when a patent issued, in addition to the $5,000 in bonus compensation he earned upon the submission of a patent application.

Outside the presence of the jury, the following exchange occurred between the business court (here, "THE COURT") and counsel for Morris (here, "MR. BROCK"):

> THE COURT: [W]hat the jury instruction says is . . . if [the members of the jury] believe [they] can calculate [the value of the issuance bonuses owed by Scenera], [they should] calculate it and put the number there.
>
> If [they] feel like [they] can't calculate it because [the patents] haven't issued and that's critical to [them], [they should] put down whether issued. So if they are able to calculate it[,] I told them to calculate it and put a number down.
>
> MR. BROCK: . . . [B]ut before there is a number down you are asking them what may be a [purely] legal question, is it calculable.
>
> . . .
>
> THE COURT: Mr. Brock, if they believe they can calculate it . . . , that sounds like ["]calculable["] to me. . . . But I believe that this jury instruction is framed in such a way that you can tell [them: "]I believe you can calculate this, it's easy to calculate.["]
>
> . . .
>
> THE COURT: . . . It is interesting — and I may be giving the jury an opportunity to decide what is a legal issue. I agree, Mr. Brock. But I don't know how else to frame the issue.

Regarding the different duties of the judge and jury, our Supreme Court has stated that "[t]he judge lays down and explains the law, and the jury is under [the] obligation to accept and apply the law as thus explained." *State v. Fogleman*, 204 N.C. 401, 405, 168 S.E. 536, 538 (1933). The determination of the weight of the evidence and the resulting facts from the evidence is the exclusive province of the jury. *Id.*; *see also Sneed v. Lions Club of Murphy, N.C., Inc.*, 273 N.C. 98, 101, 159 S.E.2d 770, 772 (1968) ("It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to the plaintiff, is sufficient to permit a legitimate inference of the facts essential to recovery; and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove.") (citations omitted).

In this case, the business court asked the jury to determine whether it could calculate the amount of issuance bonuses owed to Morris in order to answer the larger question of whether the WHA applied to enforce payment of those wages. Though the business court characterized this question as a potential "legal issue" in its colloquy with Mr. Brock, we hold that "whether bonus compensation is 'calculable' under the WHA" is a question of fact. Section 95-25.7 of the WHA requires the decision-making entity to evaluate the evidence presented at trial, apply its logical reasoning, and, in doing so, determine if such evidence is sufficient to characterize the amount of earned bonuses as "presently calculable." This requires a weighing of the evidence and, thus, falls in a jury trial within the exclusive purview of the jury. *See Fogleman*, 204 N.C. at 405, 168 S.E. at 538 (1933); *cf. Ferguson v. Ferguson*, 55 N.C. App. 341, 347, 285 S.E.2d 288, 292 ("Whether plaintiff committed an unconscionable act and whether her actions were more egregious than those of defendants[] are questions of material fact to be decided by a jury and not by the court."), *disc. review denied*, 306 N.C. 383, 294 S.E.2d 207 (1982). Accordingly, we hold that the question of calculability under the WHA was properly presented to the jury for review. *Cf. Meachan v. Montgomery Cnty. Bd. of Ed.*, 47 N.C. App. 271, 278, 267 S.E.2d 349, 353 (1980) ("If the evidence in a particular case raises a permissible inference that [the elements of equitable estoppel exist], . . . estoppel is a question of fact for the jury . . . .").

Even though this question was properly before the jury, Defendants argue that "there is no evidence that the issuance bonuses were calculable" because "[t]he amount of each bonus will not be calculable unless and until such time as the [patent office] disposes of a pending application." They note that many of Morris's patents had been pending for eight years at the time of the trial and point out that it is difficult to know whether a particular patent will issue and, if it does, when that issuance will occur. Based on those circumstances, Defendants contend "there was no *evidence* [at trial] that [Morris's historic] success rate on the 150 *pending* [patent] applications would be the same as for applications that previously received a final [patent office] determination." (Emphasis in original). We disagree.

The term "calculable" is not defined in the WHA or in our case law. *See* N.C. Gen. Stat. § 95-25.2 (2011) (defining terms used in the WHA); *see also Kornegay*, 204 N.C. App. at 230, 693 S.E.2d at 736. In such a circumstance, when the language of a statute is clear and unambiguous, we apply its plain and definite meaning. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). Because we find that the language

of section 25.7 of the WHA[7] is, in fact, clear and unambiguous, we apply its plain meaning here.

The American Heritage College Dictionary defines "calculable" as "[t]hat [which] can be calculated *or estimated*." The American Heritage College Dictionary 198 (3d ed. 1997) (emphasis added). At trial, Morris offered a formula for estimating the issuance bonuses he would likely be owed based on evidence regarding the number of patents pending with the patent office at that time, his previous issuance rate on patents submitted to the patent office, and his agreement with Scenera regarding payment for each issued patent. Taking that evidence in a light most favorable to Morris, we hold that the formula was adequate to submit to the jury the question of whether the issuance bonuses owed were "calculable" under the WHA. The formula offered by Morris was at least one reasonable way to calculate those bonuses, and the evidence relied on for that formula was supported in the record. Accordingly, we hold that the business court did not err in submitting this question to the jury.

B. Liquidated Damages for Application and Issuance Bonuses

[2] In its 14 May 2012 judgment, in response to Morris's motion for supplemental relief, the business court granted $210,000 in liquidated damages to Morris for Defendants' failure to pay application and issuance bonuses between 1 January 2008 and 10 July 2009. Defendants argue that the business court erred in granting those damages because Scenera "acted with both subjective good faith and an objectively reasonable belief that it was not violating the [WHA.]" We are unpersuaded.

Section 25.22(a1) of the WHA provides:

> In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in *good faith* and that the employer had *reasonable grounds for believing that the act or omission was not a violation of this Article*, the court may, in its discretion, award no liquidated damages or may award any amount of

7. "Wages based on bonuses . . . shall be paid on the first regular payday after the amount becomes *calculable* when a separation occurs. . . ." N.C. Gen. Stat. § 95-25.7 (emphasis added).

> liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C. Gen. Stat. § 95-25.22(a1) (2011) (emphasis added). At trial,

> [t]he employer bears the burden of avoiding liquidated damages by showing that it acted in good faith and with a reasonable belief that its actions were not in violation of the [WHA]. Even if an employer shows that it acted in good faith[] and with the belief that its action[s] did not constitute a violation of the Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages.

Kornegay, 204 N.C. App. at 241, 693 S.E.2d at 742 (citations, quotation marks, and brackets omitted).

A court's determination regarding whether an employer has made a showing of good faith and objective reasonableness is reviewed under a *de novo* standard. *See id.* at 245, 693 S.E.2d at 745. The findings of fact in support of that determination are reviewed under a competent evidence standard. *Id.* If a trial court properly determines that an employer failed to make a showing of good faith and objective reasonableness under those standards, then it has no discretion and must award liquidated damages to the employee. *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 15, 454 S.E.2d 278, 285, *disc. review denied*, 340 N.C. 260, 456 S.E.2d 830 (1995). If, however, the trial court properly determines that the employer established good faith and objective reasonableness, we review its decision regarding whether to award liquidated damages for abuse of discretion. *Kornegay*, 204 N.C. App. at 241, 693 S.E.2d at 742. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In granting Morris's motion for supplemental relief, the business court made the following determination:

> Defendants have not adequately demonstrated good faith or reasonable grounds for a belief that their failure to pay application and issuance bonuses accruing during the period of January 1, 2008 through July 10, 2009 was not a violation of the [WHA]. While there is evidence to support Defendants' subjective good faith, *there was no evidence supporting a conclusion that a change in Morris's*

> *wages was reduced to writing until June 2009, shortly before his employment ended.* . . . The court, considering the greater weight of the evidence, further concludes in its discretion that it would award liquidated damages in the amount of $210,000[] even if Defendants had proven that they acted in good faith or with a reasonable belief within the meaning of the [WHA].

(Emphasis added). Accordingly, the court's conclusion that Defendants failed to establish good faith and objective reasonableness appears to turn on its finding that any change in the agreement to pay wages to Morris was not reduced to writing until June of 2009.[8]

Defendants do not contest the validity of the business court's finding that Scenera failed to reduce any change in Morris's pay to writing until June of 2009. Rather, they refer to the court's determination as "flawed" and argue that, as a matter of policy, any failure to properly notify employees under the WHA should not "justify the award of liquidated damages" because that would mean "*every* failure to properly notify employees of changes in wages would *automatically* entitle [those employees] to liquidated damages, a result inconsistent with the plain text of [section 95-22.22(a1)]." (Emphasis in original). We disagree.

As Morris notes in his brief, the WHA requires every employer to "[n]otify employees, in writing or through a posted notice . . . , at least 24 hours prior to any changes in promised wages." N.C. Gen. Stat. § 95-25.13(3). Failure to do so is a violation of the Act. Here, the business court cited to Defendants' failure to provide written notice of the change in Morris's bonus plan as support for its determination that Defendants failed to act in good faith and with objective reasonableness. While that failure does not and could not result in "automatic" liquidated damages, it constitutes a violation of the Act and, as such, *may* be used as evidence that the employer acted unreasonably or without good faith.[9] For that reason, we hold that Scenera's failure to provide Morris with notice of the change in his bonus plan constituted sufficient evidence to support the business court's finding that Defendants did not act in good faith or with objective reasonableness and, therefore, justified the

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8. Because damages might be avoided only if the employer establishes *both* good faith and objective reasonableness, the court's finding supports its award of liquidated damages as long as it properly demonstrates Defendants' failure to establish *either* good faith or objective reasonableness.

9. Such a failure does not, however, preclude an employer from nonetheless establishing that it acted in good faith and with objective reasonableness.

business court's award of liquidated damages in this case. Accordingly, Defendant's argument is overruled.[10]

C. Attorneys' Fees

[3] Lastly, Defendants contend that, if this Court reverses the business court's judgment on any of the grounds discussed above, we should vacate its award of attorneys' fees. Because we find no error regarding the business court's judgment on Defendants' first and second issues on appeal, we need not address this third argument.

II. Plaintiff's Appeal

Morris makes five arguments on appeal. First, he contends that the business court erred by failing to add liquidated damages to the jury's award of patent bonuses for the pending patents. Second, he asserts that the business court erred by failing to award treble damages under REDA. Third, he argues that the business court erred by reducing the attorneys' fees award. Fourth, he claims that he is "entitled to elect between rescinding the patent assignments or accepting the award of patent bonuses and liquidated damages." Fifth, he argues — in the alternative to his fourth argument — that the business court erred in granting Defendants' motions for summary judgment and directed verdict on patent ownership. We find no error on the first two arguments, reverse the business court's judgment in part under the third argument, remand in part on the third and fourth arguments, and do not address the fifth argument.

A. Liquidated Damages for Pending Patents

[4] Morris contends that the business court erred in failing to grant liquidated damages in response to the jury's award of issuance bonuses for the 150 patents pending with the patent office. He argues that Scenera did not establish that it acted with good faith and objective reasonableness under section 95-25.22(a1) of the WHA when it denied the bonuses on the belief that "Morris was required to be employed at the time the

10. Even if Defendants had acted in good faith and in an objectively reasonable way, the business court nonetheless retained discretion under the Act to grant Morris's motion for liquidated damages. *Hamilton*, 118 N.C. App. at 15, 454 S.E.2d at 285 ("[E]ven if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the [WHA], the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages."). The business court acknowledged this fact in its opinion, stating that it would have awarded liquidated damages for that same amount in its discretion under the Act "even if Defendants had proven that they acted in good faith or with a reasonable belief . . . ." Defendants inexplicably contest this point in their brief, wrongly alleging that the trial court "had no such discretion."

patents issued in order to receive his bonuses." For that reason, Morris contends that the business court was required to award liquidated damages under the Act. We disagree.

In its 14 May 2012 opinion, the business court determined that Scenera made a proper showing of good faith and objective reasonableness as to its failure to pay the issuance bonuses. As noted above, we review the court's findings under a competent evidence standard. *See Kornegay*, 204 N.C. App. at 245, 693 S.E.2d at 745. If those findings are based on competent evidence, we review the court's conclusion that the employer acted in good faith and with objective reasonableness *de novo*. *See id.* If we conclude that the business court correctly determined that the employer acted in good faith and with objective reasonableness, we review the court's award of liquidated damages for abuse of discretion. *See id.* at 241, 693 S.E.2d at 742. If the court did not correctly determine that Scenera acted in good faith and with objective reasonableness, then it necessarily erred, and liquidated damages must be awarded. *See* N.C. Gen. Stat. § 95-25.22(a1); *Hamilton*, 118 N.C. App. at 15, 454 S.E.2d at 285.

Under section 95-25.22(a1) of the WHA, a court may decline to award liquidated damages in its discretion if the employer shows that it acted in good faith and with reasonable grounds for believing that it was not in violation of the WHA. N.C. Gen. Stat. § 95-25.22(a1). In declining to award liquidated damages to Morris, the business court made the following determination:

> {24} . . . Defendants reasonably believed that Morris and Defendants agreed at the inception of Morris's employment that Morris would receive patent application and patent issuance bonuses, that his employment at the time of patent issuance was a condition of the patent issuance bonuses[,] and that issuance bonuses required continued employment. Defendants never changed this condition which was in place when Morris's employment began. That belief was not unreasonable, even after an informed reading of the [WHA] and related regulations. The court finds that when refusing to pay issuance bonuses for patents which had not yet issued at the time Morris's employment ended, Defendants acted in good faith and with a reasonable belief that they were not in violation of the [WHA].

In challenging the business court's determination, Morris argues that Defendants' failure to pay these bonuses was not objectively reasonable because (1) the WHA has "clear and explicit requirements and

prohibitions" regarding an employer's obligation to give notice of any grounds for the "loss or forfeiture of a bonus" and (2) Scenera failed to provide Morris with such notice.

This argument ignores the business court's finding that Defendants failed to pay issuance bonuses to Morris *in good faith*. Even accepting Morris's contention that the WHA's "loss or forfeiture" requirements are applicable to Scenera's actions,[11] Defendants could not reasonably be expected to provide Morris with notice that they were enforcing a policy which would cause the loss or forfeiture of some of his bonuses if they held a good faith belief that their policy was not causing such loss or forfeiture. Because Morris's argument does not address the issue of whether there is competent evidence to support the business court's findings that Defendants acted *in good faith*[12] and because recovery is only available if the employer failed to act in good faith *and* lacked reasonable grounds for believing that it was not in violation of the WHA, we need not evaluate Morris's argument that Defendants acted in an objectively unreasonable manner by failing to provide him with notice that they would discontinue payment. Because Morris failed to show that Scenera did not act in good faith, he cannot recover liquidated damages resulting from Scenera's denial of bonuses for the pending patents. Therefore, Morris's first argument is overruled.

B. Treble Damages Under REDA

[5] A willful violation of the retaliatory discrimination section of REDA requires the trial court to treble damages under that Act. N.C. Gen. Stat. § 95-243 (2011). Morris asserts that the business court erred in declining to treble his $390,000 jury award under REDA because the jury rejected Defendants' alternative contentions that Morris had "effectively resigned" or that Defendants would have terminated him even if he had not made the disputed wage claims. Accordingly, Morris reasons, Defendants' violation of REDA was "willful" as a matter of law. We disagree.

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11. Defendants contend that notice was not required under the WHA because their failure to pay the issuance bonuses was in accordance with a pre-existing term or condition of the company bonus policy and, therefore, did not constitute a forfeiture or loss of wages under the WHA.

12. Though Morris includes the header "Scenera Did Not Act With Subjective Good Faith," he makes no argument to that effect in his brief. Accordingly, that argument is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

In pertinent part, Section 95-243 of REDA states:

> (c) The employee . . . may seek and the court may award any or all of the following types of relief [in a civil action]:
>
> . . .
>
> (4) Compensation for lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action or discrimination.
>
> If in an action under [REDA] the court finds that the employee was injured by a *willful violation* of [the prohibition against discrimination or retaliatory action by the employer], the court shall treble the amount awarded under [subsection 4].

N.C. Gen. Stat. § 95-243 (emphasis added). In order to determine whether Defendants' violation of REDA was "willful," we must first determine the meaning of that term.

"Willful" is not defined under REDA. The business court, in its 14 May 2012 judgment, described "the relevant question" on the issue of Defendants' willfulness as "whether Defendants acted in conscious and intentional disregard of or indifference to Morris's rights when terminating his employment." However, the North Carolina appellate courts have neither defined the term "willful" nor set a standard for reviewing a trial court's finding of willfulness under section 95-243. Accordingly, we may "look to federal decisions for guidance." *See Abels v. Renfro Corp.*, 335 N.C. 209, 218, 436 S.E.2d 822, 827 (1993) (noting that the appellate courts may "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases") (citation omitted).

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 100 L. Ed. 2d. 115 (2010), the United States Supreme Court addressed a three-year exception to the general two-year statute of limitations for "willful" violations of the Fair Labor Standards Act ("FLSA"). *Id.* at 129, 100 L. Ed. 2d at 120. Using the standard for "willfulness" originally articulated in relation to the Age Discrimination in Employment Act ("ADEA"), the Supreme Court defined a willful violation of the FLSA as one in which the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *Id.* at 133, 100 L. Ed. 2d at 123. The Fourth Circuit applied that standard one year later in *Desmond v. PNGI Charles Town Gaming, LLC*, noting that "[n]egligent conduct is insufficient to show willfulness" under *McLaughlin*. 630 F.3d

351, 358 (4th Cir. 2011) ("[O]nly those employers who either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA have willfully violated the statute.") (citations, quotation marks, and brackets omitted). Because REDA and the FLSA were both established for the purpose of protecting employees from retaliation by their employers,[13] we hold that the Supreme Court's definition of willfulness is applicable to section 243 of REDA and apply it in this case.

The United States Court of Appeals for the Eleventh Circuit has determined that the issue of "willfulness" under the ADEA is a question of fact for the jury. *Formby v. Farmers & Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990)[14] ("[T]he determination of whether a violation of the ADEA was willful is a determination of fact, to which a party, upon giving proper notice, is entitled to have a jury decide the plaintiff's entitlement to liquidated damages."). We agree with that reasoning and apply it to our interpretation of willfulness under REDA. Accordingly, we hold that a determination of "willfulness" under REDA is a finding of fact for the jury to decide, not for the judge. In this case, however, the issue of willfulness was decided by the business court.

Under certain circumstances, a party may waive or forfeit its right to have a jury decide questions of fact. *Sykes v. Belk*, 278 N.C. 106, 123, 179 S.E.2d 439, 449 (1971). Here, Morris waived his right to have the issue of willfulness decided by the jury because he explicitly concurred with the business court's suggestion that the issue of Scenera's "willfulness" under REDA was for the court to decide. Accordingly, we review the business court's factual determination that Scenera did not "willfully" violate REDA under the competent evidence standard used for a trial court's findings of fact made during a bench trial. *See generally In re Estate of Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007)

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13. "In enacting REDA and its predecessor statute, N.C. Gen. Stat. § 97-6.1 [(2011)], the General Assembly intended to prevent employer retaliation from having a chilling effect upon an employee's exercise of his or her statutory rights under the Worker's Compensation Act." *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005) (citation omitted). Similarly, "[t]he anti-retaliation provision [of the FLSA] facilitates the enforcement of the FLSA's standards by fostering an environment in which employees' fear of economic retaliation will not cause them quietly to accept substandard conditions." *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (citation and quotation marks omitted).

14. The definition of willfulness used in *Formby* under the ADEA is the same definition that the United States Supreme Court used in *McLaughlin* under the FLSA. In addition, the ADEA provides in a manner similar to REDA that liquidated damages are available only for *willful* violations of the Act. 29 U.S.C. § 626(b) (2006).

("The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law . . . .") (citations and quotation marks omitted).

In determining that Defendants did not willfully terminate Morris's employment, the business court relied on the following "key evidence":

> {31} Draft employment agreements [between the parties] were exchanged in late May or early June 2009. Morris believed that Scenera was overreaching, in that any bonus being offered was discretionary and could be withdrawn at any time, while Morris was being asked to forego his claim to accrued and future patent bonuses in exchange. Scenera believed that Morris was demanding unreasonable terms for an employment agreement. As the dispute intensified . . . , Morris's counsel . . . wrote an e-mail . . . in which he stated that,
>
> > negotiations have established to us that our representative clients have fundamentally different perspectives on . . . Morris's value and contribution to Scenera. As you know, in a free market under such circumstances, it's best to part ways. Accordingly, . . . Morris wants to immediately resolve the outstanding issue regarding non-payment of patent bonuses and negotiate a termination agreement.
> >
> > . . .
> >
> > [S]ince the parties are so far apart on a permanent employment agreement, and the part[-] time concept does not look workable, we suggest pursuing a separation agreement.
>
> [Morris's attorney] suggested terms for such an agreement. He also indicated that he would initiate legal recourse to collect the unpaid bonuses if they had not been paid by July 13, 2009.
>
> {32} Subsequent to [the e-mail from Morris's counsel], Fry and Morris spoke directly, after which Morris wrote Fry two July 7, 2009 e-mails . . . . The first e-mail concluded with the following statement: "There [was] one proposal

only. That is, the payment of $210k, the issue bonuses, and my terminating my employment are all elements of a single proposal. They stand together." The second e-mail encouraged Fry to have his counsel . . . contact [Morris's counsel] to clarify any confusion.

{33} Both [counsel for Fry and counsel for Morris] affirmed that they did not talk again before [counsel for Fry] responded to [counsel for Morris's] July 2, 2009 e-mail by her e-mail on July 9, 2009, which [began as follows:] "Scenera understands that . . . Morris has put forth an effective resignation[."] [Fry's counsel also] indicated that Scenera "accepts [Morris's] resignation effective tomorrow morning, July 10, 2009." [Counsel for Fry] indicated that Scenera contended that no bonus compensation was due Morris, but then offered payment of $210,000 "on condition that . . . Morris acknowledge that such sum is the full amount due and owing him through the date of termination," and provided that Scenera would make those payments in two successive payroll periods. [Counsel for Fry] . . . [also stated] that Scenera refused to pay any future patent issuance bonuses[,] [offered] strongly worded cautions that Morris would suffer adverse consequences should he elect to file suit, and [suggested that] negative perceptions [might] impair his ability to secure alternative employment.

{34} While Morris did not specifically resign, it was also apparent that Morris was unlikely to continue his employment. It was also clear that no agreement on the wage claim was imminent and that Morris intended to further prosecute his wage claims and intended to continue to dispute patent ownership and [his] obligation to assign inventions while those claims remained unresolved.

{35} Scenera offered to pay the disputed $210,000, but never without condition. It is . . . unclear whether Morris would have agreed to sign an employment agreement had Scenera paid that amount without condition while also refusing the other elements that Morris insisted must be included in any employment agreement, including future patent issuance bonuses.

{36} The court acknowledges that the jury rejected Scenera's contention that Morris had resigned. But in

> considering willfulness the court also considers that Morris himself raised the issue of severing his employment and preferring to continue his association only under a consulting arrangement. Ultimately, the failure to reach an agreement, if based on wages, related to that portion of the wage claim for patent issuance bonuses for patents which had not yet issued. On this issue, the court has concluded that Defendants' denial was in good faith.

Morris argues that the court erred in finding that Scenera did not act willfully by citing to: (1) Morris's testimony that Scenera's general counsel informed him that he should "quit" and stated "you know, we can't fire you" when Morris refused to quit; (2) the fact that Defendants hired a number of competent law firms to advise them regarding North Carolina's employment law; (3) Defendants' "relentless insistence that Morris 'effectively resigned' " as evidence that they did not want to "be seen as firing Morris"; and (4) Defendants' failure to offer evidence "that they were unaware that firing Morris for pursuing his WHA claims was illegal."

Defendants respond by pointing out that: (1) Scenera's general counsel "flatly denied making [the] statement [alleged by Morris that 'we can't fire you']," and the business court was not required to rely on that statement as evidence of willfulness even if it had been made; (2) Morris's counsel testified that he suggested "look[ing] at terminating formal employment and set[ting Morris] up as an independent contractor" in his early July message to Scenera; and (3) R. Fry believed that Morris was intentionally "not going to do [his] job" because of difficulties resulting from negotiations with Scenera.

After a thorough review of the record on appeal, we find that there is competent evidence to support the business court's determination that Scenera did not willfully violate REDA. Though the jury rejected Defendants' argument that Morris "effectively resigned," it made no statement regarding Scenera's *belief* on the issue of Morris's employment status. Further, Defendants have offered evidence, *supra*, that Scenera held a good faith belief that it was not in violation of REDA. Therefore, we find that the evidence presented at trial and summarized in the business court's 14 May 2012 judgment is competent to support the conclusion that Scenera did not know or show reckless disregard as to whether its conduct was prohibited by REDA. Accordingly, the business court did not err in declining to treble Morris's $390,000 REDA damage award.

C. Attorneys' Fees

[6] In its May judgment following the jury trial, the business court determined that "Morris should recover attorneys' fees as a successful litigant, but [that] the total fees and expenses sought should, in part, be allocated among the claims on which he was successful and those on which he was not." Morris was successful on all ten of the issues submitted to the jury and on Scenera's counterclaims, but failed on the questions of fraudulent inducement, unjust enrichment, and whether he was "hired to invent," which the business court resolved on summary judgment. For that reason, the court granted $450,000 in attorneys' fees instead of the $800,000 requested by Morris.

As the business court notes in its judgment, sections 95-25.22(d) of the WHA and 95-243(c) of REDA provide that the trial court "may" award reasonable costs and expenses, including attorneys' fees, to the plaintiff. N.C. Gen. Stat. §§ 95-25.22(d), -243(c). Interpreting subsection 25.22(d) of the WHA, we have held that "[a] trial court's decision [regarding] whether or not to award attorneys' fees . . . is reviewed for abuse of discretion." *Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746; *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 435, 531 S.E.2d 476, 482 (2000) ("[W]here, as here[,] the Act applies, the court in its discretion may award plaintiff attorney[s'] fees."). Because subsection 243(c) of REDA similarly provides that a trial court "*may* award [attorneys' fees] to the plaintiff," we hold that a court's decision to grant attorneys' fees under that section is similarly reviewed for abuse of discretion. *See* N.C. Gen. Stat. § 95-243(c) (emphasis added); *see also Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746. "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Sowell v. Clark*, 151 N.C. App. 723, 727, 567 S.E.2d 200, 202 (2002) (citation and quotation marks omitted).

On appeal, Morris argues that the business court erred by allocating among legal claims — and thereby reducing his award of attorneys' fees — because (1) claims that arise from a common nucleus of operative fact should not be allocated; (2) the business court "failed to make any findings of fact or offer any conclusions of law on whether Morris's claims and Defendants' counterclaims [arose] from a common nucleus of operative fact[]"; and (3) the parties' claims did, in fact, arise from a common nucleus of operative fact. We agree with Morris's first two arguments and refrain from addressing the third.

Morris bases his argument on three of our opinions: (1) *Hamilton*, 118 N.C. App. 1, 454 S.E.2d 287; (2) *Okwara v. Dillard Dep't Stores*,

Inc., 136 N.C. App. 587, 525 S.E.2d 481 (2000); and (3) *Whiteside Estates, Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 553 S.E.2d 431 (2001), *dismissed as moot and disc. review denied*, 356 N.C. 315, 571 S.E.2d 219–20 (2002). First, in *Hamilton*, we concluded that "the trial court did not err in refusing to reduce the [trial court's award of] attorneys' fee award to account for [certain members of a class of plaintiffs] who prevailed only on [their] contract claim[s]" because "the attorneys' work was not divisible between the [WHA] claims and [those] contract claims." *Hamilton*, 118 N.C. App. at 17, 454 S.E.2d at 286 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40 (1983) and noting that the reasoning of the federal courts, while not binding on us, is instructive). Second, in *Okwara*, we affirmed "the trial court's conclusion that no apportionment of fees was necessary" because "plaintiff's claims arose from a common nucleus of operative fact[]" and were thus "inextricably interwoven." *Okwara*, 136 N.C. App. at 596, 525 S.E.2d at 487 (quotation marks omitted). In so holding, we relied on and described the Supreme Court's opinion in *Hensley* as follows:

> [W]here multiple state law and federal law claims are litigated together, fees incurred defending both the federal civil rights claims and other claims may be fairly charged to the prevailing party under § 1988 [of the U.S. Code] so long as all of these claims stem from a common nucleus of law or fact. This is so because, as noted in *Hensley*, "much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." This determination is left largely to the discretion of the trial courts.

Id. at 595, 525 S.E.2d at 486–87 (citations and brackets omitted). Lastly, in *Whiteside Estates*, we determined that the trial court was not required to apportion attorneys' fees because "all of [the] plaintiff's claims [arose] from the same nucleus of operative fact[] and each claim was 'inextricably interwoven' with the other claims . . . ." *Whiteside Estates*, 146 N.C. App. at 467, 553 S.E.2d at 443 (citing *Okwara*, 136 N.C. App. at 596, 525 S.E.2d at 487). These cases are controlling when considering the question of whether an award of attorneys' fees may be allocated under the WHA or REDA.

The *Hensley* opinion, which provided the rationale for each of the cases discussed above, concerns a federal statute allowing for attorneys' fees in civil rights cases. Like the WHA and REDA, that statute provides that the trial court, "in its discretion, *may* allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988(b)

(2006) (emphasis added). Interpreting that statute, the *Hensley* Court provided the following instruction:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney[s'] fees reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 440, 76 L. Ed. 2d at 54–55. In reviewing the business court's allocation of attorneys' fees under the WHA and REDA, we must follow our opinions in *Whiteside Estates*, *Hamilton*, and *Okwara* and employ the rationale laid down in *Hensley*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In his brief, Plaintiff points out that the trial court failed to make any findings of fact or conclusions of law regarding whether his claims arose from a common nucleus of operative fact. He argues that his claims are related nonetheless because "[e]very claim asserted in the [c]omplaint and [a]mended [c]omplaint by Morris arises out of his claim for patent bonuses, Defendants' refusal to pay those bonuses, the legal consequences of that refusal, and Defendants' firing of Morris in retaliation for pursuing those claims." Defendants contend, to the contrary, that the trial court did not abuse its discretion in allocating attorneys' fees among Morris's claims because those claims are "derived from two separate disputes": (1) Scenera's "allegation [that it] was the lawful owner of all inventions Morris had developed during his employment" and (2) Morris's claims concerning "Scenera's failure to pay him wages and the termination of his employment."

The business court's 14 May 2012 judgment provided no authority for its determination that Morris's award of attorneys' fees "should, in part, be allocated among the claims on which he was successful and those on which he was not." Though the court stated in its judgment that it "considered the holdings in *Whiteside Estates* . . . and *Hamilton*[,]" it made no findings regarding whether Morris's claims were sufficiently related to preclude the allocation of attorneys' fees and did not address the legal standard relied upon in those decisions. Rather, the court's

discussion is limited to the reasonableness of the fees overall. Therefore, we are unable to review the court's decision to allocate among Morris's claims in accordance with *Hamilton*, *Okwara*, and *Whiteside Estates*. *See also Hensley*, 461 U.S. at 440, 76 L. Ed. 2d at 54–55. Accordingly, we reverse the business court's award of attorneys' fees and remand to the trial court for further findings of fact and conclusions of law regarding whether Morris's claims arose from a common nucleus of operative fact and, thus, whether he is entitled to all of his attorneys' fees.

D. Rescission of Patent Assignments

[7] Morris next argues that "the trial court erred in its summary judgment order by foreclosing Morris's right to elect between money damages or rescission of the patent assignments" and requests that this Court remand this case "to the trial court with instructions that Morris is entitled to elect between his WHA [damages] award[] or rescission of his patent assignments." We agree.

The remedy of rescission "implies the . . . abrogation of [a] contract [by the party seeking it] and a restoration of the benefits [received] from the other party." *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 541 (1967) (citation and quotation marks omitted).

> Rescission is not merely a termination of contractual obligation. It is abrogation or undoing of [the contract] from [its] beginning. It seeks to create a situation the same as if no contract ever had existed. . . . Rescission may [occur] by mutual agreement or . . . because of a substantial breach by [one party]. In either case, rescission of the contract entitles each party to be placed *in statu quo ante fuit.*[15]

Id. at 74–75 (citations and quotation marks omitted; italics in original).

Before addressing the merits of Morris's argument, we consider Defendants' contention that Morris waived his right to argue rescission on appeal because he did not raise that issue below. In support of this contention, Defendants allege that Morris "*never* sought rescission in the trial court" and "[h]is complaint did not include a claim for rescission

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15. *in statu quo*. . . . In the condition in which (it was before): a part of the phrase *in statu quo ante fuit* . . . used with reference to the restoration of any person or property to the situation existing at a previous time . . . , or to the maintenance of the present situation unchanged.

4 William Dwight Whitney, The Century Dictionary and Cyclopedia 3123 (15th ed. 1906).

. . . nor did he plead rescission as an affirmative defense in his answer to Scenera's counterclaims." This is incorrect.

Morris's complaint, though it does not explicitly mention the word "rescission," asserts in its "[b]reach of [c]ontract" section that: (1) the parties entered into a contract whereby Morris would receive $10,000 for each patentable invention developed at Scenera, $5,000 for patent applications filed and $5,000 for patents issued; (2) Scenera breached the contract by refusing to pay those bonuses; and (3) Morris is owed, *inter alia*, "specific restitution in the form of the rights and ownership of the patent applications and patents" and "damages in excess of $10,000." In addition, both Defendants and the business court later acknowledged that Morris had requested "rescission" early in the proceedings and in his complaint, respectively. In fact, Morris referred to this request in his answer to Defendants' counterclaims, where he noted that he "seeks rescission of assignments for certain patents and patent applications," and during the summary judgment hearing. Accordingly, Morris preserved his right to argue rescission on appeal.

The substance of Morris's argument is that he is entitled to elect between the remedies of (1) damages for Scenera's breach of the WHA, which were awarded in the total amount of $885,000 at trial, or (2) rescission of the patent-bonus agreement ("PBA")[16] because intellectual property is considered unique and Scenera materially breached the PBA when it failed to pay the agreed-upon bonuses between 1 January 2008 and 17 June 2009. Citing *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964), Morris points out that a material breach of contract going "to the very heart of the instrument" entitles the other party to elect to rescind the agreement and, further, does not bind that party to "relief at law by an award for damages." *See id.* at 43, 134 S.E.2d at 242. He also argues that the alternative remedy of rescission is commonly applied to contracts for the purchase of land under the theory that real estate is "unique property," the value of which cannot necessarily be encapsulated by a particular dollar amount. *See*, *e.g.*, *Brannock*, 271 N.C. at 76, 155 S.E.2d at 542 (granting rescission of a land-sale contract). Because patents are considered to be "unique intangible personal property" by the federal courts, Morris argues that rescission is an appropriate alternative remedy in this circumstance. *See Baumel v. Rosen*, 283 F. Supp. 128, 146 (D. Md. 1968), *affirmed in part*, *reversed in part on other*

16. This is the agreement whereby Scenera would pay Morris $5,000 for every patent application and $5,000 for every issued patent in exchange for assignment of those patents by Morris to Scenera.

grounds, 412 F.2d 571 (4th Cir. 1969) (referring to patents or copyrights as "unique intangible personal property") (citation omitted); *see also Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 824 (11th Cir. 1982) ("Although the originality concept [of the Copyright Act] defies exact definition, courts generally agree that 'originality' for copyright purposes is something less than the novelty or uniqueness necessary for patent protection.").

Defendants offer three "independent reasons" that Morris's argument is without merit. First, Defendants contest the existence of the PBA and argue that no summary judgment evidence supports the existence of a separate, patent-bonus agreement between Morris and Scenera. Second, Defendants alternatively argue that the breach was not material because (a) the breach only existed for eighteen months and (b) the parties had already agreed on a fee of $5,000 for each patent application filed and patent issued, meaning that the damages award was an adequate remedy alone. Third, Defendants assert that ownership of each invention vested in Scenera "immediately upon its discovery" because Morris was "hired to invent" by Scenera and, thus, Morris was "legally bound to execute patent assignments as part of his employment duties." We are unpersuaded.

First, as Morris notes in his reply brief, the record before the business court on summary judgment included "ample evidence" of the existence of the PBA. Indeed, the affidavit provided by Morris in opposition to Scenera's motion for summary judgment describes the agreement between Morris and S. Fry in detail. Further, Morris stated in his 2010 deposition in the Eastern District of North Carolina action that "[he] had [his] own agreement and own payment [while he was an employee with Scenera]. It was 5 and 5. And that was established before these were drawn up."

Second, Scenera's failure to pay Morris under the PBA constitutes a *prima facie* material breach of that agreement. In *Wilson*, our Supreme Court described the breach requirement for rescission as follows:

> [W]here there is a material breach of the contract going to the very heart of the instrument, [*i.e.*, a dependent covenant,] the other party to the contract may elect to rescind and is not bound to seek relief at law by an award [of] damages. . . . A covenant is dependent where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is

> such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances if the remedy at law will not be full and adequate.
>
> Rescission . . . is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of the agreement.

Wilson, 261 N.C. at 43, 134 S.E.2d at 242–43 (citations and quotation marks omitted). Scenera's obligation to pay Morris for the patents submitted to and issuing from the patent office was a covenant on which the oral contract between the two parties depended. Failure to fulfill that covenant constitutes a material breach. The fact that Scenera failed to pay bonuses to Morris for eighteen months is relevant only to the extent that it provides a cap on the number of times Defendants breached; it does not affect the materiality of those breaches. Similarly, the adequacy of money damages is not relevant to the materiality of the breach. Our Supreme Court made it clear in *Wilson* that a party may "elect" to rescind an agreement when there is a material breach of this nature. *Id.*

Third, the business court's determination in its memorandum opinion that Morris was "hired to invent" is inapposite. As Morris notes in his reply brief, the "hired to invent" doctrine works to vest employers with intellectual property rights in those inventions made by their employees when those employees were hired to invent and *compensated for their work*. *See Speck v. N.C. Dairy Foundation, Inc.*, 311 N.C. 679, 687, 319 S.E.2d 139, 144 (1984) ("It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention[] *and accepts pay for such work*, it is his duty to disclose to his employer what he discovers in making the experiments, and what he accomplishes by the experiments belongs to the employer.") (citing *Houghton v. United States*, 23 F.2d 386, 390 (4th Cir. 1928)) (emphasis added). Morris was not compensated for the patents submitted to and issuing from the patent office between 1 January 2008 and 17 June 2009. Accordingly, Scenera's failure to pay those bonuses constituted a material breach of that contract and entitled Morris to sue for either rescission or damages. Because the jury granted damages for Scenera's breach, we direct the trial court to allow Morris to elect between the remedies of damages or rescission. *See, e.g.*, *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426–27, 344 S.E.2d 297, 301 (1986)

("[W]e hold that plaintiff should be allowed to elect her remedy *after* the jury's verdict. . . . [I]t would be manifestly unfair to require plaintiffs . . . to elect before the jury has answered the issues *and* the trial court has determined whether to treble the compensatory damages found by the jury[. Therefore,] such election should be allowed in the judgment.") (emphasis in original).

E. Summary Judgment and Directed Verdict on Patent Ownership

[8] Alternative to his fourth argument, Morris contends that the business court erred in granting Scenera's motions for (1) summary judgment on whether Morris was "hired to invent" and (2) directed verdict on ownership of the unassigned patents. Because we have remanded this case on the question of election of remedies between rescission and damages, we need not address this final argument.

NO ERROR in part, AFFIRMED in part, REVERSED in part, and REMANDED in part for further judgment.

Judges McGEE and HUNTER, ROBERT C., concur.

ADAN NIETO-ESPINOZA, Employee-Plaintiff
v.
LOWDER CONSTRUCTION, INC., Employer, and AUTO-OWNERS INSURANCE COMPANY, Carrier, Defendants

No. COA12-1316

Filed 20 August 2013

1. Workers' Compensation—voluntary dismissal—refiling not timely—not excusable neglect

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's failure to timely refile his claim after a voluntary dismissal was not due to excusable neglect. A lack of diligence was shown in that counsel failed to note the date of entry of the order.

2. Workers' Compensation—voluntary dismissal—deadline for refiling—not waived

The Industrial Commission did not abuse its discretion by declining to waive the one year deadline under Workers' Compensation

Rule 613 for plaintiff to refile his claim after a voluntary dismissal. Although, plaintiff contended that the Commission should have waived the filing deadline in the interest of justice, the Commission's decision was logically sound.

3. Workers' Compensation—voluntary dismissal—Rule 63—nullification declined

The Court Appeals declined plaintiff's invitation to nullify Workers' Compensation Rule 613, which allows one year to refile a claim after a voluntary dismissal. The Court of Appeals has repeatedly adhered to Rule 613 and recognized it as an enforceable provision, and it is clear that Rule 613 was properly promulgated by the Industrial Commission pursuant to its rulemaking authority.

Appeal by plaintiff from an order of the North Carolina Industrial Commission entered 12 June 2012. Heard in the Court of Appeals 27 March 2013.

Lanier Law Group, P.A., by Michael F. Roessler, for plaintiff-appellant.

McAngus Goudelock and Courie, by Daniel L. McCullough, for defendant-appellees.

BRYANT, Judge.

Where the Commission properly concluded plaintiff's failure to timely re-file his claim was not due to excusable neglect, and where we find no abuse of discretion in the Commission's decision to decline to waive the Rule 613 deadline to allow plaintiff to re-file his claim, we affirm the order of the Commission.

On 1 August 2007, Adan Nieto-Espinoza ("plaintiff") filed a Form 18 Notice of Accident to Employer, alleging that on 24 May 2007, during the course of his employment, a nail gun discharged into his knee. Over the course of the next year, a number of parties were added or removed from plaintiff's claim, ultimately resulting in the Commission ordering, on 25 August 2010, that Lowder Construction and its insurance carrier, Auto Owners Insurance, be added to the claim (hereinafter, "defendants").

On 25 August 2010, plaintiff filed a motion for voluntary dismissal in an effort to have the opportunity to file a new claim with correctly named employers. In an order noting a file date of 7 September 2010, Deputy Commissioner Adrian A. Phillips granted plaintiff's motion for voluntary

dismissal. On 16 September 2010, inquiry via email was made by the office of plaintiff's counsel as to whether the Deputy Commissioner had received plaintiff's motion and proposed order for voluntary dismissal. On 18 October 2010, the office of plaintiff's counsel acknowledged receipt and service of a copy of Deputy Commissioner Phillips' Order of dismissal. The service acknowledgement form noted "*Transmission via facsimile 9/7/10: Todd Mozingo and Roger Dillard*" referencing that the order had been faxed to plaintiff's and defendants' counsel, respectively on 7 September 2010. Plaintiff's counsel's paralegal calendared the one year deadline to re-file the claim for 18 October 2011, one year from the date of plaintiff's counsel's acknowledgement of receipt of the Order of dismissal as opposed to 7 September 2011, one year from the date of entry of the order. A year later, on 3 October 2011, counsel for plaintiff moved to file a "Form 33 Late Due to Excusable Neglect."

In an order filed 5 November 2011, Deputy Commissioner Phillips denied plaintiff's motion, stating the claim was barred pursuant to Rule 613. Plaintiff appealed to the Full Commission ("the Commission"). In an order filed 12 June 2012, the Commission affirmed Deputy Commissioner Phillips' order denying plaintiff's Motion to File Form 33 Late Due to Excusable Neglect. Plaintiff appeals.

On appeal, plaintiff raises three issues: whether the Commission erred by (I) concluding plaintiff's failure to timely re-file his claim was not due to excusable neglect; (II) concluding the untimely filing of plaintiff's claim should not be allowed under Rule 801 of the Workers' Compensation Rules; and (III) enforcing the provisions of Rule 613 of the Workers' Compensation Rules.

Standard of Review

> Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Egen v. Excalibur Resort Prof'l, 191 N.C. App. 724, 728, 663 S.E.2d 914, 918 (2008) (quoting *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (2006)). "Our standard of review

of the Commission's exercise of a discretionary power is a deferential one, and the Commission's decision will not be overturned absent an abuse of discretion.' " *Soder v. CorVel Corp.*, 202 N.C. App. 724, 730, 690 S.E.2d 30, 33 (2010) (quoting *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 251, 652 S.E.2d 713, 717 (2007)).

I

[1] Plaintiff first argues the Commission erred by concluding that his failure to timely re-file his claim was not due to excusable neglect.

Workers' Compensation Rules, Rule 613 states that, "[u]nless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim." Workers' Comp. R. of N.C. Indus. Comm'n 613(1)(b), 2012 Ann. R. of N.C. 1084. Excusable neglect is not addressed in the Commission Rules, however "[w]hile '[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act,' they may provide guidance in the absence of an applicable rule under the Workers' Compensation Act." *Harvey v. Cedar Creek BP*, 149 N.C. App. 873, 875, 562 S.E.2d 80, 81 (2002) (quoting *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985)). Rule 60 of the North Carolina Rules of Civil Procedure provides relief from a final judgment for "mistake, inadvertence, surprise, or excusable neglect[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2011).

"The Commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect." *Egen*, 191 N.C. App. at 730, 663 S.E.2d at 919 (quoting *Allen v. Food Lion, Inc.*, 117 N.C. App. 289, 291, 450 S.E.2d 571, 572 (1994)). "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). "Deliberate or willful conduct cannot constitute excusable neglect ... nor does inadvertent conduct that does not demonstrate diligence[.]" *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d 30, 38 (1999) (citation omitted). "Whether excusable neglect has been shown is a question of law, not a question of fact." *Engines & Equip., Inc. v. Lipscomb*, 15 N.C. App. 120, 122, 189 S.E.2d 498, 499 (1972).

Plaintiff contends that *Egen v. Excalibur* is analogous to the case at bar and supportive of his contention that his late filing was due to excusable neglect. Cognizant of our duty to review the Commission's

conclusions of law *de novo*, we nevertheless find the Commission's analysis of plaintiff's contention instructive:

> In support of his contention that his late refiling of his claim was due to excusable neglect, Plaintiff cites to the North Carolina Court of Appeals' decision in *Egan v. Excalibur Resort Professional*, 191 N.C. App. 724, 663 S.E.2d 914 (2008). In *Egen*, counsel for Plaintiff's paralegal received the Opinion and Award via email but did not notify counsel that the decision had been received which ultimately led to Plaintiff missing the deadline to file his appeal to the Full Commission. *Id.* at 731, 663 S.E.2d at 919. The e-mail attaching the Deputy Commissioner's Opinion and Award appeared on its face to have been sent to counsel for Plaintiff and counsel for Defendants — Plaintiff's counsel's paralegal's name did not appear on the "TO" line of the e-mail, leading her to believe that Plaintiff's counsel had received the e-mail and that she had only been "blind copied." *Id.* at 727, 663 S.H2d at 917. The Court of Appeals concluded that counsel for Plaintiff's paralegal's assumption that she was blind copied on the e-mail and her assumption that the Opinion and Award had actually been e-mailed to counsel for Plaintiff was excusable neglect. *Id.* at 731, 663 S.E.2d at 919. The Court further concluded that, given the fact that this was the first time in her ten years of work experience with the firm that an Opinion and Award had been received by e-mail, it was excusable neglect for counsel for Plaintiff's paralegal not to realize that the preservation of Plaintiff's right to appeal was dependent on her delivery of the e-mail attaching the Opinion and Award to Plaintiff's counsel. *Id.* at 731, 663 S.E.2d at 920.
>
> Plaintiff contends that the facts of the instant case are analogous to those in Egen. Specifically, Plaintiff contends that, like Plaintiff's counsel's paralegal in *Egen*, the representative of Plaintiff's counsel's firm in the instant case demonstrated diligence in following up with Deputy Commissioner Phillips regarding the status of Plaintiff's Motion for Voluntary Dismissal on September 16, 2010 and in calendaring the one-year deadline for Plaintiff to re-file his claim following receipt of Deputy Commissioner Phillips Order on October 18, 2010. The

> Full Commission does not find this argument persuasive. Although the Court in its opinion in *Egen* does cite *Couch v. Private Diagnostic Clinic*, 133 NC App. 93, 103, 515 S.E.2d 38, *aff'd*, 351 N.C. 92, 520 S.E.2d 785 (1999) for the proposition that "inadvertent conduct that does not demonstrate diligence" cannot constitute excusable neglect, the Court's determination that there was excusable neglect was based not on a conclusion that counsel for Plaintiff's paralegal had demonstrated diligence, but rather on the facts of the case including the appearance of the e-mail containing the Opinion and Award, the paralegal's ten years of experience during which she had never before received an Opinion and Award via email, and the lack of any Industrial Commission rules regarding the use of e-mail. *Egen* [sic] at 731, 663 S.E.2d at 920. Moreover, assuming arguendo that the Court's decision in *Egen* signals support for the proposition that demonstration of diligence constitutes excusable neglect, the Full Commission concludes that counsel for Plaintiff did not demonstrate diligence in failing to discover the calendaring error until more than more than [sic] 11 months had passed since the receipt of Deputy Commissioner Phillips' Order approving Plaintiff's Motion for Voluntary Dismissal. *Egen*, [sic] at 731, 663 S.E.2d at 919.
>
> The Full Commission concludes that using the date on which Deputy Commissioner Phillips Order was received to measure the one year deadline to refile Plaintiff's claim demonstrates ignorance of the applicable rule and lack of diligence, and therefore, does not constitute excusable neglect. *Briley* [sic] at 546, 501 S.E.2d at 655. Furthermore, the Full Commission concludes that counsel for Plaintiff's failure to discover the calendaring error until the one year deadline to refile Plaintiff's claim had passed demonstrates lack of diligence and, therefore, also does not constitute excusable neglect. *Egen*, [sic] at 731, 663 S.E.2d at 919.

We agree with the analysis as set forth by the Commission. A lack of diligence was shown in the instant case where, just after requesting and receiving a copy of the order of dismissal, counsel failed to note the date of entry of the order. Even assuming plaintiff's counsel never received the order purportedly faxed on 7 September 2010, had plaintiff's counsel

merely looked at the 18 October 2010 acknowledgement of receipt of order, which acknowledgement noted 7 September 2010 as the date of entry of the order, that would have demonstrated a level of diligence. Here, carelessness if not negligence, caused plaintiff's counsel to enter the wrong date to re-file plaintiff's worker's compensation claim. We find no error in the Commission's conclusion that plaintiff's counsel's failure to timely re-file the claim was not due to excusable neglect.

II & III

[2] We combine plaintiff's second and third issues and address plaintiff's argument that the Commission abused its discretion by declining to waive, per Rule 801, the one year deadline under Rule 613 for plaintiff to re-file his claim. Plaintiff contends that even if no excusable neglect existed, the Commission should have, in the interest of justice, waived the filing deadline.

> Although the Industrial Commission is not a court with general implied jurisdiction, it is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers. Although it primarily is an administrative agency of the state, charged with the duty of administering the provisions of the Worker's Compensation Act "in hearing and determining facts upon which the rights and liabilities of employers and employees depend, it exercises certain judicial functions to which appertain the rules of orderly procedure essential to the due administration of justice according to law.

Hogan, 315 N.C. at 137-38, 337 S.E.2d at 483 (citations omitted). "[North Carolina General Statutes, section 97-80(a)] grants the Industrial Commission the power to make rules consistent with the Workers' Compensation Act in order to carry out the Act's provisions. Under the authority of this statute, the Commission adopted Rule 613[.]" *Daugherty v. Cherry Hosp.*, 195 N.C. App. 97, 103, 670 S.E.2d 915, 920 (2009).

Workers' Compensation Rules, Rule 613(b), states that "[u]nless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim." Workers' Comp. R. of N.C. Indus. Comm'n 613(1)(b), 2012 Ann. R. of N.C. 1084.

Workers' Compensation Rules, Rule 801, states that "[i]n the interest of justice, these rules may be waived by the Industrial Commission." Workers' Comp. R. of N.C. Indus. Comm'n 801, 2012 Ann. R. of N.C. 1090.

Plaintiff contends that since defendant would not be prejudiced by plaintiff filing his claim less than thirty days after the one year deadline, the Commission erred by not invoking Rule 801 to better serve the interest of justice. While the Commission had the inherent authority under Rule 801 to waive plaintiff's violation of Rule 613, it declined to do so. We find no abuse of discretion.

As stated in *Soder v. CorVel Corp.*, absent an abuse of discretion, this Court shall not overturn the Commission's decision regarding a Rule 801 waiver request. 202 N.C. App. at 730, 690 S.E.2d at 33 (holding that while the "Commission's authority under Rule 801 to waive violations of the rules in the interest of justice is discretionary and not obligatory.... Our standard of review of the Commission's exercise of a discretionary power is a deferential one, and the Commission's decision will not be overturned absent an abuse of discretion." (citation and quotations omitted)). In the instant case, the Commission recognized plaintiff had failed to timely file his request for a hearing, and ruled that the reason was not due to excusable neglect. Therefore, as the Commission's decision was logically sound, we find no abuse of discretion and therefore overrule plaintiff's argument.

[3] Plaintiff also argues the North Carolina courts have historically played a role in "policing" the Commission's rule making, and should invoke that policing power to invalidate Rule 613. However, we decline plaintiff's invitation to nullify Rule 613 as adopted by the Commission. This Court has repeatedly adhered to Rule 613 and recognized it as an enforceable provision. *See Daugherty*, 195 N.C. App. 97, 670 S.E.2d 915; *see also*, *Lee v. Roses*, 162 N.C. App. 129, 131, 590 S.E.2d 404, 406 (2004) (discussing the Commission's authority under Rule 613 and noting that "[p]ursuant to its power to efficiently administer the Workers' Compensation Act, the Commission has inherent judicial authority to dismiss a claim with or without prejudice for failure to prosecute." (citation omitted)).

Further, in *Hogan*, our Supreme Court held that the Commission had the inherent power to invoke Rule 60 of the North Carolina Rules of Civil Procedure (regarding relief from judgment or order), concluding "the statutes creating the Industrial Commission have by implication clothed the Commission with the power to provide this remedy, a remedy related to that traditionally available at common law and equity[.]" *Hogan*, 315 N.C. at 137, 337 S.E.2d at 483; *see* N.C. R. Civ. P. § 1A-1, Rule 60 (2011) (Relief from judgment or order).

Notwithstanding plaintiff's argument that the promulgation of Rule 613 allows the Commission to narrow an injured worker's "substantive" rights,

it is clear that Rule 613, similar to its counterpart, Rule 41 of the North Carolina Rules of Civil Procedure, is a rule of procedure and was properly promulgated by the Industrial Commission pursuant to its rulemaking authority. *See* N.C. R. Civ. P. § 1A-1, Rule 41 (2011) (Dismissal of actions). Both rules allow a one year deadline to re-file a claim after plaintiff voluntarily dismisses his claim. Therefore, plaintiff's argument is overruled.

The order of the Full Commission is affirmed.

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

RL REGI NORTH CAROLINA, LLC, PLAINTIFF
v.
LIGHTHOUSE COVE, LLC, LIGHTHOUSE COVE DEVELOPMENT CORP., INC., GLEN C. STYGAR, JOHN R. LANCASTER, LETICIA S. LANCASTER, LIONEL L. YOW AND CONNIE S. YOW, DEFENDANTS

No. COA12-1279

Filed 20 August 2013

1. Creditors and Debtors—guarantee agreement—spousal guarantee—loan secured by real estate

The trial court did not err by granting summary judgment for defendant Connie Yow in an action against her on a guarantee agreement where she claimed that the spousal guarantee was void under the Equal Credit Opportunity Act. Although plaintiff argued that a spousal guaranty may be required for unsecured credit, the credit extended by Regions Bank to defendants in this case was secured by real estate.

2. Creditors and Debtors—guarantor-spouse—affirmative defense—ECOA violation

A guarantor spouse may assert an Equal Credit Opportunity Act (ECOA) violation as an affirmative defense in an action brought by a lender under North Carolina law, and defendant may use Regions Bank's violation of the ECOA as an affirmative defense in this case.

3. Creditors and Debtors—foreclosure—affirmative defense—not waived

Defendant did not waive her Equal Credit Opportunity Act affirmative defense by virtue of a forbearance agreement entered into

during attempts to resolve the default. A defense which allows a party to avoid the obligations of a contract because it was entered into in violation of law cannot be waived by stipulation.

Appeal by Plaintiff from order entered 22 March 2012 by Judge Allen Baddour and judgment entered 1 June 2012 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Cross-appeal by Defendant Connie S. Yow from orders entered 22 March 2012 and 27 March 2012 by Judge Allen Baddour and judgment entered 1 June 2012 by Judge Jay D. Hockenbury. Heard in the Court of Appeals 13 March 2013.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake, Joseph S. Dowdy, and Meghan E.B. Pridemore, for Plaintiff.

Shipman & Wright, LLP, by Matthew W. Buckmiller, for Defendant, Connie S. Yow.

DILLON, Judge.

RL REGI North Carolina, LLC, ("Plaintiff") appeals from an order entered 22 March 2012 denying Plaintiff's motion for summary judgment. Plaintiff also appeals from a judgment entered 1 June 2012 concluding Plaintiff violated the Equal Credit Opportunity Act, declaring void the guarantee agreement signed by Defendant Connie S. Yow on 11 April 2006, and denying Plaintiff's post trial motion for judgment on the verdict, or in the alternative, for judgment notwithstanding the verdict. Defendant Connie S. Yow cross-appeals from an order entered 22 March 2012 denying her motion for summary judgment, a 27 March 2012 discovery order, and, "[t]o the extent said Judgment is found to be in error[,]" the judgment entered 1 June 2012. We affirm the judgment of the trial court.

I. BACKGROUND

Plaintiff is the successor in interest to certain loans made by Regions Bank. Defendant Connie S. Yow executed an agreement guaranteeing two of those loans in April 2006 at which time she was married to Defendant Lionel L. Yow. Mr. Yow, along with Defendants Glen C. Stygar and John R. Lancaster (collectively the "LC owners") formed two entities, specifically, Defendants Lighthouse Cove, LLC, and Lighthouse Cove Development Corp., Inc. (the "LC Entities"), for the purpose of acquiring a tract of land in Brunswick County, consisting of approximately fifty-seven acres (the "Property") and developing a residential subdivision thereon to be known as Lighthouse Cove.

In early 2006, the LC Owners met with Alex King, a commercial lending officer with Regions Bank, to seek financing for the development project. In March 2006, Regions Bank provided a commitment to provide two loans (the "Loans") to the LC Entities, as borrowers, for the acquisition and partial development of the Property. The aggregate amount committed for the Loans was $4,280,000.00. The commitment provided that the Loans would be secured by the real estate and guaranteed by the LC Owners. The Loans would also be guaranteed by the LC Owners' wives, including Defendants Leticia S. Lancaster and Connie S. Yow,[1] though neither was an owner, officer or director of either of the LC Entities or otherwise involved in the development project.

In April 2006, the Loans closed under terms consistent with Regions Bank's commitment through the execution of various documents (the "Loan Documents") by Defendants.

By 2009, the LC Entities were in default of their obligations under the Loans. In December 2009, Defendants executed a forbearance agreement with Regions Bank in which they acknowledged their obligations under the Loan Documents and in which Regions Bank agreed to modify certain terms. Subsequently, though, the LC Entities defaulted on their obligations under the forbearance agreement.

In September 2010, Regions Bank sold its interest in the Loans, with said interest ultimately being transferred to Plaintiff. Plaintiff filed an amended complaint in this action on 15 March 2011, seeking damages from Defendants relating to the alleged default by the LC Entities of their obligations pursuant to the Loans.[2] On 18 April 2011, Defendants filed an amended answer and counterclaim. In this filing, Defendant Connie Yow asserted as an affirmative defense that Plaintiff's predecessor in interest, Regions Bank, unlawfully obtained her guaranty of the Loans in violation of the federal Equal Credit Opportunity Act (ECOA) codified in Chapter 15 of the United States Code.

On 31 October 2011, Plaintiff moved for summary judgment on all of its claims against all Defendants. On 17 January 2012, Defendant Connie Yow moved for summary judgment, in part, due to Regions Bank's alleged violation of the ECOA. On 22 March 2012, the trial court entered an order granting summary judgment in favor of Plaintiff on all claims, counterclaims and affirmative defenses, except its claim against

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1. Defendant Glen Stygar was unmarried.

2. Plaintiff's predecessor in interest in the Loans commenced this action in December 2010; however, its interest was subsequently transferred to Plaintiff.

Defendant Connie Yow for violating the guarantee agreement, concluding that there existed a genuine issue of material fact with regard to her ECOA affirmative defense.

On 21 May 2012, the matter came on for trial. The central issue was summarized by the trial court in its jury instructions:

> [T]his is a case in which Plaintiff is seeking to recover a deficiency monetary judgment against Defendant, Connie S. Yow. On the other hand, the Defendant, Connie S. Yow, says that [Plaintiff] should not recover judgment against her because [Regions Bank, Plaintiff's predecessor in interest] violated the Equal Credit Opportunity Act.

The trial court submitted four questions to the jury. Based on the factual findings contained in the jury's special verdict, the trial court concluded that Regions Bank had procured the guaranty of Defendant Connie Yow (hereinafter, "Defendant") in violation of the ECOA and that this violation constituted an affirmative defense; and, accordingly, the trial court entered judgment in favor of Defendant. From this judgment, Plaintiff appeals.

II. ANALYSIS

The ECOA is federal legislation which prohibits lending institutions from discriminating against any "applicant" on the basis of "race, color, religion, national origin, sex or *marital status*, or age[.]" 15 U.S.C. § 1691(a)(1). The Federal Reserve Board has promulgated rules interpreting the ECOA, known as Regulation B codified in 12 C.F.R. § 202.1, *et seq.* Section 207(d) sets forth rules which creditors must follow regarding, *inter alia*, their procurement of spousal guaranties. Specifically, the portions of section 202.7(d) relevant to this case provide the following with respect to spousal guaranties:

> (d) Signature of spouse or other person-
>
> (1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse . . . if the applicant qualifies [for the loan] under the creditor's standards of creditworthiness[.] . . .
>
> (2) Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of

> creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary . . . to enable the creditor to reach the property being relied upon [by the creditor to establish creditworthiness];
>
> . . .
>
> (4) Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse . . . to make the property offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien[.] . . .
>
> (5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request [an additional person to serve as] a . . . guarantor. . . . The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

12 C.F.R. § 207(d)(1)-(2), (4)-(5).

In the case *sub judice*, four issues concerning Plaintiff's deficiency claim and Defendant's ECOA defense were submitted to the jury and answered on the verdict sheet as follows:

> Issue One: Did Regions Bank seek the spousal guaranty of Defendant Connie S. Yow as additional support for the loans by Regions Bank to the Lighthouse Cove entities before making a determination of whether the applicants for the loans (the Lighthouse Cove entities, Glen Stygar, John Lancaster and her husband Lionel Yow) were independently creditworthy under Regions Bank's standards of creditworthiness?
>
> Answer: NO
>
> After you answer Issue One please proceed to Issue Two.
>
> Issue Two: Did Regions Bank, under its standards of creditworthiness, fail to make a determination that the personal liability of an additional party, defendant Connie Yow, was

necessary to support the loans requested by the Lighthouse Cove entities for the real estate development project?

Answer: NO

If your answer to Issue Two is "Yes" please proceed to Issue Four. If your answer to Issue Two is "No" please proceed to Issue Three.

Issue Three: Did Regions Bank require Connie Yow be a guarantor for the loans to the Lighthouse Cove entities?

Answer: YES

After you answer Issue Three please proceed to Issue Four.

Issue Four: Did Regions Bank prior to April 11, 2006 routinely require as a condition of loans spousal guarantees without first ascertaining whether an applicant for credit is creditworthy under Regions Bank's standards of creditworthiness?

Answer: NO

In its judgment, the trial court concluded that "[b]ased on the jury's answer 'Yes' to Issue Three, the Court rules as a matter of law that Regions Bank violated the [ECOA] by discriminating on the basis of marital status, a 'protected class' under the [ECOA]." The trial court further concluded that Defendant's remedy "is to allow her to use the violation of the [ECOA] by Regions Bank as an affirmative defense in the matter," and Defendant was released from any liability under the Loans. From this judgment, Plaintiff appeals.[3]

In its brief on appeal, Plaintiff argues (1) that the trial court erred by concluding that Regions Bank violated the ECOA as a matter of law based upon the jury's affirmative response to Issue Three; (2) that the trial court erred in concluding that a violation by Regions Bank of the ECOA created an affirmative defense for Defendant on Plaintiff's claims

3. Plaintiff also noted an appeal from the denial of its motion for summary judgment with regard to Defendant's affirmative defense, which was based upon Regions Bank's alleged violation of the ECOA. Further, Defendant cross-appealed from the trial court's denial of her motion for summary judgment, from a 27 March 2012 discovery order, and, "[t]o the extent said Judgment is found to be in error[,]" the judgment entered 1 June 2012. Plaintiff's challenge to the denial of its summary judgment motion is unavailing in light of the fact that this case was decided on its merits after a trial by jury. *Harris v. Walden*, 314 N.C. 284, 286-87, 333 S.E.2d 254, 256 (1985).

under her guaranty; and (3) that Defendant waived any ECOA defense arising under the ECOA by executing the forbearance agreement. We address each argument below.

A. ECOA Violation

[1] Plaintiff first argues that the jury's answer to Issue Three – that Regions Bank *required* Defendant to serve as a guarantor as a condition of approval – does not support the trial court's conclusion that Regions Bank violated the ECOA. Specifically, Plaintiff contends that "the ECOA . . . allows creditors to require spousal guarantees in appropriate circumstances, including those presented in this case." For this argument, Plaintiff relies on subsection (2) of 12 C.F.R. § 202.7(d), which provides that "the creditor *may require*" a spouse to sign certain instruments in relation to an application for "unsecured credit." *Id.* (emphasis added). Plaintiff argues that Mr. Yow's guaranty was, in essence, an application for unsecured credit. Accordingly, Regions Bank could *require* Defendant to execute a guaranty as well. We disagree.

While subsection (2) allows for a creditor to require a spouse of an applicant to execute certain instruments when the credit being sought is unsecured, subsection (5) provides that a creditor, if it deems additional support is needed for a credit, *may request* that an additional party serve as a guarantor, but that it "*shall not require* that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5) (emphasis added.) From our review of the jury instructions pertaining to Issue Three, it is clear that the jury was being asked to resolve whether Regions Bank violated subsection (5), not subsection (2). The following was the jury instruction pertaining to Issue Three:

> On this Issue 3, the defendant, Connie S. Yow, has the burden of proof.
>
> Under the ECOA, an applicant spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party. This is not to suggest that the ECOA prohibits a creditor requesting that the spouse serve as an additional guarantor.
>
> As to Issue 3, in which the defendant, Connie S. Yow, has the burden of proof, if you find by the greater weight of the evidence that Regions Bank required Connie Yow to be a guarantor for the loans to the Lighthouse Cove entities, then it would be your duty to answer this issue yes, in favor of the defendant. If on the other hand, you fail to so

> find, then it would be your duty to answer this issue no, in favor of the plaintiff, RL REGI North Carolina, LLC.

The trial court clearly differentiates between a creditor *requesting* a spousal guaranty, which is allowed under subsection (5), and *requiring* a spousal guaranty, which is prohibited under subsection (5). Plaintiff did not object to this instruction. Further, Plaintiff did not argue before the trial court that subsection (2) applied or request a jury instruction concerning subsection (2). We do not believe subsection (2) is applicable, in this case, simply because subsection (2) applies to situations where the credit being sought is unsecured, while the credit extended by Regions Bank to Defendants was secured by real estate. Plaintiff's argument that the guaranty executed by Mr. Yow was actually an extension of unsecured credit – and, therefore, subsection (2) applies – is without merit. Defendant was not required to guarantee her husband's guaranty agreement; rather, she was required to guarantee the Loans, which were secured by the Property. Accordingly, this argument is overruled.

B. ECOA as an Affirmative Defense

[2] Plaintiff next argues that a mere violation of the ECOA by a creditor in procuring a guaranty does not create an affirmative defense. Specifically, Plaintiff argues that since Regulation B provides a remedy in the form of an award of actual and punitive damages, *see* 12 C.F.R. § 202.16(b), "the clear legislative intent for remedying a violation of the ECOA is by a claim or counterclaim for damages; not for avoidance of an obligation through an affirmative defense." The question of whether, under North Carolina law, the procurement of a spousal guaranty in violation of the ECOA may be used as an affirmative defense in a suit to enforce the provisions of a guaranty is a question of first impression.

A number of other state and federal courts have addressed this question and have typically resolved it in one of three ways. *See Bank of the West v. Kline*, 782 N.W.2d 453, 459 (Iowa 2010); *In re Westbrooks*, 440 B.R. 677, 683 (M.D.N.C. 2010).

The first approach requires that a debtor can *only* assert an ECOA violation as a claim or counterclaim for damages, a position supported by Plaintiff in its brief. *Bank of the West*, 782 N.W.2d at 459; *see also F.D.I.C. v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480 (D. Kan. 1995); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993), *aff'd*, 36 F.3d 370 (4th Cir. 1994).

The second approach allows a debtor to assert an ECOA violation as an affirmative defense in the nature of a "recoupment." *Bank of the*

West, 782 N.W.2d at 460; *see also Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999). Recoupment "allows a defendant to 'defend' against a claim by asserting — up to the amount of the claim — the defendant's own claim against the plaintiff growing out of the same transaction," even if it was asserted after the statute of limitations applicable to ECOA violation claims has run. *Id.* at 672.

The third approach allows a debtor to assert an ECOA violation as an affirmative defense based on the defense of illegality. *Bank of the West*, 782 N.W.2d at 461; *see also Integra Bank/Pittsburg v. Freeman*, 839 F. Supp. 326, 329 (E.D.Pa. 1993); *Still v. Cunningham*, 94 P.3d 1104, 1114 (2004); *Eure v. Jefferson Nat'l Bank*, 248 Va. 245, 252, 448 S.E.2d 417, 421 (1994).

We believe that the third approach above is the most consistent with the law of this State and, therefore, we hold that a guarantor-spouse may assert an ECOA violation as an affirmative defense in an action brought by a lender.

It has long been the law in North Carolina that "an agreement which violates a constitutional statute or municipal ordinance is illegal and void." *Financial Services v. Capitol Funds*, 288 N.C. 122, 128, 217 S.E.2d 551, 555 (1975). Our Supreme Court expounded on this principle in the case of *Covington v. Threadgill*, 88 N.C. 186 (1883). In *Covington*, a plaintiff sued for the recovery of money owed when he sold the defendant intoxicating liquor. *Id.* at 186-87. As a defense, the defendant relied upon a statute which prohibited the extension of credit by a bar owner of more than $10 unless the patron actually signed a note. *Id.* The statute provided a penalty for any violation thereof. *Id.* at 187-88. In voiding the debt, the Supreme Court stated the following:

> The plaintiff, however, insists . . . that inasmuch as the statute does not in positive terms declare the act of selling, though upon a credit and in excess of the designated amount, to be *unlawful*, but simply prescribes a penalty for it, its effect is not to make the selling so absolutely illegal, as that it will vitiate the whole of the note, or other contract, of which it may form, in part, the consideration. A distinction, like that attempted to be made, between the effect in this regard, of statutes which affirmatively declare acts done in contravention of their provisions to be *unlawful*, and those which merely visit such acts with penalties, has been at times, and perhaps still is, recognized in some of the authorities, but never in the courts of

> this State. . . . [A]fter considering a vast number of cases upon the subject, they deem the law perfectly settled, that no action will be sustained in enforcement of an executory contract founded upon an immoral consideration, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute, and that a distinction between acts *malum in se* and *malum prohibitum*, could no longer be admitted as sound in principle, for that, the law would be false to itself, if it allowed a party through its tribunals to enforce a contract made against the express provisions of a statute[.]

Covington, 88 N.C. at 188-89 (emphasis in original).

In *Phosphate Co. v. Johnson*, 188 N.C. 419, 423-24, 124 S.E. 859, 863 (1924), our Supreme Court quoted Volume 13 of Corpus Juris with approval as a summary of the principle that an illegal agreement is void:

> Where a statute expressly declares that certain kinds of contracts shall be void, there is then no doubt of the legislative intention, and an agreement of the kind voided by the statute is unlawful. The same is true where the contract is in violation of a statute, although not therein expressly declared to be void. . . . A statute prohibiting the making of contracts, except in a certain manner, *ipso facto*, makes them void if made in any other way.

Id. at 429, 124 S.E. at 863-64 (quoting Corpus Juris, Vol. 13, p. 420 *et seq.*).

The foregoing notwithstanding, our Supreme Court has recognized exceptions to the general principle that contracts which violate a law are to be deemed void. In *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, our Supreme Court described one such exception in certain circumstances in which the law violated contains a penalty provision:

> [T]here is ample authority that the statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself. In such cases the Courts may examine the language and purposes of the statute, as well as the effects of avoiding contracts in violation thereof, and restrict the penalty for violation solely to that expressed within the statute itself.

288 N.C. 122, 128, 217 S.E.2d 551, 555 (citing *Price v. Edwards*, 178 N.C.

493, 101 S.E. 33 (1919)); *see also Hines v. Norcutt*, 176 N.C. 123, 96 S.E. 899 (1918). The Court further stated the following:

> The holdings of this Court demonstrate a remarkable divergence in results in cases presenting the question of illegality of contracts because of violation of statutory provisions. The cases generally follow the rule that where certain acts are expressly made illegal, contracts based on such acts are void.
>
> On the other hand, the Court has refused to extend the terms of a penal statute to avoid a contract unless such a result is within the intent of the legislative body.

Capitol Funds, Inc., 288 N.C. at 128-29, 217 S.E.2d at 556 (citations omitted); *see also Furr v. Fonville Morisey*, 130 N.C. App. 541, 545, 503 S.E.2d 401, 405 (1998) (stating that "[c]ourts will not extend the terms of a penal statute to avoid a contract unless such a result was within the intent of the legislature in enacting the statute").

Having determined that the trial court properly concluded that Regions Bank violated the ECOA based on the jury's answer to Issue Three, we must apply the above principles to determine whether, under North Carolina law, Defendant may avoid her obligations under the guaranty by way of an affirmative defense. We believe she may. We believe that, in enacting the ECOA, Congress did not intend for the *sole* remedy available against a creditor for an ECOA violation to be actual and punitive damages under 12 C.F.R. § 202.16(b). Rather, Congress expressly provided in the ECOA that, in addition to actual and punitive damages, "the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title[.] . . ." 15 U.S.C. § 1691e(c); *see also Bledsoe v. Fulton Bank*, 940 F. Supp. 804, 809 (1996) (holding that § 1691e(c) grants state courts concurrent jurisdiction to grant relief in the form of voiding a guaranty executed in violation of the ECOA). Further, allowing Plaintiff in this case to enforce the provisions of Defendant's guaranty would frustrate an important purpose of the ECOA, which is the eradicative of credit discrimination based on marital status, and would allow Plaintiff to benefit from discrimination that the ECOA seeks to eliminate. We find the Virginia Supreme Court's reasoning in *Eure*, *supra*, persuasive on this point:

> To deny [a guarantor-spouse] the right to use the ECOA violation defensively would be to enforce conduct that is

> forbidden by the Act. Such use, therefore, would be contrary to the will of Congress or in any manner inconsistent with or derogatory of the remedies specifically provided by the Act. Indeed, to permit such use would give effect to the clear legislative intent to deter discrimination in the particular area of endeavor regulated by ECOA.

Id. at 252, 448 S.E.2d at 421. Finally, we note that under our Consumer Finance Act, the General Assembly has expressly proscribed discrimination by a lender in the extension of credit based on marital status. N.C. Gen. Stat. § 53-180(d) (2011). Accordingly, we conclude that under North Carolina law, Defendant may use Regions Bank's violation of the ECOA as an affirmative defense.

C. Forbearance Agreement

[3] Plaintiff finally argues that Defendant waived her right to assert the ECOA as an affirmative defense when she executed the forbearance agreement. Specifically, Plaintiff references a provision in the forbearance agreement which states that Defendant "waives all defenses. . . ." However, a defense which allows a party to avoid the obligations of a contract because it was entered into in violation of law cannot be waived by stipulation. *Martin v. Underhill*, 265 N.C. 669, 673, 144 S.E.2d 872, 875 (1965). Our Supreme Court has held that "[a] stipulation in the most solemn form to waive [a defense of illegality] would be tainted with the vice of the original contract, and void for the same reasons." *Cansler v. Penland*, 125 N.C. 578, 581, 34 S.E. 683, 684 (1899). Accordingly, applying these principles, we hold that Defendant has not waived her ECOA defense by virtue of the forbearance agreement.

For the foregoing reasons, we affirm the trial court's judgment in this case.[4]

NO ERROR.

Judge CALABRIA and Judge ERVIN concur.

4. Because we affirm the trial court's judgment, which was favorable to Defendant, we need not address the issues presented in her cross-appeal.

STATE OF NORTH CAROLINA
v.
GLORIA TATUM-WADE, DEFENDANT

No. COA12-1568

Filed 20 August 2013

1. Evidence—opinion testimony—character evidence—trusting nature—tax evasion—pertinent trait—no prejudice

The trial court erred in a tax evasion case by excluding opinion testimony of defendant's friend and colleague regarding defendant's trusting nature where defendant's allegedly trusting nature was pertinent to the issue of willfulness under N.C.G.S. § 105-236(a)(7). However, defendant failed to demonstrate that a reasonable possibility existed that, absent the trial court's error, a different result would have been reached at trial.

2. Evidence—testimony—inflammatory anti-tax cult—no plain error

The trial court did not commit plain error in a tax evasion case by admitting inflammatory anti-tax cult evidence through the testimony of several of the State's witnesses. Even assuming *arguendo* that the challenged evidence should not have been admitted, the error did not reach the level of plain error.

Appeal by defendant from judgments entered 24 February 2012 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 6 May 2013.

Roy Cooper, *Attorney General*, *by Ryan F. Haigh*, *Special Deputy Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by John F. Carella*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Gloria Tatum-Wade ("defendant") appeals her convictions for seven counts of attempting to evade or defeat the imposition or payment of North Carolina's individual income tax. After careful review, we find no prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: Prior to 1995, defendant filed federal and North Carolina income tax returns for 27 years. Beginning in 1995, defendant and her (now late) husband, William Wade ("Wade"), started attending conventions put on by the organizations "We, the People" and "Sovereign Citizens Patriot." At one of these conventions, it was represented to Wade and defendant that they could obtain an exemption from paying income tax by completing a set of documents labeled "Form 1776 Codicil" and filing them with the Internal Revenue Service ("IRS"). They purchased the packet of materials, completed the Form 1776 Codicil, and mailed a copy of it to the IRS. They also registered a copy with the Guilford County Register of Deeds.

In January 2003, defendant began a new job teaching at a public high school in Guilford County. As part of the hiring process, defendant completed an NC-4 Employee Withholding Allowance Certificate. Defendant wrote on the form that she was "exempt" from having North Carolina income tax withheld from her pay. No taxes were withheld from defendant's wages for the years 2003 through 2010.

On 18 June 2010, the North Carolina Department of Revenue ("DOR") sent defendant a letter indicating that her taxes were delinquent. Defendant responded with a letter stating that in 1995 she had submitted the Form 1776 Codicil to the IRS and, three months later, received a letter indicating that she was "free from paying taxes to the federal government." Defendant further explained that while she had recently moved and could not find a copy of her letter from the IRS purporting to show her tax-exempt status, she did have a copy of the Form 1776 Codicil. Defendant included a copy of that document with her letter to DOR.

On 2 May 2011, defendant was interviewed by DOR Special Agents Charles Nische, Jr. ("Special Agent Nische") and Nancy Yokley ("Special Agent Yokley"). During the conversation, defendant told the agents that she had not paid state income tax since 1995. She also identified herself as being a member of the organizations "Sovereign Citizens Patriot" and "We, the People." Defendant told Special Agents Nische and Yokley that she had gone to several of those organizations' meetings and had watched some of their internet-based presentations. When the agents asked defendant about the Form 1776 Codicil, she explained that it was her "application" for obtaining tax-exempt status.

Defendant was subsequently charged with seven counts of tax evasion under N.C. Gen. Stat. § 105-236(a)(7) for the tax years 2004 through

2010. Defendant pled not guilty and the case proceeded to trial. At the close of the State's evidence, defendant moved to dismiss the charges for insufficient evidence, and the motion was denied.

Defendant testified on her own behalf. She stated that in 1995, she and Wade attended several conventions put on by the organizations "We, the People" and "Sovereign Citizens Patriot." At one such meeting, various speakers introduced themselves as attorneys, accountants, or former IRS employees and indicated that they could help people apply for an exemption from having to pay individual income tax. Defendant and Wade were told that the exemption was "legal" and that if their applications were accepted, they would no longer have to pay income tax. Defendant testified that she trusted this advice, purchased the packet including the Form 1776 Codicil, and completed the application process.

According to defendant's testimony, approximately three months after she submitted the Form 1776 Codicil to the IRS, she received a letter on IRS letterhead stating that it had reviewed her application and determined that she was no longer required to pay income tax. Based on this letter, defendant stopped having income tax withheld from her pay. After being contacted by DOR, defendant hired a tax service to determine whether she had a "problem." Defendant eventually learned that the "exemption" was not legal and had the tax service prepare and file tax returns for her that encompassed the tax years 2006 through 2010.

At trial, defendant also called several character witnesses who testified that she was an honest, truthful, and law-abiding person. At the close of all the evidence, defendant renewed her motion to dismiss the charges against her. The trial court denied the motion.

The jury found defendant guilty on all seven counts of tax evasion. The trial court sentenced defendant to a presumptive-range term of six to eight months imprisonment for one count, consolidated the remaining six counts into one judgment, and imposed a second, consecutive term of six to eight months imprisonment. The court then suspended the sentences, placed defendant on supervised probation for 36 months, and ordered her to pay a $1,500 fine and $8,754 in restitution. Defendant appealed to this Court.

Analysis

I. Character Evidence of Defendant's Trusting Nature

[1] Defendant's primary argument on appeal is that the trial court erred in excluding opinion testimony by Dr. Yardley Hunter ("Dr. Hunter"), one of defendant's friends and colleagues, regarding defendant's trusting

nature. Although we agree that the trial court's exclusion of this testimony constituted error, we conclude that it was not prejudicial error.

A. Exclusion of Opinion Testimony

On direct examination, Dr. Hunter testified that she had worked closely with defendant at the high school at which they both taught and that she was also defendant's friend outside of work. Dr. Hunter was permitted to testify that, in her opinion, defendant was a truthful, honest, and law-abiding citizen.

At the end of Dr. Hunter's testimony before the jury, following an unrecorded bench conference, defense counsel requested a *voir dire* examination of Dr. Hunter. During the *voir dire*, defense counsel asked her whether she had an "opinion about [defendant's] character trait for her being a trusting person of others, in general, versus a skeptical person of others[.]" Dr. Hunter responded, in pertinent part, as follows: "[Defendant] trusts people without challenging them. She's open to them. She believes in people. She believes in what they say. She's not gullible." After considering Dr. Hunter's *voir dire* testimony, the trial court excluded the evidence, citing Rules 401 and 403 of the North Carolina Rules of Evidence.

Defendant contends that Dr. Hunter's testimony was admissible under Rule 404(a), which provides, in relevant part, as follows:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> > (1) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C. R. Evid. 404(a)(1).

Our Supreme Court has held that "Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). However, as an exception to this general rule of exclusion, Rule 404(a)(1) "permits the accused to offer evidence of a 'pertinent trait of his character' as circumstantial proof of his innocence." *Id.* (quoting N.C. R. Evid. 404(a)(1)).

The Supreme Court has further explained that " 'pertinent' in the context of Rule 404(a)(1) is tantamount to relevant." *State v. Squire*, 321

N.C. 541, 547, 364 S.E.2d 354, 358 (1988). Thus, the key determination concerning admissibility under Rule 404(a)(1) is whether the evidence of the trait "would 'make the existence of any fact that is of consequence to the determination of the action' more or less probable than it would be without evidence of the trait." *Id.* at 548, 364 S.E.2d at 358 (quoting N.C. R. Evid. 401). *See also Bogle*, 324 N.C. at 201, 376 S.E.2d at 751 ("[I]n order to be admissible as a 'pertinent' trait of character, the trait must *bear a special relationship to or be involved in* the crime charged.") (emphasis in original).

Relevance is a question of law, and, as such, the admissibility of evidence under Rule 404(a)(1) is reviewed *de novo*. *See State v. Houseright*, __ N.C. App. __, __, 725 S.E.2d 445, 448 (2012) (holding that "questions of relevance" are "reviewed *de novo*"); *see also United States v. Diaz*, 961 F.2d 1417, 1419 (9th Cir. 1992) (conducting *de novo* review of whether "district court improperly excluded testimony from two character witnesses").

Defendant was charged with violating N.C. Gen. Stat. § 105-236(a)(7), which makes it unlawful for any person to "*willfully* attempt[] . . . in any manner to evade or defeat a tax or its payment . . . ." N.C. Gen. Stat. § 105-236(a)(7) (2011) (emphasis added). In the context of tax offenses, the term "willfulness" means "to purposely commit an offense in violation of a known legal duty." *State v. Howell*, 191 N.C. App. 349, 354, 662 S.E.2d 922, 926 (2008); *accord Cheek v. United States*, 498 U.S. 192, 201, 112 L.Ed.2d 617, 630 (1991) ("Willfulness, . . . in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.").

Defendant contends that her character trait of being trusting of others was pertinent to whether she *willfully* attempted to evade paying taxes. The crux of her defense, she argues, was that she believed the representations made to her by the sellers of the Form 1776 Codicil that the purported tax exemption was legal and thus she had a good faith – albeit mistaken – belief that she was exempt from having to pay state income tax. As such, she contends that the trial court erred in excluding Dr. Hunter's testimony regarding this character trait.

Although neither party cites to any North Carolina appellate decision addressing whether a defendant's trusting nature may be a trait pertinent to the crime charged, defendant does direct our attention to *United States v. Elliott*, 23 M.J. 1 (C.M.A. 1986), in which the United

States Court of Military Appeals addressed this precise issue.[1] In *Elliott*, the defendant, a member of the United States Air Force, was charged with stealing two government-owned televisions. *Id.* at 2. During the criminal investigation, the defendant maintained that the televisions had been given to him as a gift by another servicemember that defendant had recently met and who could not be located. *Id.* During the court-martial proceeding, defense counsel attempted to introduce evidence through character witnesses that "[the defendant] is a trusting person, that he trusts other people in general." *Id.* at 3. The military judge excluded the evidence, and the defendant appealed his convictions. *Id.* at 4.

On appeal, the court concluded

> that the accused's trusting nature as to other people was "pertinent" in th[e] case. The defense theory at trial was that another person, who may or may not himself have stolen the TVs, gave the accused both sets and that the accused had no reason to believe that they were not then his own. Contrariwise, the prosecution's theory was that [the accused] had stolen both television sets himself, had sold one, and had kept the other. With the case in this posture, it could fully be expected that the [jurors] would ask themselves, in weighing the accused's story, "What kind of person would innocently accept two working television sets as gifts from someone he had only recently met – is that really believable?" In other words, the reasonableness of the accused's story obviously was squarely in issue; and equally obviously, the accused's trusting nature of other people – that is, taking them and what they say and do at face value – was directed to this issue in dispute and legitimately tended to prove the defense version of how [the accused] had come into possession of the television sets.

Id. at 5-6.

Similarly, here, defendant openly admitted to not paying individual income tax when questioned by Special Agents Nische and Yokley about her delinquent tax status. Defendant maintained throughout the investigation that she believed she was not required to pay income tax because, by filing the Form 1776 Codicil with the IRS, she had "take[n] advantage

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1. Where, as here, the controlling North Carolina Rule of Evidence is similar or identical to its counterpart in the Federal Rules of Evidence, our courts have looked to federal decisions for guidance. *Crawford v. Fayez*, 112 N.C. App. 328, 333, 435 S.E.2d 545, 548 (1993), *disc. review denied*, 335 N.C. 553, 441 S.E.2d 113 (1994); N.C. R. Evid. 102 cmt.

of [an] exception in the law[.]" In contrast, the State's theory of the case was that defendant was a "tax protestor," and that "her statements, her filings, every action that she's ever taken are of a tax protestor . . . ."

Given these opposing theories of the case, defendant's allegedly trusting nature was pertinent to the issue of willfulness under § 105-236(a)(7). *See Commonwealth v. Bonds*, 445 Mass. 821, 830 n.13, 840 N.E.2d 939, 947 n.13 (Mass. 2006) (noting that evidence of "the 'trusting nature' of a person" would constitute "character evidence"). As such, we conclude that Dr. Hunter's excluded opinion testimony on this subject was admissible under Rule 404(a)(1). *See Bogle*, 324 N.C. at 199, 376 S.E.2d at 749 (holding that "character trait of law-abidingness" was pertinent in trafficking prosecution). The trial court, therefore, erred by excluding this portion of Dr. Hunter's testimony on relevancy grounds.

The trial court also excluded Dr. Hunter's opinion testimony under Rule 403 due to its "cumulative" nature. Rule 403 "provides that evidence, although relevant, 'may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *State v. Barton*, 335 N.C. 696, 704-05, 441 S.E.2d 295, 299 (1994) (quoting N.C. R. Evid. 403). A trial court's ruling under Rule 403 is reviewed for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Under this standard, a trial court's ruling may not be overturned on appeal unless the ruling is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citation and quotation marks omitted), *cert. denied*, 552 U.S. 1319, 170 L.Ed.2d 760 (2008).

Here, the trial court considered the evidence of defendant's trusting nature to be cumulative because defendant, through the testimony of Dr. Hunter and other witnesses, had already presented evidence of "[defendant] loving and trusting her husband . . . and [of the fact] that she loved her family, and the family was first." The trial court's articulation of its rationale for excluding the evidence suggests that it misunderstood the purpose for which defendant sought to offer Dr. Hunter's opinion testimony regarding her character trait for trusting others. The evidence of defendant's trusting nature was not offered to show that she trusted her husband or that she valued her familial relationships but, rather, to show that defendant was trusting of individuals whom she did not know – "taking them and what they say and do at face value . . . ." *Elliott*, 23 M.J. at 6.

Our review of the trial transcript reveals that Dr. Hunter's proffered testimony would have been the *only* evidence regarding defendant's character trait for being trusting of others. We therefore conclude that the trial court abused its discretion in excluding the evidence as being cumulative under Rule 403.

B. Harmless Error

Although we conclude that the trial court erred in excluding Dr. Hunter's testimony, defendant must nevertheless demonstrate that she was prejudiced by the exclusion of the evidence in order to receive a new trial as a result of the trial court's error. N.C. Gen. Stat. § 15A-1443(a) (2011). "To establish prejudice based on evidentiary rulings, [the] defendant bears the burden of showing that a reasonable possibility exists that, absent the error, a different result would have been reached." *State v. Lynch*, 340 N.C. 435, 458, 459 S.E.2d 679, 689 (1995), *cert. denied*, 517 U.S. 1143, 134 L.Ed.2d 558 (1996).

In attempting to demonstrate prejudice, defendant, once again, relies on *Elliott*. In addressing the issue of prejudice resulting from the exclusion of the evidence of the defendant's trusting nature in *Elliott*, the Court of Military Appeals observed that although the defendant had been allowed to testify as to his version of how he came into possession of the missing television sets, the government "throughout the trial made a consistent and sometimes strident effort to disparage the likely credibility of [the defendant's] explanation." *Elliott*, 23 M.J. at 8.

Against these attacks, the court noted that the defendant

> had no more with which to defend himself than his own credibility, manifested by his demeanor on the stand, and testimony that he was an honest person. It cannot be doubted that the believability of [the accused]'s story explaining his possession of the stolen property would have been enhanced if the [trial] judge had not erroneously excluded all this evidence that he is a trusting person who takes others and their actions at face value without questioning motives when other people might do so[.]

Id. at 8-9. Consequently, the court concluded that "[t]he existence of prejudice [was] clear." *Id.* at 9.

Analogizing to *Elliott*, defendant contends that "the State went to some lengths to disparage [her] testimony," attack her credibility, and undermine the "believability of her account . . . ." Unlike in *Elliott*,

however, the jury in the present case was not limited to assessing the believability of defendant's story based solely on her own testimony. To the contrary, the jury heard from several witnesses – besides defendant herself – whose testimony bore directly on her state of mind – that is, whether she genuinely believed that she was exempt from paying income tax.

First, Norma Matto ("Matto"), a mortgage loan originator, testified on defendant's behalf. Matto testified that she had met with defendant about obtaining a loan to purchase a new home. During the qualification process, Matto told defendant that she would need copies of defendant's tax returns to determine her eligibility. In response, defendant told Matto that she believed, based on a letter she had received from the IRS, that she was exempt from having to file income tax returns and, for this reason, she did not have any returns to give Matto. Matto further testified that (1) defendant was "open and confident in [her] belief" that "she was exempt from paying taxes"; and (2) nothing about defendant's demeanor suggested that she was "being evasive in any way[.]"

Similarly, Ruthmarie Mitchell ("Mitchell"), an assistant principal at the school at which defendant taught, also testified as a character witness for defendant. After testifying that, in her opinion, defendant was an honest, truthful, and law-abiding person, Mitchell was asked on cross-examination whether there was anything that would change her opinion about defendant's character. In response, the following exchange occurred:

> A. Not of Ms. Wade's character. No.
>
> Q. If I told you that she's evaded taxes for more than 15 years, that wouldn't change your mind?
>
> A. *Considering she thought she was exempt, no.*
>
> Q. The fact that she's never filed a return in 15 years, would not change your mind that she's a law-abiding citizen?
>
> A. It would not change my mind, because Ms. Wade was exempt. *In her mind, she was exempt.*

(Emphasis added.)

Finally, on cross-examination, Dr. Hunter was asked by the prosecutor whether – as a former member of the military and current public school teacher whose salary was paid from tax revenue – she was "bother[ed]" by defendant's failure to pay individual income tax. Dr.

Hunter responded as follows: "If she consciously violated a right of responsibility, then it would bother me. However, *I don't believe she consciously violated her right of responsibility.*" (Emphasis added.)

We believe that this testimony by Matto, Mitchell, and Dr. Hunter arguably had greater probative force regarding defendant's state of mind – and, therefore, the issue of willfulness – than the excluded testimony would have had. The gist of these witnesses' testimony was that defendant openly, honestly, and in good faith believed, based on what she had been told by others, that she was exempt from paying taxes. As defendant asserts in her brief, "the central issue in this case" was whether "she w[as] . . . taken in by the scheme she described and honestly believed she was not violating the law." This state of mind evidence bore directly on this issue and was sufficient to enable the jury to consider her defense that she had not willfully violated the law.

Moreover, we note that while Dr. Hunter did testify that, in her opinion, defendant was a "trusting person," she qualified that opinion by emphasizing that defendant was "not gullible." Thus, had the trial court allowed the jury to hear Dr. Hunter's opinion testimony regarding defendant's trusting nature, it also would have heard evidence that defendant was not "gullible." Such testimony could have had the effect of diminishing, rather than enhancing, her defense.

For these reasons, we conclude that defendant has failed to demonstrate that a reasonable possibility exists that, absent the trial court's error, a different result would have been reached at trial. *See State v. Powell*, 340 N.C. 674, 692, 459 S.E.2d 219, 228 (1995) (holding that defendant was not prejudiced by erroneous exclusion of character evidence in light of "all of the other evidence" presented at trial), *cert. denied*, 516 U.S. 1060, 133 L.Ed.2d 688 (1996).

II. "Tax Protestor" Evidence

[2] Defendant also contends that the trial court erred in admitting "inflammatory anti-tax cult evidence" through the testimony of several of the State's witnesses. The first witness, Jeff Thigpen ("Thigpen"), the Guilford County Register of Deeds, testified that defendant filed copies of the Form 1776 Codicil with his office and that it resembled other filings by members of "tax protestor" groups known as "sovereign citizen" groups. Thigpen then stated, without objection from defendant, that he had heard that such groups in the Southwest had been involved in (1) the death of several law enforcement officers; (2) bringing lawsuits against judges; and (3) obtaining liens against the property of law enforcement officers.

Stephanie Gray, the DOR supervisor who manages the unit responsible for investigating tax protestor groups, testified – once again, without any objection from defendant – that she was familiar with sovereign citizen groups and that she understood such groups to be "very anti-tax and that they can be aggressive, even dangerous, in nature."

The last witness, Special Agent Yokley, testified that when she first interviewed defendant, defendant indicated that she was a member of the "American Patriot" and "We, The People" organizations and that she had participated in some of the groups' activities. Without objection, Special Agent Yokley then stated that these groups were involved in the tax protest movement and that they are "anti-government in general."

Defendant asserts that this evidence was not relevant to any issue at trial and that it served no purpose other than to portray her as a dangerous, anti-government "tax protestor." Because – as defendant acknowledges – she failed to object to the admission of the above-referenced testimony at trial, we review its admission only for plain error. N.C. R. App. P. 10(a)(4). As our Supreme Court has recently emphasized, under plain error review, the defendant bears the burden of establishing prejudice resulting from a "fundamental error" – one that, based on an "examination of the entire record," had a "probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

Defendant contends that this evidence of the "violent" and "anti-government" nature of tax protestor organizations was not relevant to any element of the charges against her and that the "repeated association" of her with these groups amounted to inflammatory and prejudicial character evidence. Even assuming *arguendo* that the challenged evidence should not have been admitted, we do not believe that any such error reached the level of plain error. On redirect examination, Thigpen clarified that he had no reason to believe that defendant was actually involved in or associated with any of the violent or anti-government conduct of the tax protestor groups referenced earlier in his testimony. Moreover, on recross examination, Thigpen answered in the negative when asked: "Do you have any knowledge whether that group you're talking about, the [S]outhwest thing, is this same group [with which defendant is associated]?"

We conclude that the clarifying testimony as to the absence of evidence that defendant had participated in, or been affiliated with, the violent, anti-government activities of certain tax protestor groups mitigated any prejudicial impact of the challenged testimony. *See United States*

v. Grosshans, 821 F.2d 1247, 1253 (6th Cir.) (holding that admission of allegedly prejudicial tax protestor evidence in tax evasion prosecution did not constitute plain error under equivalent federal rule), *cert. denied*, 484 U.S. 987, 98 L.Ed.2d 505 (1987). Thus, even assuming *arguendo* that this evidence was erroneously admitted, defendant has failed to show plain error.

III. Jury Instructions

Finally, defendant argues that the trial court erroneously instructed the jury regarding the element of willfulness under § 105-236(a)(7). Specifically, she asserts that "[t]he trial court erred by denying [her] requested jury instruction defining 'good faith' and instructing the jury . . . that certain beliefs were not objectively reasonable and had no support in the law."

We need not address these contentions, however, because even if we assume – without deciding – that the trial court's instructions were erroneous, we conclude that defendant has failed to establish prejudice on appeal.[2] "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A–1443(a)). It is the defendant's burden to establish the existence of such prejudice on appeal. *State v. Easterling*, 300 N.C. 594, 609, 268 S.E.2d 800, 809 (1980).

Defendant's entire argument with respect to prejudice on this issue consists of her bare assertion that "[a] new trial is required" because "[t]here is a reasonable possibility that the jury would have reached a different verdict" had the trial court not committed the alleged instructional errors. Such a conclusory, unsubstantiated claim is insufficient to demonstrate prejudice warranting a new trial. *See State v. Bailey*, 280 N.C. 264, 269, 185 S.E.2d 683, 687 ("It suffices to say that [a] defendant's bare assertion of prejudice is not self-sustaining."), *cert. denied*, 409 U.S.

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2. In her reply brief to this Court, defendant asserts that the trial court's instructional errors are "reversible *per se*" because the instructions were not supported by the evidence presented at trial. Defendant is correct that "[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." *State v. Sweat*, 366 N.C. 79, 89, 727 S.E.2d 691, 698 (2012). It is well established, however, that only " '[w]hen such instructions are *prejudicial* to the accused' " is she " 'entitled to a new trial.' " *Id.* (quoting *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973)) (emphasis added).

948, 34 L.Ed.2d 218 (1972); *State v. Barron*, 202 N.C. App. 686, 695, 690 S.E.2d 22, 29 (holding that defendant "failed to carry his burden of proof to show he was prejudiced" by assumed instructional error where defendant "never addresse[d] the effect of the error on the jury's verdict") (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). Thus, without any particularized argument showing how she was prejudiced by the challenged instructions, defendant has failed to demonstrate that she is entitled to a new trial.

Conclusion

For the reasons stated above, we find no prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
BOBBY E. BOWDEN

No. COA12-1072

Filed 20 August 2013

Sentencing—sentence reduction credits—unconditional release date

The trial court correctly concluded that a defendant whose death sentence was converted to life in 1976 had a constitutionally protected liberty interest in good time, gain time, and merit time sentence reduction credits which he earned between 1975 and October 2009 and that defendant was entitled to have those sentence reduction credits deducted from his sentence for all purposes, including the calculation of his unconditional release date. This case is distinguished from *Jones v. Keller*, 364 N.C. 249, by the actual award and application of sentence reduction credits by the Department of Correction to reduce defendant's unconditional release date.

Judge McCULLOUGH concurring with separate opinion.

Appeal by the State from order entered 8 May 2012 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 13 March 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellee.

BRYANT, Judge.

Where there was competent record evidence to support the trial court's findings of fact, where those findings of fact supported the trial court's conclusions of law, and where the trial court properly distinguished defendant's case from the holding in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), we affirm the 8 May 2012 order of the trial court.

Facts and Procedural History

On 15 December 1975, defendant Bobby Bowden was convicted of two counts of first-degree murder and one count of armed robbery and was sentenced to death for the homicide of two individuals on 7 August 1975. On appeal in 1976, the Supreme Court of North Carolina vacated defendant's death sentence and remanded the case with directives that judgments imposing life sentences be imposed for the two counts of first-degree murder. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414 (1976) ("*Bowden I*"). Defendant was given two life sentences, to run concurrently.

In December 2005, defendant filed a Petition for Writ of *Habeas Corpus ad Subjiciendum*. Defendant claimed that he was entitled to be released from prison because after applying all of his sentence reduction credits, he had completed service of his 80-year life sentence. At the time defendant committed his offenses, N.C. Gen. Stat. § 14-2 (1974) provided that a life sentence should be considered as imprisonment for 80 years. The trial court denied defendant's petition by order entered on 25 January 2006.

Defendant filed a petition for writ of certiorari on 29 January 2007 to our Court. On 12 February 2007, our Court treated defendant's petition as a motion for appropriate relief, vacated the 25 January 2006 order, and remanded the matter for an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-1420. Following an evidentiary hearing on defendant's motion for appropriate relief held on 27 August 2007, the trial court entered an order denying defendant's claim for relief.

Defendant appealed the denial of his motion for appropriate relief to our Court. In *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (2008)

("*Bowden II*"), our Court noted that at the time defendant committed his offenses, section 14-2 of the North Carolina General Statutes provided that

> [e]very person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. *A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.*

Id. at 599, 668 S.E.2d at 109 (citation omitted). The *Bowden II* Court held that N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes — without any limitation or restriction. *Id.* at 600-601, 668 S.E.2d at 109-10. Our Court also noted that "for reasons unclear to this Court, the [DOC] later retroactively changed the status of defendant's sentence reduction credits from 'applied' to 'pending.' " *Id.* at 598, 668 S.E.2d at 108. Our Court reversed the trial court's order and remanded for a "hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied." *Id.* at 601, 668 S.E.2d at 110.

The State sought discretionary review of *Bowden II*, which was initially granted by the Supreme Court. *State v. Bowden*, 363 N.C. 258, 677 S.E.2d 161 (2009). On 9 October 2009, the Supreme Court entered an order that discretionary review had been improvidently allowed. *State v. Bowden*, 363 N.C. 621, 683 S.E.2d 208 (2009).

On remand, the trial court held a hearing on 15-16 March 2012 and entered a Memorandum Opinion and Order on 8 May 2012. The 8 May 2012 Memorandum Opinion and Order of the trial court concluded that defendant had a liberty interest in good time, gain time, and merit time sentence reduction credits which he earned between 1975 and October 2009. It also concluded that those sentence reduction credits were subject to constitutional protection under the Due Process Clause of the United States Constitution. Further, the trial court determined that defendant was entitled to have those sentence reduction credits deducted from his sentence for all purposes, including the calculation of his unconditional release date. The trial court concluded that the Department of Correction's ("DOC") revocation of defendant's sentence reduction credits violated his rights under the Due Process Clause and violated the Ex Post Facto Clause of the United States Constitution. The trial court then determined that defendant had served the entirety of his sentence, that his unconditional release date was 13 October 2009, and

that he would be released on 29 October 2009 (the date the mandate issued in his case). The trial court ordered that defendant be released unconditionally by 11 May 2012, no later than 5:00 p.m.

However, on 9 May 2012, the trial court entered an order granting the State's motion to stay the 8 May 2012 order until final appellate review.

On 30 May 2012, the State sought review of the trial court's 8 May 2012 order by filing a Petition for Writ of Certiorari which was entered 18 June 2012. It was granted by our Court by order entered 18 June 2012. Thereafter, both parties submitted a record and briefs to our Court.

The State advances the following issues: whether the trial court erred by (I) distinguishing defendant's case from *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010); (II) entering findings of fact not supported by competent evidence; and (III) entering conclusions of law not supported by the findings of fact.

Standard of Review

> 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. Heavner, __ N.C. App. __, __, 741 S.E.2d 897, 903 (2013) (citation omitted).

I

The State argues that the trial court erred by concluding that defendant's case is distinguishable from the Supreme Court's holding in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), based on findings not supported by competent evidence. We disagree.

Here, the trial court concluded that the outcome of the case was not controlled by the *Jones* decision:

> 11. The outcome of [defendant's] case is not controlled by [*Jones*] because *Jones* is predicated upon the following facts, which are not present in this case: (1) the [DOC] never applied Mr. Jones' good, gain, and merit time sentence reduction credits to reduce his unconditional release date; (2) Mr. Jones was never informed he

would be released on October 29, 2009; (3) Mr. Jones was informed it was only a possibility that he might be released on October 29, 2009; (4) the [DOC] only applied Mr. Jones' good, gain, and merit time sentence reduction credits to reduce his parole eligibility date, to determine his custody classification, and to reduce his sentence in the event the governor commuted his sentence to a term of years; and (5) the [DOC] only performed test runs to calculate Mr. Jones' unconditional release date.

12. In *Jones* the Supreme Court held the trial court found as fact that the [DOC] never used good time, gain time or merit time credits in the calculation of Mr. Jones' unconditional release dates. *Id.* at 254, 698 S.E.2d at 54. The State could lawfully continue to imprison Mr. Jones without applying his sentence-reduction credits to reduce his unconditional release date, because the [DOC] had never used sentence reduction credits to reduce Mr. Jones' unconditional release date. *Id.*, [sic] at 254-55, 698 S.E.2d at 54. Although the Court acknowledged that the [DOC]'s practice in that regard was based on a legal error, *Id.*, [sic] at 252, 698 S.E.2d at 53, the Supreme Court nevertheless "defe[red]" to the [DOC]'s position in *Jones* that, under its regulations, Mr. Jones was entitled to application of his sentence-reduction credits only to determine parole eligibility and custody grade, not to reduce his sentence. *Id.*, [sic] at 255, 698 S.E.2d at 54.

13. In contrast, the evidence in [defendant's] case shows: (1) the [DOC] applied [defendant's] good, gain, and merit time sentence reduction credits to reduce his unconditional release date; (2) the Combined Records Division of the [DOC] performed production runs to calculate [defendant's] unconditional release date; (3) after applying all good, gain, and merit time sentence reduction credits to reduce [defendant's] unconditional release date, the [DOC] determined that [defendant's] sentence expired on October 13, 2009; (4) [defendant] was informed he would be released on October 29, 2009, pursuant to the decision in his case; and (5) [defendant] was prepared for release on October 29, 2009.

The State argues that conclusion of law number 13 was made in error where there was no competent record evidence to support the

conclusion that the DOC applied defendant's sentence reduction credits to reduce his unconditional release date and to support the conclusion that the Combined Records Division of the DOC had performed production runs to calculate defendant's unconditional release date.

A thorough review of the record indicates that the trial court correctly concluded that the circumstances surrounding defendant's case was distinguishable from *Jones*. We will address each of the trial court's conclusions in turn.

First, the trial court in conclusion number 13 stated that the "DOC applied Mr. Bowden's good, gain, and merit time sentence reduction credits to reduce his unconditional release date." The evidence indicates that after *Bowden II* which established that defendant was serving a term of years sentence, the DOC applied defendant's good, gain, and merit time sentence reduction credits in order calculate an unconditional release date. This is supported by an e-mail sent on 9 October 2009 by DOC's Public Affairs Director Keith Acree to Secretary of Correction Alvin W. Keller, Jr. This e-mail stated that the North Carolina Supreme Court had declined to review *Bowden II* and that the decision of the Court of Appeals would stand. Attached to this e-mail was a list of "affected inmates," including defendant, and included a recalculated, projected release date of 13 October 2009 for defendant. In addition, on 15 October 2009 Deputy Secretary James French wrote an e-mail to the Director of the Division of Prisons Robert "Bob" Lewis and the Chief Auxiliary Officer Mary Lu Rogers stating that as a result of *Bowden II*,

> [l]ife sentences for a crime committed between April 4, 1974 and June 30, 1978 equal 80 years and that based on other sentencing laws the 80 year sentence is cut to 40 years. In addition the inmate is entitled to other sentence reduction credits earned for program or work participation while in prison. As a result of this ruling the [DOC] is mandated to calculate the affected inmates['] sentence in this manner.

The trial court found that Bob Lewis sent an e-mail on 16 October 2009 addressed to all wardens, administrators, and superintendents providing that the Supreme Court's ruling in *Bowden II* had "caus[ed] the [DOC] to re-calculate the release dates of some life sentence inmates. A number of those inmates will be released later this month and others will be released in the coming months and years as their new release dates are reached."

In the second portion of conclusion number 13, the trial court concluded that "the Combined Records Division of the [DOC] performed production runs to calculate Mr. Bowden's unconditional release date."[1] This conclusion was supported by evidence of the DOC's e-mails exchanged between 9 October and 21 October 2009 – all of which supported the unchallenged findings of fact made by the trial court. On 9 October 2009, DOC Public Affairs Director Keith Acree sent an e-mail to Secretary Keller, Deputy Secretary James French, and others containing an attachment of a list created by the Management Information Services and Combined Records Division of the DOC. The attachment listed defendant's projected release date as 13 October 2009. On 13 October 2009, administrative officer Shelby Howerton of the Combined Records Division sent an e-mail with the subject line "Re-audit of inmates scheduled for release" to the following recipients: Deputy Secretary James French, DOC General Counsel LaVee Hamer, Chief Auxiliary Officer Mary Lu Rogers, Application Development Manager Donna Powell, DOC attorney Elizabeth Parsons, and Combined Records Manager Judy Sills. The e-mail requested "specific instructions on the exact dates you would like the offenders to show in the OPUS [(The Offender Unified Population System is an electronic database used to maintain inmate records)] system prior to getting them ready for their release."

On 14 October 2009, DOC employee Langley Rooney sent an e-mail to Applications Development Manager Donna Powell, stating that "[t]he order has come down to putting these inmates that have a projected release date in the past (or before 10/29/2009), out on 10/29/2009." The e-mail went on to further explain that Rooney had been working with Howerton in the Combined Records Office to fix "the 6 in production that were missing offense dates." On 21 October 2009, Chief Operating Officer Jennie Lancaster sent an e-mail to Chief Information Officer Robert Brinson of the Management Information Services and to others. The e-mail instructed Brinson to "look at all earned time-good time for each inmate . . [.] and make sure what they received was applicable to the policies/practices in approved status at that time . . . we went through some old documents yesterday . . [.] still looking for 1975 guiding gain time policy . . [.]" These e-mail exchanges support the trial court's

1. The trial court noted that the DOC "applied Mr. Bowden's sentence reduction credits in production." In unchallenged finding of fact 42, the trial court stated that "the [DOC] determined that Mr. Bowden's sentence expired on October 13, 2009, when the Combined Records Division, working in production, and assisted by the MIS Division, applied all good, gain, and merit time sentence reduction credits to Mr. Bowden's unconditional release date."

unchallenged findings of fact and its conclusion that production runs were conducted to calculate defendant's unconditional release date.

Next, the trial court concluded that "after applying all good, gain, and merit time sentence reduction credits to reduce Mr. Bowden's unconditional release date, the [DOC] determined that Mr. Bowden's sentence expired on October 13, 2009." This conclusion is supported by the unchallenged finding of fact that a 9 October 2009 letter from DOC Public Affairs Director Keith Acree to Secretary Keller, Deputy Secretary of Correction French, Deputy Director of Prisons Anderson, and Victim Services Director Dixon stated that defendant showed a projected release date of 13 October 2009.

Lastly, the trial court concluded that defendant was informed he would be released and was prepared to be released on 29 October 2009. This conclusion is supported by the unchallenged finding of fact that defendant testified that he was informed by his case manager at Tillery Correctional Facility, Ralph Hill, that his release date would be 29 October 2009. It is also supported by the unchallenged findings of fact that Superintendent Oliver Washington informed defendant on 13 October 2009 that he would be released on 29 October 2009 and that Superintendent Washington prepared defendant for release pursuant to a memorandum he had received from the Director of the Division of Prisons and other communications from DOC officials.

Based on the foregoing, we hold that the trial court's conclusion of law number 13 was supported by unchallenged findings of fact which were, in turn, supported by competent record evidence. Next, we address how the conclusions made within conclusion of law number 13 relate to our decision in *Jones*.

In *Jones*, the Supreme Court considered a limited group of prisoners, "each of whom committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprisonment[.]" *Jones*, 364 N.C. at 252, 698 S.E.2d at 53. The *Jones* Court recognized that our General Assembly dedicated the responsibility of administration of Jones' sentence to the DOC. *Id.*

> [T]he Secretary of Correction shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof. Specifically, [t]he rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and

> privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

Id. at 252-53, 698 S.E.2d at 53 (citations and quotations omitted).

The *Jones* Court further noted that DOC had *never* used sentence reduction credits, which included good time, gain time, or merit time, "in the calculation of unconditional release dates for inmates who received sentences of life imprisonment." *Id.* at 254, 698 S.E.2d at 54. "More specifically, [the] DOC acknowledge[d] that Jones earned gain and merit time, but state[d] that these credits were not applied to reduce the time to be served on his sentence in any way." *Id.* Per the DOC, the "gain and merit time were only recorded in case Jones's sentence was commuted by a governor, at which time they would be applied to calculate a release date" and good time was awarded "solely for the purposes of allowing [Jones] to move to the least restrictive custody grade and to calculate his parole eligibility date." *Id.* Therefore, the issues before the *Jones* Court were whether the DOC's interpretation and implementation of its regulations – specifically refusing to apply Jones' earned gain time and merit time to reduce the time to be served on Jones' sentence – violated Jones' rights to due process and equal protection, as well as whether Jones had suffered an ex post facto violation. *Id.* at 256, 698 S.E.2d at 55.

The *Jones* Court held that Jones' liberty interest in good time, gain time, and merit time was limited and "[t]hus, his liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public." *Id.* at 257, 698 S.E.2d at 56. The Court noted that because Jones was eligible for parole and had received annual parole reviews without having been released by the Parole Commission, he had "received the process that is due him as an inmate eligible for parole, when the State's corresponding interest is assuring that inmates are safely released under supervision." *Id.*

The Supreme Court rejected Jones' argument contending there was a violation of his right to equal protection of the law – "that his equal protection right prohibits the State from treating inmates who committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprisonment under N.C.G.S. § 14-2, [and] who are thus serving determinate sentences, differently from other inmates serving

determinate sentences." *Id.* at 259, 698 S.E.2d at 57. The Supreme Court, based on rational basis scrutiny, held that

> Jones was convicted of a different crime than others serving determinate sentences under statutes other than N.C.G.S. § 14-2, even if the sentences of some of those others are for eighty years or even longer (perhaps due to the imposition of consecutive sentences). The fact that Jones is serving a sentence for first-degree murder reasonably suggests that he presents a greater threat to society than prisoners convicted of other offenses. Thus, DOC has a rational basis for denying petitioner good time, gain time, and merit time for the purposes of unconditional release, even though these same credits have been awarded for that purpose to other prisoners with determinate sentences.

Id. at 260, 698 S.E.2d at 58.

Furthermore, the *Jones* Court noted that the ex post facto prohibition applies to "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Id.* at 259, 698 S.E.2d at 57 (citation omitted) (emphasis in original). However, Jones did not allege that any legislation or regulation had altered his award of sentence reduction credits, nor that the DOC changed its interpretation or its application of its regulations; therefore, there was no ex post facto violation. Based on the foregoing, the *Jones* Court held that Jones was legally incarcerated and reversed the decision of the superior court, ordering that Jones be released. *Id.* at 260, 689 S.E.2d at 58.

In our present case, the DOC actually awarded and applied defendant's good, gain, and merit time sentence reduction credits which he earned between 1975 and October 2009 to reduce defendant's unconditional release date. This is a significant distinction between the instant case and the *Jones* case. Jones' sentence reduction credits were used to reduce his parole eligibility date, to determine his custody classification, and to reduce his sentence in the event the governor commuted his sentence to a term of years. Defendant's sentence reduction credits on the other hand, were used to calculate his unconditional release date.

Here, defendant was never told that it was merely a possibility he might be released early as was the case in *Jones*. Defendant was actually informed that his sentence had expired and that he would be released on 29 October 2009. Defendant prepared for that release, and the DOC prepared for that release. Given these significant distinctions, we are

unable to hold that the trial court erred by concluding that defendant's case is distinguishable from the Supreme Court's holding in *Jones*. This argument is overruled.

II

The State challenges several of the trial court's findings of fact.

Finding of Fact Number 28

Here, the trial court entered an unchallenged finding of fact (finding of fact number 27) which stated that in October 2009, Alvin W. Keller, Jr., was the Secretary of Correction for the DOC, Jennie Lancaster the Chief Operating Officer, LaVee Hamer the General Counsel, James French the Deputy Secretary, Robert "Bob" Lewis the Director of the Division of Prisons, and Mary Lu Rogers the Chief Auxiliary Officer. It is well established that "[a]ny unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal." *State v. Osterhoudt*, __ N.C. App. __, __, 731 S.E.2d 454, 458 (2012) (citation and quotation marks omitted).

Finding of fact number 28, provided that:

> 28. Each of those officials [named in finding of fact number 27] within the [DOC] is responsible for and has the authority to carry out the plain language of the Department's rules, regulations, policies, procedures and long-standing practices. Each of those officials within the [DOC] is responsible for and has the authority to advise and instruct subordinates throughout the Department on how to carry out the plain language of the Department's rules, regulations, policies, procedures and long-standing practices.

The State argues that the trial court erred by entering finding of fact number 28 where there was no evidence in the record to support this finding. We disagree.

A thorough review of the record reveals that in an administrative memorandum dated 17 November 2009, Keller, serving as Secretary of the DOC, stated the following:

> Since at least 1955, the Secretary of Correction has possessed statutory authority to establish rules and regulations or policies governing the state prison system. More specifically, the Secretary has possessed authority to establish rules and regulations or policies as to grades

> of prisoners, rewards and privileges applicable to the classification of prisoners, and allowances of time for good behavior.

On 13 October 2009, Chief Auxiliary Officer Mary Lu Rogers sent an e-mail titled "URGENT Request Regarding Upcoming Inmate Releases" to superintendents of various prisons directing the recipients to call her office immediately. The e-mail further stated that "we have a total of 21 inmates at your locations who must be released this year – 20 this month" and directed the recipients of the e-mail "to move quickly to ascertain release plans and prepare for these releases."

On 14 October 2009, Deputy Secretary James French sent an e-mail instructing the superintendents "at the locations where we have lifers being released" to ask "their programs people [to] share" with the inmates being released information regarding Offender Employment and Training Initiatives.

On 15 October 2009, French sent an e-mail to Director of the Division of Prisons Bob Lewis and Mary Lu Rogers. The e-mail informed Lewis and Rogers that the *Bowden II* decision meant that "life sentences for a crime committed between April 4, 1974 and June 30, 1978 equal 80 years and that based on other sentencing laws the 80 year sentence is cut to 40 years" and that "[i]n addition the inmate is entitled to other sentence reduction credits earned for program or work participation while in prison." French also directed Rogers to give instructions based on this information to his field staff in order to respond to questions from inmates regarding their eligibility for release.

On 16 October 2009, Lewis sent a letter to "Wardens, Administrators, [and] Superintendents," also including Keller, Chief Operating Officer Jennie Lancaster, and French in the correspondence. The letter's subject referred to the *Bowden II* holding and stated the following, in pertinent part:

> [*Bowden II*'s ruling] only affects certain inmates based on the date of their offense(s). The following is provided to assist you in responding to inquiries from the inmate population, their families, and other interested parties. Please share this information with staff likely to be asked questions regarding an inmate's release date.

Lewis' letter went on to reiterate that the DOC was mandated to calculate the affected inmates' sentences in a manner consistent with the *Bowden II* holding and directed the recipients of the letter to relate the

ruling to inmates and other interested parties. The record also indicates that on 16 October 2009, Rogers sent an e-mail to French and Lewis, pursuant to the *Bowden II* ruling, stating that they should "contact the affected agencies to make them aware of the impending release of these inmates who have been confined for many years and are in need of assistance."

On 19 October 2009, Lancaster sent an e-mail to recipients that included Keller, French, and General Counsel LaVee Hamer with the subject headline "Meeting on [W]ednesday for inmate releases." Through her e-mail, Lancaster scheduled a meeting "to review with each other the planning in place for the inmate releases on 10/29/09."

Based on the foregoing, there was competent evidence found within internal correspondence between DOC officials that the officials named in finding of fact 27 were responsible for and had the authority "to advise and instruct subordinates" throughout the DOC on how to carry out the DOC's rules, regulations, policies, procedures, and practices. Furthermore, an unchallenged finding of fact, which is binding on appeal, indicates that

> [a]fter the North Carolina Supreme Court allowed the Court of Appeals' decision to stand in Mr. Bowden's case, [DOC] officials, with the authority to apply and carry out the [DOC's] rules, regulations, policies, procedures, and longstanding practices, authorized [DOC] subordinates throughout the state to begin preparing Mr. Bowden, and the other affected inmates, for release on October 29, 2009.

See Osterhoudt, __ N.C. App. at __, 731 S.E.2d at 458 (stating that unchallenged findings of fact are binding on appeal). The State's argument as to finding of fact number 28 is overruled.

Findings of Fact Number 64, 65, and 70

Next, the State argues that there was no evidence to support findings of fact numbers 64, 65, and 70 which provided the following:

> 64. The [DOC's] records identify all of Mr. Bowden's good conduct time, merit time, and gain time credits, which he earned and which the [DOC] awarded him between 1973 and 2002, as being applied to his sentence.
>
> 65. The [DOC] retroactively changed the status of the sentence reduction credits, which Mr. Bowden earned and the [DOC] awarded to him between 1975 and 2002, from "APPLIED" to "PENDING."

. . .

> 70. The [DOC's] August 14, 2007 change in Mr. Bowden's sentence reduction credits from "APPLIED" to "PENDING" was not the result of a "computer glitch", but was a conscious attempt on the part of the [DOC] to change Mr. Bowden's records to aid in its litigation against Mr. Bowden.

At both of defendant's motion for appropriate relief hearings, the 27 August 2007 hearing and the 15-16 March 2012 hearing before Judge Weeks, evidence was presented showing the DOC's sentence reduction credit records for defendant. The records established defendant's earned good, gain, and merit time from the years 1973 until 2002 and included the "status" of sentence reduction credits as "APPLIED." The DOC also produced, at each separate hearing, a differing version of defendant's sentence reduction credits that listed his 1973 credits' status as "APPLIED" but his 1975 through 2002 credits' status as "PENDING."

During the hearing before Judge Weeks, former Chief Information Officer Robert Brinson testified that he believed the sentence credits reports designated credits as "PENDING" were due to a computer system "glitch." The trial court entered an unchallenged finding of fact that

> 68. Mr. Brinson's explanation is not credible because the alteration of Mr. Bowden's sentence reduction credits occurred only after he filed his petition for writ of habeas corpus and showed he could prove the existence of his credits with the "Sentence Reduction Credits" record.

In addition, our Court in *Bowden II* noted that

> [i]nitially, the [DOC's] records indicated that all of defendant's good conduct time, merit time, and gain time credits had been applied to his sentence. However, for reasons unclear to this Court, the [DOC] later retroactively changed the status of defendant's sentence reduction credits from "applied" to "pending."

Bowden II, 193 N.C. App. at 598, 668 S.E.2d at 108. There is competent evidence in the record to support the trial court's findings that the sentence reduction credits had been awarded and applied to defendant's sentence, that the status of the sentence reduction credits had been retroactively changed, and that the change was not due to a computer glitch. Therefore, we overrule the State's argument as to findings of fact numbers 64, 65, and 70.

II

Conclusion of Law Number 10

The State argues that the trial court erred by entering conclusion of law number 10 and that the trial court's conclusions of law numbers 22 through 25[2], which "flow directly from" conclusion of law number 10, are erroneous as well. We disagree.

Conclusion of law number 10 states the following:

> 10. Between October 9 and October 22, 2009, Secretary of Correction Alvin W. Keller, Jr., was informed by various high ranking officials within the [DOC] that: (1) the [DOC] understood Mr. Bowden and the other affected inmates were serving term-of-year sentences; (2) because the inmates were serving term-of-year sentences, the inmates were entitled to have all good, gain, and merit time sentence reduction credits applied to reduce their unconditional release date; (3) the [DOC] was mandated to apply all good, gain, and merit time sentence reduction credits to reduce their unconditional release dates;

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2. Conclusions of law number 22 through 25 stated the following:

> 22. The [DOC] in fact, between October 9 and October 22, 2009: (1) awarded and applied Mr. Bowden's sentence reduction credits – in the form of good time, gain time, and merit time – to reduce his unconditional release date on his sentence of 80 years incarceration; (2) calculated his unconditional release date/projected release date/PRD/max-out date as October 13, 2009; (3) determined he would be released on October 29, 2009 – the date the mandated [sic] issued in his case; (4) informed him that he would be released on October 29, 2009; and (5) readied him for that release. Therefore, Mr. Bowden is entitled under the North Carolina General Statutes, the United States Constitution, the North Carolina Constitution, and the [DOC's] regulations, policy, and procedure to have these good, gain, and merit sentence reduction credits deducted from his sentence for all purposes, including the calculation of his unconditional release date, and to be immediately unconditionally released.
>
> 23. Given the application of the sentence reduction credits that Mr. Bowden earned pursuant to the [DOC's] regulations, policy, and procedure, and the earned prison credit for time he has served on his sentence, Mr. Bowden's unconditional release date for his sentence of 80 years incarceration, imposed pursuant to N.C. Gen. Stat. § 14-2, was October 13, 2009.
>
> 24. Mr. Bowden has served the entirety of the sentence imposed in his case.
>
> 25. Mr. Bowden has carried his burden of proof showing that he is entitled to relief.

> (4) the inmates were told of points 1-3; (5) the inmates were told they would be released on October 29, 2009; and (6) the inmates were actually prepared for that release. The circumstances are such that a denial and or correction would naturally be expected if the Secretary of Correction believed those statements and directions to be untrue, inaccurate, or based upon a misunderstanding of the law or of the [DOC's] rules, regulations, policies, procedures, and longstanding practices. The Secretary's silence from October 9 through October 22, 2009, in the face of those statements constitutes an admission by silence.

A review of the record indicates that in coming to this conclusion, the trial court entered several unchallenged findings of fact regarding communications sent to Keller: (1) Finding of fact 35(a)-(b) provides that on 9 October 2009, "four hours after the Supreme Court issued its decision in Mr. Bowden's case, Department of Correction Public Affairs Director Keith Acree sent an e-mail to [the personal e-mail account of Secretary Keller], Deputy Secretary of Correction French, Deputy Director of Prisons Ricky Anderson, and Victim Services Director Sandy Dixon." This e-mail informed Secretary Keller that that North Carolina Supreme Court had "declined to review the [*Bowden II*] case, meaning the decision of the NC Court of Appeals will stand"; (2) Finding of fact 35(d)-(e) provides that on 16 October 2009, the Division of Prisons Director Robert Lewis sent a memorandum to all wardens, administrators, and superintendents, and Secretary Keller was cc-ed on the e-mail. The memorandum stated the following, in pertinent part:

> As I'm sure you are aware, the North Carolina Supreme Court recently issued a ruling in the above referenced case causing the [DOC] to re-calculate the release dates of some life sentence inmates. A number of those inmates will be released later this month and others will be released in the coming months and years as their new release dates are reached. . . . The Court of Appeals has ruled that life sentences for crimes committed between April 4, 1974 and June 30, 1978 equals 80 years which is then cut to 40 years based on other sentencing laws. In addition, the inmate is entitled to other sentence reduction credits earned for program or work participation while in prison which further reduces the amount of actual time served. As a result of this ruling, the [DOC] is mandated to calculate the affected inmates' sentences in this manner.

The trial court also found that on 19 October 2009, "Director Lewis' memorandum was sent to all Superintendents, posted on the Director's Memo page via the web, and copied to Secretary of Correction Alvin W. Keller, Jr."; and (3) Finding of fact 39(a) states that on 19 October 2009, "Chief Operating Officer of the [DOC], Jennie Lancaster, sent an e-mail to various Department officials, including Secretary of Correction Alvin W. Keller, Jr."

The State argues that Secretary Keller did not make an admission by silence because the record fails to show that the communications relied on by the trial court were made in the "presence" of Secretary Keller and that there is no evidence that Secretary Keller either received or read these communications. To support its argument, the State relies on our holding in *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 354 S.E.2d 767 (1987), for the contention that "mere possession of a written statement does not manifest an adoption of its contents." *Id.* at 279, 354 S.E.2d at 772.

Our Court in *FCX* noted that

> [a] person may expressly adopt another's statement as his own, or an adoptive admission may be implied from 'other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person. . . . [A]doptive admissions fall generally into two categories – those implied from an affirmative act of a party, and those implied from silence or a failure to respond in circumstances that *call for a response*.

Id. at 278, 354 S.E.2d at 772 (emphasis added). In the case before us, Secretary Keller's admission by silence falls into the latter category.

> Regarding admissions by silence, our Supreme Court stated in *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975): "Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having first hand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission."

Id. at 279, 354 S.E.2d 772-73 (citations omitted). The *FCX* Court noted that "[w]hether the statement is oral or written, the critical inquiry is

whether a reasonable person would have denied it under the circumstances." *Id.* at 279, 354 S.E.2d at 773.

In the present case, there were multiple communications sent to Secretary Keller. None of these written statements elicited a response from Secretary Keller. The content of these written statements were of a nature that a "denial would be naturally expected" if Secretary Keller disagreed with or believed any of the communications to be inaccurate – a "reasonable person would have denied it under the circumstances." *See id.* As Secretary of Correction, possessing the authority to establish rules, regulations, and policies governing the state prison system, Secretary Keller's unique position made it probable that he would have responded if he disagreed in any way. Thus, we are unable to hold that the trial court erred by entering conclusion of law number 10 and the State's argument is overruled. Based on our foregoing holding, we do not reach the State's arguments concerning conclusions of law 22 through 25.

Conclusions of Law 18 and 21

Next, the State argues the trial court erred by concluding that the DOC violated the Ex Post Facto Clause of the United States. The State contends that because the DOC never applied defendant's sentence reduction credits towards the calculation of his unconditional release date, those credits were not subsequently revoked such that defendant was subject to an *ex post facto* law. We disagree.

The challenged conclusions of law numbers 18 and 21 state the following:

> 18. The [DOC's] revocation of Mr. Bowden's sentence reduction credits – from applying all sentence reduction credits to reduce Mr. Bowden's unconditional release date, to not applying those sentence reduction credits to his unconditional release date – violated the Ex Post Facto Clause of the United States Constitution, *see*, *Lynce v. Mathis*, 519 U.S. 433, 445-447, 137 L.Ed.2d 63, 74-76 (1997); *Weaver v. Graham*, 450 U.S. 24, 33-36, 67 L.Ed.2d 17, 25-27 (1981), and Article I, § 19 of the North Carolina Constitution.
>
> . . .
>
> 21. The [DOC's] August 14, 2007, "retroactive[] change[] in the status of defendant's sentence reduction credits from 'applied' to 'pending' ", *Bowden* 193 N.C. App. at 598, 668 S.E.2d at 108, violated the Ex Post Facto Clause

> of the United States Constitution, *see Lynce*, 519 U.S. at 445-447, 137 L.Ed.2d at 74-76; *Weaver*, 450 U.S. at 33-36, 67 L.Ed.2d at 25-27, and Article I, § 19 of the North Carolina Constitution.

As we have previously discussed, we held that there was competent evidence to support the trial court's finding that the DOC applied sentence reduction credits to defendant's unconditional release date.

> The *ex post facto* prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. Through this prohibition, the Framers [of the Constitution] sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.

Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, 964 (1981) (citations omitted). "To fall within the *ex post facto* prohibition, a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it[.]' " *Lynce*, 519 U.S. at 441, 117 S. Ct. at 896 (citation omitted).

We hold that the present case fulfills both requirements. The DOC's revocation of defendant's sentence reduction credits after it applied his sentence reduction credits to calculate his unconditional release date was retrospective and disadvantaged defendant by "lengthen[ing] the period that someone in [defendant's] position must spend in prison." *Id.* at 442, 117 S. Ct. at 896 (citation omitted). These factors amounted to a violation of the Ex Post Facto Clause of the United States Constitution. *See id.* at 446, 117 S. Ct. at 898 (stating that because petitioner was awarded 1,860 provisional credits which were retroactively canceled as a result of a 1992 amendment, the 1992 amendment "has unquestionably disadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment" and amounted to an ex post facto clause violation). Therefore, this argument is overruled.

Conclusions of Law 14 through 16 and 19 through 20

The State argues that through conclusions of law 14, 15, 16, 19, and 20, the trial court erroneously concluded that the DOC created a "legitimate expectation of release," created a liberty interest in those credits, and violated defendant's due process rights by "revoking" them when

the DOC never applied sentence reduction credits to defendant's unconditional release date. We disagree.

The challenged conclusions of law state the following:

> 14. When the [DOC] in early October 2009, awarded and applied Mr. Bowden's good, gain, and merit time sentence reduction credits, which he earned between 1975 and October 2009, to reduce his unconditional release date on his sentence of 80-years incarceration, in accordance with [DOC] regulations, policies, procedures, and longstanding practices, a "liberty interest" in those credits was created that is subject to constitutional protection under the due process clause of the United States Constitution. *See Wolff v. McDonald*, 418 U.S. 539, 558, 41 L.Ed.2d 935, 952 (1974).
>
> 15. When the [DOC] informed Mr. Bowden in early October 2009 that, pursuant to the Supreme Court's decision in his case, his sentence had expired and he would be released on October 29, 2009, and when the [DOC] began readying him for that release in accordance with the [DOC's] rules, regulations, policies, procedures, and longstanding practices, it "create[d] a legitimate expectation of release" which gave rise to a liberty interest subject to constitutional protection under the due process clause of the United States Constitution. *See Board of Pardons v. Allen*, 482 U.S. 369, 371-74, 96 L.Ed.2d 303, 308-310 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12, 60 L.Ed.2d 668, 678 (1979).
>
> 16. The [DOC's] revocation of Mr. Bowden's sentence reduction credits, in which he has a protected liberty interest, violated Mr. Bowden's rights under the due process clause of the United States Constitution. *See Wolff*, 418 U.S. 539 at 557, 41 L.Ed.2d at 952.
>
> . . .
>
> 19. Between 1975 and 2002, when the [DOC] awarded Mr. Bowden gain time, merit time and restored good time and identified that time as "APPLIED" in its own "Sentence Reduction Credits" records, in accordance with [DOC] regulations, policies, procedures, and longstanding practices, a "liberty interest" in those credits was created that is subject to constitutional protection under the due process

> clause of the United States Constitution. *See Wolff*, 418 U.S. at 558, 41 L.Ed.2d at 952.
>
> 20. The [DOC's] August 14, 2007, "retroactive[] change[] in the status of defendant's sentence reduction credits from 'applied' to 'pending' ", *Bowden* 193 N.C. App. at 598, 668 S.E.2d at 108, violated Mr. Bowden's rights under the due process clause of the United States Constitution, *see Wolff*, 418 U.S. 539 at 557, 41 L.Ed.2d at 952, and Article I, § 19 of the North Carolina Constitution.

"The United States Supreme Court has held that [l]iberty interests protected by the Fourteenth Amendment may arise from two sources-the Due Process Clause itself and the laws of the States." *Jones*, 364 N.C. at 256, 698 S.E.2d at 55 (citations and quotations omitted).

> The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest. [To] determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103 (1979) (citations and quotations omitted).

"While a prisoner retains basic constitutional rights, the Supreme Court has found that an inmate's liberty interests derived from the Fourteenth Amendment are limited, given the nature of incarceration[.]" *Jones*, 364 N.C. at 256, 698 S.E.2d at 55 (citations omitted). Even so, it is well established that "a State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures. Prisoner benefits in the form of good time, gain time, and merit time arise from such statutes or regulations." *Jones*, 364 N.C. at 256, 698 S.E.2d at 55 (citations omitted).

> When a liberty interest is created by a State, it follows that the State can, within reasonable and constitutional limits, control the contours of the liberty interest it creates. In other words, the liberty interest created by the State through its regulations may be limited to those particular aspects of an inmate's incarceration that fall within the purview of those regulations.

Id. at 256-57, 698 S.E.2d at 55-56.

We note that we have already held above that competent evidence supports the finding that DOC applied defendant's sentence reduction credits to his unconditional release date. When the DOC applied defendant's good, gain, and merit time sentence reduction credits to reduce his unconditional release date, it "interpreted its regulations as permitting the award of different types of time credits for certain purposes, and has in fact, awarded those credits to [defendant] for those purposes." *Id.* at 257, 698 S.E.2d at 56. Because defendant once received the sentence reduction credits towards the calculation of his unconditional release date, a purpose for which he is entitled, the DOC's actions created a liberty interest in those credits subject to protection under the Due Process Clause of the United States Constitution. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975 (1974) (stating that "the State having created the right to good time[,] . . . the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated"). We believe that under the facts of the instant case, this liberty interest, unlike in *Jones*, is not limited in scope, but entitled to full constitutional protection.

Further, the DOC's actions "create[d] a legitimate expectation of release" subject to constitutional protection under the due process clause. *See Greenholtz*, 442 U.S. at 12, 99 S. Ct. at 2106 (stating that the "expectancy of release provided in this statute is entitled to some measure of constitutional protection); *Board of Pardons v. Allen*, 482 U.S. 369, 371-74, 107 S. Ct. 2415, 2417 (1987) (holding that a statute providing that the parole board shall release prisoners on parole when certain prerequisites were fulfilled created a liberty interest protected by the Due Process Clause.) The DOC's subsequent act of revoking defendant's sentence reduction credits violated his due process rights. *See Wolff*, 418 U.S. at 557, 94 S. Ct. at 2975. Therefore, we overrule the State's argument that the trial court's conclusions of law 14 – 16, 19, and 20 were made in error.

Based on the foregoing, we affirm the 8 May 2012 order of the trial court.

Affirmed.

Judge HUNTER, Jr., Robert N., concurs.

McCULLOUGH, Judge, concurring with separate opinion:

I write separately, concurring in the case before this Court, which will now be labeled *Bowden III*. I was the author of *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (2008), which was filed on 4 November 2008. That case is referred to as *Bowden II* in the majority opinion. While discretionary review was originally accepted by our Supreme Court, that review was eventually withdrawn as having been improvidently granted by an order entered on 9 October 2009. Within a short period of time thereafter, the mandate of this Court's opinion in *Bowden II* became final. N.C.R. App. P. 32.

Thereafter, the N.C. Department of Correction ("DOC") issued credits to this appellant pursuant to a lawful court order. Under the law of the case doctrine, (*see Creech v. Melnik*, 147 N.C. App. 471, 556 S.E.2d 587 (2001)), even if our Supreme Court should now believe that *Bowden II* was erroneously decided, and that the doctrine set forth in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), should have been applied, it would not affect the outcome in the case at bar. Under that doctrine, the holding of that case became the final word on the issues decided in *Bowden II*. This principle is well-established and was explained in *Creech* as follows:

> Preliminarily, we address the issue of whether the earlier decisions in *Creech I* and *II* set forth a doctrine of law that decides the issues in this appeal—whether Mr. Pulley had authority to contract on behalf of the minor, and whether the alleged contract on behalf of the minor required court approval. We conclude that they do not.
>
> > "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case. . . ."
> >
> > *Tennessee-Carolina Transp. Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974); *see also North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983); *Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997); *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). Under the

> law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. *See Weston v. Carolina Medicorp., Inc.*, 113 N.C. App. at 417, 438 S.E.2d at 753.

Creech, 147 N.C. App. at 473-74, 556 S.E.2d at 589.

As the majority opinion makes clear, once credits against the appellee's sentence were applied due to the decision in *Bowden II*, the defendant acquired a liberty interest which cannot be rescinded arbitrarily without running afoul of the Ex Post Facto clause of the United States Constitution or violating due process. These are well-settled principles of constitutional law and the majority discusses the case law in more than sufficient detail. *See Wolff v. McDonnell*, 418 U.S. 539, 555, 41 L. Ed. 2d 935, 950 (1974); and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 60 L. Ed. 2d 668 (1979).

At the time that *Bowden II*'s ruling was ready for implementation, his case became politically controversial and further litigation developed. The case that went to our Supreme Court, *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), however, had a completely different factual scenario. There the Court gave deference to the DOC's interpretation of their own rules, regulations and the implementation of those rules. As the majority opinion demonstrates, credits had never been applied to the inmate involved in that litigation whereas this defendant-appellee has been awarded credits both before and after litigation. I write separately to stress that the applicability of *Jones* is irrelevant due to the law of the case doctrine set forth above.

Bowden II clearly held that life sentences were equivalent to a sentence of 80 years. This Court came to that conclusion after taking judicial notice of a statement in the State's brief in the case of *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978). I believe it is worth reviewing what we said in *Bowden II* on this issue:

> Defendant asks our Court to take judicial notice of a statement contained in the State's brief in *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978), and we grant defendant's request. An appellate court may take judicial notice of the public records of other courts within the state judicial system. *Whitmire v. Cooper*, 153

> N.C. App. 730, 735 n.4, 570 S.E.2d 908, 911 n.4 (2002), *disc. review denied, appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003). Accordingly, we take judicial notice of the following sentence: "The State agrees with the defendant that credit is now provided to those serving a life sentence since N.C.G.S. § 14-2 makes a life sentence equivalent to 80 years." Here, the State concedes to what defendant is currently arguing. Our judicial notice of this sentence is dispositive to the issue of whether defendant's life sentence is equivalent to 80 years for purposes other than parole eligibility.

Bowden II, 193 N.C. App. at 600, 668 S.E.2d at 109.

In *Bowden II*, we also noted that our holding was consistent with precedent established by our Supreme Court:

> Even without our judicial notice of the statement above, we still hold that N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes. Our Supreme Court has previously considered a life sentence to be equivalent to 80 years, pursuant to N.C. Gen. Stat. § 14-2 (1974), for purposes other than parole eligibility. *See State v. Williams*, 295 N.C. 655, 679, 249 S.E.2d 709, 725 (1978); *see also Richardson*, 295 N.C. at 318-19, 245 S.E.2d at 760-61. In *Richardson*, our Supreme Court considered the defendant's life sentence to be the equivalent of 80 years for purposes of determining his pretrial incarceration credit. *Id.* In *Williams*, our Supreme Court decided that each of the defendant's life sentences was equal to 80 years for purposes of adding his consecutive sentences and determining his total sentence of 300 years. *Williams*, 295 N.C. at 679-80, 249 S.E.2d at 725.

Id. at 600, 668 S.E.2d at 109-10.

Normally, appellate courts do not allow parties to take divergent positions, but in all subsequent litigation on this issue, the State has been allowed to take a position that is completely contrary to the position it took in *Richardson*. While the State's concession was not essential to the disposition of *Bowden II*, as there were 2 cases decided by our Supreme Court that essentially held that life sentences in the timeframe now under review were equivalent to 80-year sentences, it was a frank

recognition by all parties that the statute meant what it said. In *Bowden II* on this point, we stated:

> We do not read this statute to be ambiguous nor do we find that it must be read in conjunction with N.C. Gen. Stat. § 148-58 (1974). The plain language of the statute states that life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison without any limitation or restriction. We are not permitted to interpolate or superimpose provisions or limitations which are not contained in the text of the statute. *Sonopress, Inc. v. Town of Weaverville*, 139 N.C. App. 378, 383, 533 S.E.2d 537, 539 (2000). Had our Legislature intended that N.C. Gen. Stat. § 14-2 (1974) only apply when determining a prisoner's parole eligibility, it would have been a simple matter to have included that explicit phrase. *See In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994).

Bowden II, 193 N.C. App. at 601, 668 S.E.2d at 110.

It seems disingenuous for the State to argue otherwise now, after the decision became controversial. The rule of law cannot survive if parties are allowed to abandon positions taken in court merely because they are displeased with the result or their concession leads to a decision that later becomes controversial. I doubt that the citizens of North Carolina are placed at risk if a small number of geriatric prisoners are released after having served over 38 years in prison. Yet, the State has repudiated its own interpretation of the law to be able to make the arguments it has made in both *Bowden II* and this case, *Bowden III*, as well as the arguments made in *Jones v. Keller*. I believe that allowing a party to shift its argument due to controversy is a far greater danger to our State.

In all other respects, I fully concur in the majority opinion.

STATE v. GREEN

[229 N.C. App. 121 (2013)]

STATE OF NORTH CAROLINA
v.
DARIUS GREEN

No. COA12-1466

Filed 20 August 2013

1. Evidence—prior crimes or bad acts—robbery—no prejudice

The trial court did not err in a robbery with a dangerous weapon case by admitting evidence of a Holiday Inn robbery to which defendant had previously pled guilty. Even assuming, *arguendo*, that the evidence regarding the similarities between the robberies was insufficient for the trial court to allow the admission of the evidence pursuant to Rule 404(b), defendant failed to show how he was prejudiced by the admission of the evidence.

2. Sexual Offenses—first-degree—engaging in a sexual act—forcing victim to self-penetrate

The trial court did not err by denying defendant's motion to dismiss a first-degree sex offense charge. The act of forcing a victim to self-penetrate constitutes engaging in a sexual act with another person and against the will of the other person. Defendant's assertion that he did not engage in a sexual act with the victim because he did not make physical contact with her therefore failed.

3. Satellite-Based Monitoring—aggravated offense—elements of the conviction offense

The trial court erred in ordering lifetime sex offender registration and lifetime satellite-based monitoring ("SBM") for defendant. The determination of aggravated offense triggering lifetime registration and SBM is limited to considering only the elements of the conviction offense. As penetration is not a required element of first-degree sexual offense, defendant was not convicted of an aggravated offense.

Appeal by defendant from judgments entered 3 August 2012 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 22 May 2013.

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

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

CALABRIA, Judge.

Darius Green ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree burglary, first-degree sexual offense, three counts of robbery with a dangerous weapon ("RWDW"), and assault with a deadly weapon inflicting serious injury ("AWDWISI"). We find no error in part and reverse and remand in part.

I. Background

On 20 September 2011, after approximately 1:00 a.m., two men ("the men") entered a residence on Tenth Street in Wilmington, North Carolina, and held M.C. ("Mary"),[1] her boyfriend and three minor children at gunpoint in one of the bedrooms ("the home invasion"). The men wore black hooded sweatshirts ("hoodies"), the lower portions of the men's faces were covered, and one of the men carried a gun. The man with the gun asked Mary's sixteen-year-old son ("the son") where "the money" was and forced him into a different bedroom. When the son did not find the money, the man hit him in the face. As a result, the son sustained injuries to his nose, face, and one of his teeth.

One of the men took Mary into the kitchen, pointed a gun to her head and ordered her to undress. Once Mary was undressed, while still pointing a gun to her head, the man ordered her to insert her own fingers into her vagina and "play with herself." Mary reluctantly complied.

When the men left, they took cash, jewelry, cell phones, keys, and a laptop computer. The family contacted law enforcement from a neighbor's house. When officers arrived, Mary described the men as "tall, lean black guys" wearing hoodies and masks. Mary and her son had known defendant for several years and Mary's son had spent some time with defendant. Both Mary and her son identified defendant as one of the men and the son provided "great detail" to the officers about how he recognized the man who hit him. Specifically, the son told the officers that the object he was hit with felt like a gun and that he recognized defendant's nose, eyes, and voice.

On 31 October 2011, defendant was indicted for first-degree burglary, first-degree sex offense, second-degree kidnapping, AWDWISI, two counts of first-degree kidnapping and three counts of armed robbery for the home invasion.

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1. We will use the pseudonym "Mary" throughout this opinion to protect the victim's privacy.

At trial in New Hanover Superior Court, both Mary and her son testified for the State and identified defendant as one of the assailants in the home invasion. The State also sought to introduce evidence of a robbery at a Holiday Inn in Wilmington, North Carolina ("Holiday Inn robbery") that occurred on 22 September 2011. Two days after the home invasion and robbery, a man ("the robber") wearing a black hoodie and a mask entered the lobby of the Holiday Inn and took money from the cash drawer. Defendant pled guilty to the Holiday Inn robbery on 17 July 2012. After viewing a surveillance video of the Holiday Inn robbery and hearing three witnesses in a *voir dire* proceeding regarding admissibility under Evidence Rule 404(b), the trial court entered an order allowing the State to introduce evidence of the Holiday Inn robbery. At trial, the State introduced the surveillance video footage and testimony from four witnesses regarding the Holiday Inn robbery.

The jury entered verdicts finding defendant guilty of first-degree burglary, first-degree kidnapping, first-degree sexual offense, AWDWISI, and three counts of RWDW. The jury found defendant not guilty of one count of first-degree kidnapping and one count of second-degree kidnapping. The court arrested judgment on the jury verdict of guilty of first-degree kidnapping. Defendant was sentenced to 87 to 114 months for first-degree burglary, 316 to 389 months for first-degree sex offense, and 87 to 114 months for one count of RWDW. These sentences were ordered to be served concurrently. Defendant was sentenced to 87 to 114 months for the second count of RWDW to be served at the expiration of the previous sentence. Defendant was sentenced to 87 to 114 months for the third count of RWDW and 34 to 50 months for AWDWISI. These two sentences were ordered to be served concurrently, but the consolidated sentence was ordered to run at the expiration of the previous RWDW judgment. After the trial court made findings that defendant had been convicted of a sexually violent offense and that the offense was an aggravated offense, the trial court ordered that upon defendant's release from incarceration, he was to register as a sex offender for life and also to enroll in lifetime satellite-based monitoring ("SBM"). Defendant appeals.

II. 404(b) Evidence

[1] Defendant argues that the trial court's admission of evidence of the Holiday Inn robbery under Rule 404(b) was prejudicial error because it was not sufficiently similar to the home invasion. We disagree.

On appeal, we review the trial court's order regarding its 404(b) ruling to determine "whether the evidence supports the findings and

whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Subsequently, we "review the trial court's Rule 403 determination for abuse of discretion." *Id.*

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C–1, Rule 404(b) (2011). However, the evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Rule 404(b) is a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

"To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citation omitted). "[T]he similarities between the two situations" do not need to " 'rise to the level of the unique and bizarre.' Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (internal citation omitted). The similarities, however, must be more than generic characteristics " 'inherent to most' crimes of that type" to establish sufficient similarity. *State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) (citation omitted).

In the instant case, defendant previously pled guilty to the Holiday Inn robbery in federal court. At trial, the State sought to introduce evidence regarding the Holiday Inn robbery to show "proof of identity, intent, motive, opportunity, preparation, knowledge, modus operandi, and a common scheme or plan." After hearing evidence on *voir dire*, the trial court entered an order allowing the State to introduce the evidence.

The trial court's findings in the order admitting evidence of the Holiday Inn robbery included multiple similarities between the robberies. Specifically, both robberies were armed robberies which occurred

within two days of each other, the perpetrators in both robberies wore black hoodies and dark fabric covering the bottom portion of their faces, immediately demanded money upon entering the buildings, utilized a black semi-automatic handgun in a similar manner by "pushing" it to the heads of the victims, restrained victims in a similar manner, and moved victims from place to place during the course of the crimes, searching for money. Defendant contends that these similarities were "generic to the act of robbery" and insufficient to establish substantial evidence of similarity. *Al–Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

Even assuming, *arguendo*, that defendant is correct that the evidence regarding the similarities between the robberies is insufficient for the trial court to allow the admission of the evidence pursuant to Rule 404(b), defendant bears the burden of showing that any error by the trial court was prejudicial. *See State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010). "A defendant is prejudiced by the trial court's evidentiary error where there is a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Miles*, __ N.C. App. __, __, 730 S.E.2d 816, 827 (2012), *aff'd per curiam*, __ N.C. __, __ S.E.2d __ (2013) (citation omitted). Where there was overwhelming evidence of the defendant's guilt, this Court has held that the "defendant [could] not show prejudice in the trial court's admission of the challenged evidence as it would have no probable impact on the jury's decision." *State v. Zinkand*, 190 N.C. App. 765, 771, 661 S.E.2d 290, 293 (2008) (citation omitted); *see also LePage*, 204 N.C. App. at 44, 693 S.E.2d at 162.

In the instant case, defendant claims that "[g]iven the weaknesses in the identification of the masked assailants at [Mary's] house, two of whom were never identified, the evidence on the Holiday Inn robbery likely played a key role in the jury's determination of [defendant's] guilt." However, the State's evidence showed that on the night of the home invasion, both Mary and her son identified defendant as one of the men. Mary and her son had known defendant for several years, defendant referred to Mary as "aunt," and Mary's son had spent some time with defendant. The son provided "great detail" to law enforcement about how he recognized the man with a gun as defendant, including that he recognized defendant's nose, eyes, and voice. At trial, both Mary and her son also identified defendant as the man. Mary testified that because the scarf covering defendant's face was not thick, she could see through it, and stated that she could see defendant's eyes and nose, as well as hear his voice.

The State also offered evidence that not only did defendant know that Mary's brother hid money at her house, but when Mary told the men that the money was at her mother's house, the men left the house and shortly thereafter someone attempted to break into Mary's mother's house. While it is possible that others could have been privy to this information, defendant's prior relationship with the family supports an inference that he was the perpetrator.

We determine from the evidence of defendant's knowledge of the family's habits and the evidence from two eyewitnesses who knew defendant prior to the home invasion, that there is not a reasonable possibility that the jury would have reached a different result had the contested evidence not been admitted at trial. *See*, *e.g.*, *State v. Castaneda*, __ N.C. App. __, __, 715 S.E.2d 290, 296 (2011) (finding any error was harmless where the evidence against the defendant included an eyewitness's testimony at trial that the defendant attacked and stabbed the victim). Therefore, assuming, *arguendo*, that admission of the 404(b) evidence was error, defendant has failed to show how he was prejudiced by the admission of the evidence. We determine any error was harmless.

III. Motion to Dismiss

[2] Defendant also argues that the trial court erred when it denied defendant's motion to dismiss the first-degree sex offense charge, asserting that defendant did not engage in a sexual act with the victim because he did not come into contact with her. 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) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). The trial court must consider the evidence "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).

"A person is guilty of a sexual offense in the first-degree if the person engages in a sexual act ... [w]ith another person by force and against the will of the other person ...." N.C. Gen. Stat. § 14-27.4(a) (2011). "Sexual act ... means the penetration, however slight, by any object into the genital or anal opening of another person's body ...." N.C. Gen. Stat. § 14-27.1(4) (2011). The North Carolina Supreme Court has held that "sexual act"

encompasses "every penetration other than vaginal intercourse" and thus, the term "any object" embraces "parts of the human body as well as inanimate or foreign objects." *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981) (holding that the defendant's alleged insertion of his fingers into the victim's vagina constituted a sexual act because the defendant's fingers were within the definition of "any object").

There are no North Carolina cases determining whether a victim's forced penetration of her own vagina with her own fingers constitutes first-degree sexual offense. However, cases from other states regarding this issue provide some guidance. The Florida Court of Appeals for the Third District has held that "the coerced insertion of a woman's own fingers in her intimate body orifice, against her will and at the command of a person that is intimidating her," was prohibited by a Florida statute defining "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another *by any other object*." *State v. Kirby*, 625 So. 2d 51, 55 (Fla. Dist. Ct. App. 1993) (citing Fla. Stat. § 794.011(1)(h) (1989)). In addition, a California court has held that a statute prohibiting the penetration of genital or anal openings by foreign objects also included cases of forced self-penetration. *People v. Keeney*, 29 Cal. Rptr. 2d 451 (3d Dist. 1994).

Defendant contends that since Mary touched herself, the jury could not find that he "engaged" in a sexual act *with* Mary within the meaning of the statute. First-degree sexual offense in North Carolina requires that the defendant "engages in a sexual act ... [w]ith another person." N.C. Gen. Stat. § 14-27.4(a) (2011). When statutory language is clear and unambiguous, the Court "must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009) (citation omitted). *Black's Law Dictionary* 608 (9th ed. 2009) defines "engage" as "[t]o employ or involve oneself; to take part in; to embark on." "With" can be defined as "a function word [used] to indicate a participant in an action, transaction, or arrangement ...." *Merriam-Webster's Collegiate Dictionary* 1438 (11th ed. 2007).

In the instant case, in the light most favorable to the State, the evidence showed that defendant forced Mary, at gunpoint, to remove her clothing and insert her own fingers into her vagina. While defendant did not physically touch Mary, he was "involved" in that he coerced her to touch herself. Defendant was not merely an observer or bystander, but rather he participated in the action by directing Mary.

Given that the text of North Carolina statutes do not explicitly exclude instances such as the one in this case and the persuasive trend in other courts is to recognize coerced self-penetration as a sexual offense, we hold that the act of forcing a victim to self-penetrate constitutes "engag[ing] in a sexual act ... with another person ... and against the will of the other person." N.C. Gen. Stat. § 14-27.4(a) (2011). Defendant's assertion that he did not engage in a sexual act with Mary because he did not make physical contact with her therefore fails. Accordingly, we find no error in the trial court's denial of defendant's motion to dismiss the first-degree sex offense charge.

IV. Lifetime Registration and SBM

[3] Defendant argues that the trial court erred in ordering lifetime sex offender registration and lifetime satellite-based monitoring ("SBM"). We agree.

As an initial matter, we note that defendant filed a petition for writ of *certiorari*. Defendant conceded that although he properly gave oral notice of appeal in open court, he failed to file written notice of appeal as required by *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding that the defendant was required to file a written notice of appeal from SBM hearings because an order for SBM is a civil order). Therefore, both defendant and the State recognize that defendant's "right to prosecute [his] appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1) (2012). Defendant requests that we grant his petition for writ of *certiorari* pursuant to N.C. R. App. P. 21(a)(1). In our discretion, we grant defendant's petition.

N.C. Gen. Stat. § 14-208.40A requires that if an offender is classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of the rape or sex offense of a child, the court shall order the offender to enroll in lifetime satellite-based monitoring. N.C. Gen. Stat. § 14-208.40A (2011). Additionally, "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7 (2011). "Aggravated offense" is defined as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2011).

When a trial court determines whether a crime constitutes an aggravated offense, it "is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In other words, the elements of the offense must fit within the statutory definition of aggravated offense." *State v. Boyett*, __ N.C. App. __, __, 735 S.E.2d 371, 380 (2012) (internal quotations and citations omitted). In *Boyett*, this Court held that a second-degree sexual offense was not an aggravated offense to support lifetime SBM because penetration was not a required element of second-degree sex offense conviction. *Id.* at ___, 735 S.E.2d at 380-81.

In the instant case, the jury found defendant guilty of first-degree sexual offense. Under North Carolina statutes, "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act ... [w]ith another person by force and against the will of the other person, and ... [e]mploys or displays a dangerous or deadly weapon[.]" N.C. Gen. Stat. § 14-27.4(a) (2011). " 'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse ... [or] the penetration, however slight, by any object into the genital or anal opening of another person's body ...." N.C. Gen. Stat. § 14-27.1(4) (2011).

Since our determination of "aggravated offense" triggering lifetime registration and SBM is limited to considering only the elements of the conviction offense, and penetration is not a required element of first-degree sexual offense, defendant was not convicted of an aggravated offense. Therefore, the trial court improperly ordered lifetime sex offender registration and lifetime SBM.

V. Conclusion

We find no error in the trial court's order admitting the evidence of the Holiday Inn robbery and the trial court's denial of defendant's motion to dismiss the first-degree sex offense. However, the trial court's order requiring defendant's lifetime registration as a sex offender and lifetime enrollment in SBM based on first-degree sexual offense, which is not an aggravated offense, is reversed and remanded.

No error in part, reversed and remanded in part.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JORY JOSEPH MARINO

No. COA12-1422

Filed 20 August 2013

1. Criminal Law—prosecutor's closing argument—not so grossly improper—*ex mero motu* intervention not required—no prejudice

The trial court did not err in a driving while impaired case by failing to intervene *ex mero motu* to address the State's closing argument. Although the State pushed the bounds of impropriety, its remarks during closing argument were not so grossly improper that the trial court erred by failing to intervene *ex mero motu*. Furthermore, even assuming *arguendo* that the State's closing argument was improper, defendant failed to make a definitive showing of prejudice to warrant a new trial.

2. Motor Vehicles—driving while impaired—Intoximeter source code—not discoverable

The trial court did not err in a driving while impaired case by denying defendant's motions to examine the Intoximeter source code. Defendant failed to show the Intoximeter source code to be "favorable" to his case or "material either to guilt or to punishment." Furthermore, neither *Crawford v. Washington*, 541 U.S. 36, nor *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, stands for the proposition that defendant has a right under the Sixth Amendment to examine the Intoximeter source code. The trial court exceeded its authority under statute and erroneously ordered the State to produce the data from the Intoximeter.

3. Motor Vehicles—driving while impaired—motion for appropriate relief—no evidentiary hearing

The trial court did not err by denying defendant's motion for appropriate relief (MAR) in a driving while intoxicated case without an evidentiary hearing. Disposing of the MAR without an evidentiary hearing was within the discretion of the trial judge and the trial judge did not abuse his discretion.

Appeal by defendant from judgment entered 18 May 2012 and order entered 24 July 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 24 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant appellant.

McCULLOUGH, Judge.

Jory Joseph Marino ("defendant") appeals from his convictions for impaired driving ("DWI") and speeding. For the following reasons, we find no error.

I. Background

On the evening of 21 March 2009, at approximately 10:40 p.m., Officer Robbie Moore ("Officer Moore"), at that time a patrol officer with the Pinehurst Police Department ("PPD"), stopped defendant on Morganton Road in Pinehurst, North Carolina, after clocking him speeding 52 m.p.h. in a 35 m.p.h. zone. Defendant and his wife were in the vehicle. As Officer Moore approached the vehicle, defendant, who was driving, rolled his window down. Officer Moore testified he was initially going to ask defendant to move his car further off the road but changed his mind when he noticed the smell of alcohol coming from the vehicle.

When Officer Moore informed defendant that he was speeding, defendant disputed the allegation stating, "I wasn't speeding. I could have swore I was only going 35 or 36 miles per hour." Officer Moore testified that defendant's speech was slightly slurred and his face seemed flushed.

Due to the smell of alcohol, combined with defendant's slurred speech and flushed face, Officer Moore became concerned about the possibility of impaired driving and inquired into whether defendant had had anything to drink. Defendant initially denied having anything to drink; yet, after Officer Moore performed a quick version of the horizontal gaze nystagmus ("HGN") test, and two preliminary breath tests indicated the presence of alcohol, defendant admitted that he may have had a couple of drinks with dinner.

Officer Moore then asked defendant to exit the vehicle to perform several standardized field sobriety tests. Defendant's wife remained inside the vehicle. Officer Moore indicated that, once defendant exited the vehicle and the two were face-to-face, he could smell alcohol coming from defendant's mouth.

Officer Moore administered three separate field sobriety tests; an HGN test, a walk-and-turn test, and a one-leg stand test. Officer Moore testified that each test revealed numerous indicators that defendant was impaired. Defendant was then given an additional preliminary breath test which, like the prior breath tests, indicated the presence of alcohol. Based on the totality of his observations, Officer Moore formed the opinion that defendant was impaired by alcohol. As a result, Officer Moore placed defendant under arrest and transported him to the PPD. Defendant's wife followed behind them.

At approximately 11:30 p.m., with his wife present, defendant consented to a chemical analysis breath test on the Intoximeter EC/IR II ("Intoximeter") at the PPD. Defendant's first and second breath samples registered alcohol concentrations of .11 and .10 grams of alcohol per 210 liters of breath, respectively. A citation was then issued charging defendant with DWI and speeding. Officer Moore continued to believe that defendant was impaired by alcohol throughout the testing of defendant's breath.

Defendant's citation originally came on for trial in Moore County District Court. Upon entry of a guilty judgment defendant appealed to Moore County Superior Court.

On 29 June 2010, defendant filed a motion for *Brady* material and a request for disclosure, objection to affidavit, and motion *in limine*. Several days later on 2 July 2010, defendant filed an additional motion seeking an order finding materiality, relevance, and necessity of the Intoximeter software source code. The purpose of the 2 July 2010 motion was to facilitate the pretrial issuance of a subpoena to out-of-state witnesses in order to procure the source code so that defendant could mount a challenge to the Intoximeter results. The State filed a response on 6 August 2010.

Defendant's motions came on for hearing in Moore County Superior Court on 3 November 2010 before the Honorable James M. Webb ("Judge Webb"). By order filed 18 November 2010, the court ordered the State to provide defendant with "all downloaded and non-downloaded data in its possession that was generated from [the] Intoximeter [used to analyze defendant's breath.]" The court, however, deferred ruling on the materiality of the Intoximeter source code until defendant had had the opportunity to analyze the data produced by the State.

On 11 February 2011, the State provided defendant with data from the Intoximeter used to analyze defendant's breath. Thereafter, following numerous hearings on issues of discovery, the trial court denied

defendant's motion for an order finding the Intoximeter source code material in open court on 8 December 2011.

Defendant's case came on for trial *de novo* in Moore County Superior Court on 14 May 2012, Judge Webb presiding. At the conclusion of the trial, the jury returned verdicts finding defendant guilty of DWI and speeding.[1] Judgment was entered on defendant's DWI conviction on 18 May 2012 and defendant was sentenced to a term of 60 days' imprisonment; the term was suspended on condition that defendant complete 12 months of unsupervised probation and pay costs, fines, and fees.

Defendant appealed to this Court. Following notice of appeal, on 29 May 2012, defendant filed a Motion for Appropriate Relief ("MAR") in Moore County Superior Court. Defendant's MAR was denied by order filed 24 July 2012.

II. Analysis

Improper Closing Argument

[1] Defendant's first argument on appeal is that portions of the State's closing argument were grossly improper. Consequently, defendant contends that he was denied a fundamentally fair trial and is entitled to a new trial.

As our Supreme Court reiterated in *State v. Jones*, "[a] lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact, and should be limited to relevant legal issues." 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (internal quotation marks and citations omitted). Thus,

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

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1. The jury unanimously found defendant guilty of DWI on both of the following grounds: (1) defendant was under the influence of an impairing substance; and (2) defendant had consumed sufficient alcohol that at any relevant time after the driving defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath.

N.C. Gen. Stat. § 15A-1230(a) (2011). Furthermore, "[i]n considering specific cases of improper argument, we acknowledge our oft-quoted refrain – 'that counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence.' " *Jones*, 355 N.C. at 128, 558 S.E.2d at 105 (quoting *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697 (1996)).

In this case, defendant asserts that "the failure of the trial court to intervene, *ex mero motu*, to address the grossly improper closing argument of the State constituted plain error and an abuse of discretion[.]"

At the outset, we note that defendant has muddled different standards of review. "[T]his Court has stated that plain error review is appropriate only 'when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence.' " *State v. Walters*, 357 N.C. 68, 110, 588 S.E.2d 344, 369 (2003) (quoting *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998)). "The standard of review for alleged errors in closing arguments 'depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*.' " *State v. Chappelle*, 193 N.C. App. 313, 325, 667 S.E.2d 327, 334 (2008) (quoting *Walters*, 357 N.C. at 101, 588 S.E.2d at 364). "If there is an objection, this Court must determine whether 'the trial court abused its discretion by failing to sustain the objection.' " *Walters*, 357 N.C. at 101, 588 S.E.2d at 364 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). If there is no objection, "this Court must determine if the argument was 'so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *Id.* (quoting *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002)).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107. In either case, in order for an improper closing argument to constitute reversible error, the "prosecutor's remarks must be both improper and prejudicial." *Id.* at 133, 558 S.E.2d at 107-08.

In this case, defendant contends that the State's closing argument as a whole "reveals a pattern of speculation, misstatement of the law, opinion, mean-spiritedness, and prejudicial stereotyping[.]" Additionally, defendant identifies specific remarks made during the State's closing argument that he alleges were improper because they (1) speculated that this was not the first time defendant had driven impaired, (2) were sarcastic and provoked a sense of class envy, (3) tended to shift the burden of proof to defendant, and (4) indicated defendant's witnesses were hypocrites and liars. As a result of the alleged improper arguments, defendant argues he was denied a fundamentally fair trial.

As recognized by the State, defendant did not object to any of the remarks he now asserts were improper.[2] Therefore, we review the State's closing argument for gross impropriety.

After reviewing the entirety of the State's closing argument and considering the context in which the specifically challenged remarks were made, *see State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998) ("[C]omments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred."), we hold that, although the State pushed the bounds of impropriety, its remarks during closing argument were not so grossly improper that the trial court erred in failing to intervene *ex mero motu*. Defendant received a fundamentally fair trial.

Furthermore, even if a closing argument is grossly improper, the failure of the trial court to intervene *ex mero motu* does not necessarily constitute reversible error.

> [Our Supreme] Court has on numerous occasions found closing arguments to be outside the bounds of propriety, with varying consequences. For some violations – those in which the defendant failed to object or that lacked a definitive showing of prejudice caused by the improper argument – we have opted to warn or discipline the offending attorney in lieu of awarding a new trial.

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2. In his reply brief, defendant asserts that he did object to a portion of the State's closing argument and he should not be penalized for failing to offer further objections. A review of the record shows that defendant did in fact object to the State's comment, "Don't call yourself an instructor if you don't know how to teach, and don't call yourself an instructor if you don't even know the topic of the subject matter. Just grab your check from [defendant] and head on out the courtroom." On appeal, however, defendant did not argue that the statement to which he objected was improper. We do not penalize defendant for failing to object; yet, we find defendant's single objection insufficient to serve as an objection to the remainder of the State's closing argument.

Jones, 355 N.C. at 129, 558 S.E.2d at 105. Assuming *arguendo* that the State's closing argument was improper in the present case, defendant has failed to make a definitive showing of prejudice to warrant a new trial. Thus, we simply warn the State.[3]

Intoximeter Source Code

[2] The second issue raised by defendant on appeal is whether the trial court erred in denying his motions to examine the Intoximeter source code. In support of his assertion that the trial court erred, defendant raises constitutional arguments.

Defendant first contends that he is entitled to the Intoximeter source code pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). "Under *Brady v. Maryland*, the United States Supreme Court held that 'the suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is *material either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution.' " *State v. Cornett*, 177 N.C. App. 452, 456, 629 S.E.2d 857, 859 (2006) (quoting *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218) (emphasis added). As the Supreme Court has further explained:

> The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]

U.S. v. Bagley, 473 U.S. 667, 675, 87 L. Ed. 2d 481, 489-90 (1985).

"However, in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), the United States Supreme Court rejected the idea that every nondisclosure automatically constitutes reversible error and held that 'prejudicial error must be determined by examining the materiality of the evidence.' " *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744

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3. Without raising it as a separate issue on appeal, defendant asserts several times in his argument that, to the extent his counsel failed to object at trial, he received ineffective assistance of counsel. We dismiss this argument as defendant has not demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

(1993)). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Defendant bears the burden of showing materiality. *Tirado*, 358 N.C. at 589-90, 599 S.E.2d at 541. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *U.S. v. Agurs*, 427 U.S. at 109–10, 49 L. Ed. 2d at 353.

In the present case, defendant has not shown the Intoximeter source code to be "favorable" to his case or "material either to guilt or to punishment." Instead, defendant seeks to examine the source code in hopes that it will be exculpatory in nature or will lead to exculpatory material. Where defendant has failed to show discrepancies in the Intoximeter results, the materiality of the Intoximeter source code is speculative at best. Additionally, where the jury found defendant guilty of impaired driving under both N.C. Gen. Stat. § 20-138.1(a)(1) and (2), defendant has not shown a reasonable possibility that disclosure of the Intoximeter source code would have affected the outcome. Accordingly, we hold the trial court did not err in denying defendant access to the Intoximeter source code under *Brady v. Maryland*. Information that is only "potentially beneficial" to a defendant is not *Brady* material.[4]

Defendant's second constitutional argument is that the trial court's denial of his request to examine the Intoximeter source code is a violation of his Sixth Amendment right to confront those bearing testimony against him. Specifically, defendant contends that examination of the source code could have assisted him in exercising his right to confront his primary accuser, the Intoximeter.

The Confrontation Clause in the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, the Supreme Court interpreted the Confrontation Clause to grant a defendant the right to confront and cross-examine those witnesses that "bear testimony" against him. 541 U.S. 36, 51, 158 L. Ed. 2d 177, 192 (2004). The Court further emphasized

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4. Other jurisdictions have held likewise in cases addressing similar issues under their respective state laws. *See State v. Bastos*, 33 Fla. L. Weekly D1541, 985 So. 2d 37 (Fla. 3d DCA 2008); *State v. Bernini*, 222 Ariz. 607, 218 P.3d 1064 (Ariz. Ct. App. 2009). We find those cases instructive.

that the right extends not only to in-court testimony, but also to out-of-court statements that are testimonial in nature and introduced at trial. *Id.* at 50-51, 158 L. Ed. 2d at 192. Following *Crawford*, in *Melendez-Diaz v. Massachusetts*, the Supreme Court extended the confrontation rights to grant a defendant the right to confront and cross-examine those individuals involved in the production of testimonial documents to be introduced at trial, such as the technician operating the Intoximeter in the present case. 557 U.S. 305, 310-11, 174 L. Ed. 2d 314, 321-22 (2009).

As applied to this case, neither *Crawford* nor *Melendez-Diaz* stands for the proposition that defendant has a right under the Sixth Amendment to examine the Intoximeter source code. Nevertheless, defendant argues that extending the holdings in *Crawford* and *Melendez-Diaz* to allow examination of the Intoximeter source code is the next logical step in the line of confrontation cases. We decline defendant's invitation to extend *Crawford* and *Melendez-Diaz* and hold defendant's Sixth Amendment right has not been infringed.

N.C. Gen. Stat. § 15A-901

[3] In addition to discovery issues concerning the Intoximeter source code, both defendant and the State request that this Court address the more general issue concerning a defendant's right to discovery when a misdemeanor conviction is appealed for trial *de novo* in superior court.

At the outset, we recognize that, "[w]ith the exception of evidence falling within the realm of the *Brady* rule, . . . there is no general right to discovery in criminal cases under the United States Constitution[.]" *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (citation omitted). Thus, a defendant's right to discovery beyond the scope of *Brady* is purely statutory. Pursuant to N.C. Gen. Stat. § 15A-901, *et. seq.*, a defendant has a right to statutory discovery only in "cases within the original jurisdiction of the superior court." N.C. Gen. Stat. § 15A-901 (2011). Thus, as stated in *State v. Cornett*, "[i]n North Carolina, no statutory right to discovery exists for criminal cases originating in district court." 177 N.C. App. 452, 455, 629 S.E.2d 857, 859 (2006).

In the present case, the district court had original jurisdiction over defendant's misdemeanor DWI charge. Consequently, defendant had no statutory right to pretrial discovery.

Defendant now asserts on appeal that N.C. Gen. Stat. § 15A-901 violates the Sixth, Eighth, and Fourteenth Amendments. Specifically, defendant contends the statute is arbitrary and a violation of due process. We disagree. As noted above, there is no constitutional right to discovery

beyond the realm of *Brady* material. "[T]hus a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory." *Cunningham*, 108 N.C. App. at 195, 423 S.E.2d at 808.

In short, when a defendant's misdemeanor charge is within the original jurisdiction of the district court, the defendant is not entitled to statutory discovery but is, nonetheless, constitutionally entitled to discovery of *Brady* material.

In addition to defendant arguing the constitutionality of N.C. Gen. Stat. § 15A-901 on appeal, the State requests that we hold the trial court exceeded its authority under statute and erroneously granted discovery in its 18 November 2010 order. Upon review of the record, it appears the trial court ordered the State to produce the data from the Intoximeter in order to allow defendant a chance to prove the source code was material Brady information. Where the State voluntarily complied with the 18 November 2010 order, we will not hold that the trial court exceeded its authority.

Motion for Appropriate Relief

[3] During defendant's trial, a factual issue arose as to whether Sergeant Paul Leroy of the PPD responded to the scene of the stop as backup to Officer Moore — Officer Moore testifying that Sergeant Leroy was present and defendant's wife testifying Officer Moore was the only officer present. Neither party, however, called Sergeant Leroy to testify at trial.

Following imposition of judgment, defendant filed an MAR pursuant to N.C. Gen. Stat. § 15A-1414(b)(3). In the MAR defendant contended that, in violation of due process, he did not receive a fair and impartial trial because Officer Moore falsely testified that Sergeant Leroy provided backup during the stop. In support of his MAR, defendant attached affidavits of his counsel and Sergeant Leroy. Without an evidentiary hearing, the superior court denied defendant's MAR by order filed 24 July 2012. In the order, the court found "[t]hat the conflicting testimony as to whether or not Sgt. Leroy was at the scene of the stop was a question of fact for the jury to determine and further it was in the jury's discretion to determine the importance of that evidence in light of all other believable evidence in the case."

Now on appeal, defendant's final argument is that the trial court erred in denying his MAR without an evidentiary hearing.

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact

are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). However, "[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 challenges to [the court's] order.' " *State v. Jackson*, ___ N.C. App. ___, ___, 727 S.E.2d 322, 329 (2012) (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)) (alterations in original). Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review.

Citing N.C. Gen. Stat. § 15A-1420(c)(1) and *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998), defendant argues that it is clearly established that a defendant who files an MAR is entitled to an evidentiary hearing to determine disputed issues of fact. We disagree.

N.C. Gen. Stat. § 15A-1420(c) governs hearings on an MAR. As stated in *McHone*,

> [u]nder subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or *the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment.*

348 N.C. at 258, 499 S.E.2d at 763 (emphasis added). In *McHone*, the Court simply restated what is provided in the statute, "[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C. Gen. Stat. § 15A-1420(c)(2). The reasoning for not mandating an evidentiary hearing is clearly expressed in the commentary to N.C. Gen. Stat. § 15A-1420: "Obviously, it is unlikely that such an evidentiary hearing would be necessary on the immediate post-trial motion, made within 10 days as provided by G.S. § 15A-1414, and that is reflected in subdivision (c)(2)."

In the present case, the trial judge reviewed defendant's MAR made pursuant to N.C. Gen. Stat. § 15A-1414(b)(3) and the attached post-conviction affidavits. Based on all the evidence, the trial court determined

that defendant received a fair and impartial trial, received effective assistance of counsel, and none of defendant's rights were violated. We hold that disposing of the MAR without an evidentiary hearing was within the discretion of the trial judge. *See State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) ("[I]f a defendant files a motion for appropriate relief under N.C.G.S. § 15A–1414, the decision of whether an evidentiary hearing is held is within the sound discretion of the trial court."). Moreover, the trial judge did not abuse his discretion where the factual issue raised in the MAR could have been further litigated at trial.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err in failing to intervene in the State's closing argument *ex mero motu* and in denying defendant's motion to examine the Intoximeter source code. Furthermore, we affirm the order denying defendant's MAR.

No error; affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
ROBERT T. WALSTON, SR., DEFENDANT

No. COA12-1377

Filed 20 August 2013

1. Appeal and Error—preservation of issues—proffer of testimony—words of witnesses preferred over summary

An issue was preserved for appellate review where the trial court incorrectly denied a proffer of witness testimony and defense counsel gave a statement of what the testimony would have been. The words of the witnesses should go in the record rather than the words counsel thinks the witnesses might have used; however, in this case the trial court denied a proffer from the witnesses and counsel's offer of proof was sufficient to establish the essential content or substance of the excluded testimony.

2. Evidence—character—relevant—proper form—opinion

The trial court erred in a prosecution for sexual offenses against children by excluding testimony that defendant was respectful

around children. The testimony was relevant and was in the proper form for opinion testimony in that defendant sought to elicit opinion evidence rather than testimony of specific acts.

3. Evidence—character testimony—excluded—prejudice

Defendant was prejudiced in a prosecution for sexual offenses against children by the exclusion of testimony about his respectful, positive interactions with children. The prosecution occurred nearly two decades after the alleged events and the evidence presented a close case as to whether defendant was guilty.

4. Criminal Law—jury instructions—use of victims rather than alleged victims

In a prosecution for sexual offenses against children overturned on other grounds, the trial court erred in its instructions by using "victims" rather than "alleged victims." There were issues of fact as to whether the children (now adults) were victims of the charged offenses.

5. Statutes—effective date—superseding indictment

The amended version of N.C.G.S. § 8C-1, Rule 702 should be applied upon retrial of a prosecution for sexual offense against children that was reversed on other grounds. The amended rule applies to actions arising on or after 1 October 2011; in this case, original indictments were filed on 12 January 2009, but superseding indictments were filed on 14 November 2011. The superseding indictment annuls or voids the original indictment.

6. Evidence—prior crimes or bad acts—similarities—remoteness in time

The trial court did not abuse its discretion in a prosecution for sexual acts against children by admitting evidence of prior acts where the prior acts and the charged offenses were similar in defendant's access to the girls, the girls' relatively young ages at the time of the acts, and that the touching occurred while defendant was alone with the girls. Given the similarities in the incidents, the remoteness in time was not so significant as to mandate the exclusion of the evidence. As to prejudice, the trial court gave a limiting instruction.

Appeal by Defendant from judgments entered 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County. Heard in the Court of Appeals 21 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery for Defendant-Appellant.

McGEE, Judge.

Robert T. Walston, Sr. (Defendant) was indicted for offenses involving two sisters, E.C. and J.C., ranging from June 1988 to October 1989. In 1994, E.C. and J.C. were interviewed by "law enforcement and/or Social Services[.]" They did not report the incidents with which Defendant was later charged. E.C. and J.C. told each other of the incidents in January 2001, but they did not share details or specifics. They told their parents, but no one called law enforcement.

"[N]ear the end of 2008[,]" J.C. contacted law enforcement to report the offenses. The indictments were filed 12 January 2009, approximately two decades after the alleged events. Superseding indictments were filed 14 November 2011. At the time of trial, E.C. was twenty-nine years old, and J.C. was twenty-seven years old. Defendant was convicted on 17 February 2012 of one count of first-degree sex offense, three counts of first-degree rape, and five counts of indecent liberties with a child. Defendant appeals.

I. Character Evidence of Defendant's Respectful Treatment of Children

Defendant first argues the trial court erred in excluding testimony that Defendant was "respectful around children and interact[ed] in a positive way with children."

A. Preservation of the Error for Review

[1] We must first address whether the issue is preserved for our review. Counsel and the trial court evidently discussed "issues" regarding certain witnesses. This discussion was not recorded or transcribed. Counsel then presented arguments as to whether the trial court should admit Defendant's evidence "with regard to specific character traits of [Defendant]." Specifically, Defendant sought to introduce good character evidence of Defendant's respectful treatment of children. The trial court denied Defendant's request to make a "brief proffer" of evidence through witness testimony, stating: "I'm not going to allow that. I don't think I need to do a proffer on that."

Defendant filed a motion for appropriate relief with this Court on the same date that he filed his brief, arguing that his constitutional right to present a defense was denied when the trial court refused his request to make a proffer of evidence. Although Defendant stated in his MAR that his counsel "did not make a formal proffer of the testimony of these witnesses[,]" his counsel did make the following statement to the trial court:

> If I may, Judge, in the way of proffer rather than calling the witnesses and offering them later, if I might just offer, Your Honor, that it would have been [D]efendant's intention and in anticipation that I would have been asking Mr. Anthony Ralph, Mr. Jessie Walston, Timmy Walston, Bett Beasley, Jim Beasley, Molly Walston, Amelia Twiddy, Crystal Maqueda, Christina Purtee, Carolyn Ambrose, would have asked each and every one of those people this same series of questions about observing interactions with children. Based on my interviews each would say they have seen him in several different settings with numerous groups of children. I would have asked each of them if they had an opinion as to whether these allegations are consistent or inconsistent with his character for how he deals or treats children. Each of those individuals, Your Honor, based on my interviews, would have testified that they do have an opinion and that in their opinion these allegations are inconsistent with the caring, respectful way they have always seen him dealing with children, that that -- this is not part of his character and it is inconsistent with his character. There would be other witnesses to testify to that but hopefully that is enough to preserve our exception, Judge, and we'd ask the Court to accept that as our proffer and what that testimony would be.

"[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985); *see also State v. Mackey*, 352 N.C. 650, 660, 535 S.E.2d 555, 560 (2000). The "essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60.

" 'The practice of permitting counsel to insert answers rather than have the witness give them in the presence of the court should not be

encouraged.' " *Id.* (quoting *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974)). "The words of the witness, and not the words counsel thinks the witness might have used, should go in the record." *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60. "The better practice is to excuse the jury and complete the record in open court in the absence of the jury." *Id.* "While the principles are usually cited in situations where particular testimony of a witness already on the stand is excluded, they apply with equal vigor when the witness is not permitted to testify at all." *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60-61.

The trial court in *Simpson* denied the defendant's request "to have the assistant district attorney testify." *Simpson*, 314 N.C. at 370-71, 334 S.E.2d at 61. Counsel's offer of proof as to what the witness would have testified to was:

> His observations, if Your Honor please, are what I'm interested in, what he observed on the 13th of June 1983 and what he saw and how the defendant appeared to him; whether or not it would be the same as what's in the motion, Judge, I don't know.

Simpson, 314 N.C. at 371, 334 S.E.2d at 61 (emphasis removed). Our Supreme Court held the offer "insufficient to establish the 'essential content or substance' of the witness' testimony. Defense counsel himself admitted that he did not know what the prosecutor's testimony would be." *Id.*

The trial court's decision in the present case to deny a proffer of witness testimony is incorrect. The words of the witnesses should go in the record, not the words counsel thinks the witnesses might have used. *Willis*, 285 N.C. at 200, 204 S.E.2d at 36. Since the trial court denied a proffer from the witnesses, we have only the proffer from Defendant's counsel to review. The offer of proof, quoted above, was a specific forecast of what the testimony would be. Counsel did not express doubt as to the content of the testimony. Rather, he based his forecast on interviews with the witnesses. This fact indicates that counsel did not merely guess what the witnesses might say, but gave a reasonable forecast of the evidence. We hold that counsel's offer of proof is sufficient to establish the essential content or substance of the excluded testimony.

Because of this holding, the affidavits attached to Defendant's motion for appropriate relief are unnecessary to preserve this issue for review. We therefore deny Defendant's motion for appropriate relief and analyze the merits of Defendant's argument.

B. Analysis of the Merits

[2] Defendant argues that the trial court erred in excluding testimony that Defendant was respectful around children and interacted in a positive way with children. We agree.

i. Rule

"Generally, [e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" *State v. Banks*, 191 N.C. App. 743, 746, 664 S.E.2d 355, 358 (2008) (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)) (alterations in original) (internal quotation marks omitted). *See also State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988).

"However, an exception is provided for an accused, who may present evidence of a pertinent trait of his character in an attempt to prove he acted in accord with this trait." *Banks*, 191 N.C. App. at 746, 664 S.E.2d at 358. The exception harbors an important right of the accused to present evidence which tends to lessen the likelihood of the accused's guilt. *See* 1 Brandis & Broun on North Carolina Evidence § 88 (7th ed. 2011).

"[T]he use of the word 'pertinent,' in the context of Rule 404(a)(1), is 'tantamount to relevant.' " *Banks*, 191 N.C. App. at 746-47, 664 S.E.2d at 358 (quoting *Squire*, 321 N.C. at 547, 364 S.E.2d at 358).

> Thus, in determining whether evidence of a character trait is admissible under Rule 404(a)(1), the trial court must determine whether the trait in question is relevant; i.e., whether it would "make the existence of any fact that is of consequence to the determination of the action" more or less probable than it would be without evidence of the trait.

Banks, 191 N.C. App. at 747, 664 S.E.2d at 358.

An "accused must tailor his character evidence to a 'pertinent' trait, but the trait may be general in nature provided that it is relevant in the context of the crime charged." *Squire*, 321 N.C. at 548, 364 S.E.2d at 358. "The trial judge may, in his sound discretion, limit the number of character witnesses a defendant may call to the stand." *State v. McCray*, 312 N.C. 519, 537, 324 S.E.2d 606, 618 (1985).

In *McCray*, "the defendant was permitted to offer some evidence of his good character, but was not permitted to offer *all* of evidence which he was prepared to offer on this issue." *Id.* (emphasis in original). Our Supreme Court assumed *arguendo* that the exclusion of additional

character witnesses was error and concluded that "any possible error was harmless[.]" *Id.*

By contrast, in the present case, the trial court excluded all testimony of Defendant's character for respectful treatment of children. Defendant was charged with multiple counts of first-degree sex offense, first-degree rape, and indecent liberties with a child. The State cites *State v. Hoffman*, 95 N.C. App. 647, 383 S.E.2d 458 (1989), to support its argument that the testimony does not qualify for admission under Rule 404(a). The entire discussion of this issue in *Hoffman* is:

> [The defendant] also contends that the trial judge erred by not allowing [the] defendant's witnesses to testify that he had not molested their children and by not allowing several children to testify that he had not molested them. Such testimony was totally irrelevant. We have examined each exception upon which [the] defendant's assignment of error is based and conclude that the trial court did not err in excluding the testimony.

Hoffman, 95 N.C. App. at 648, 383 S.E.2d at 459.

This Court described the problem in *Hoffman*, not as a violation of Rule 404(a), but as a violation of N.C. Gen. Stat. § 8C-1, Rule 405(a) (on the proper form of character evidence). *See State v. Murphy*, 172 N.C. App. 734, 743, 616 S.E.2d 567, 573 (2005), *vacated on other grounds*, 361 N.C. 164, 696 S.E.2d 527 (2006). The testimony in *Hoffman* was evidently about the defendant's specific acts involving children.

Murphy is the only case interpreting this issue in *Hoffman*. In *Murphy*, the defendant sought to introduce testimony of "specific acts of nonviolence towards other children." *Murphy*, 172 N.C. App. at 743, 616 S.E.2d at 573. The Court recited the rule that, "where evidence of character or a trait of character is admissible under Rule 404, 'proof may be made by testimony as to reputation or by testimony in the form of an opinion.' " *Murphy*, 172 N.C. App. at 744, 616 S.E.2d at 573 (quoting Rule 405(a)). "Thus, elicitation of evidence regarding [the] defendant's character during direct testimony must have been accomplished via opinion or reputation testimony rather than specific instance testimony." *Murphy*, 172 N.C. App. at 744, 616 S.E.2d at 574.

The present case is distinguishable from *Hoffman* and *Murphy*. Defendant did not seek to elicit specific acts testimony. Rather, Defendant sought to elicit opinion evidence from several witnesses: "Each of those individuals, Your Honor, based on my interviews, would have testified

that they do have an opinion and that in their opinion these allegations are inconsistent with the caring, respectful way they have always seen him dealing with children[.]" Counsel forecast that the opinions would have been that the State's allegations were inconsistent with Defendant's character for respectful treatment of children.

Testimony of Defendant's character for respectful treatment of children is relevant because it has a tendency to make the existence of "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Evidence of character for respectful treatment of children tends to make the facts central to the charges, that Defendant committed, *inter alia*, first-degree statutory rape of a child, less probable than they would be without such evidence. Testimony of this character trait is therefore relevant and "pertinent." The offer indicates the evidence would have been in the proper form of opinion testimony, rather than testimony of specific acts or instances.

ii. Prejudice Analysis

[3] In *Banks*, where the defendant was charged with first-degree murder and felonious discharge of a firearm, the trial court excluded character evidence that the defendant was peaceful and law-abiding. This Court held that the exclusion was prejudicial because "the evidence presented a close case as to whether [the] defendant committed the homicide in self-defense." *Banks*, 191 N.C. App. at 747, 664 S.E.2d at 359. In evaluating the "closeness" of the case, this Court considered both the State's evidence and the defendant's evidence.

The evidence in the case before us also presents a "close case" as to whether Defendant committed the offenses. The charges were prosecuted approximately two decades after the alleged events. The State's case relied heavily on the testimony of E.C. and J.C. There were no other eye witnesses to the events described in the indictments, other than E.C. and J.C. Defendant testified in his defense and denied the allegations. Defendant also presented evidence that tended to undermine the assertions of E.C. and J.C. Considering the State's and Defendant's presentations, the evidence in this case is closely balanced. Thus, opinion testimony that Defendant treated children with respect could have affected the jury's determination of whether Defendant committed these offenses.

The trial court's exclusion of opinion testimony regarding Defendant's character for respectful treatment of children prevented Defendant from offering evidence of a pertinent character trait. Defendant demonstrated a reasonable possibility that, had the trial court not committed

this error, the result at trial would have been different. *See* N.C. Gen. Stat. § 15A-1443(a) (2011). Defendant was prejudiced by the error and is entitled to a new trial.

Because of the likelihood that the subsequent issues may recur during a new trial, we address Defendant's remaining arguments. *State v. Harris*, 149 N.C. App. 398, 404, 562 S.E.2d 547, 550 (2002).

II. Use of "Victim" in Jury Instructions

[4] Defendant next argues the trial court erred in identifying E.C. and J.C. as "victims," rather than "alleged victims" in its instructions to the jury. We agree in this case.

Defendant relies on *State v. Castaneda*, 196 N.C. App. 109, 674 S.E.2d 707 (2009), in which the trial court twice referred to an alleged accomplice as an "accomplice."

> "It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury; and, therefore, the court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

Castaneda, 196 N.C. App. at 117, 674 S.E.2d at 713 (quoting *State v. McLean*, 17 N.C. App. 629, 632, 195 S.E.2d 336, 338 (1973)). N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 "prohibit the trial court from expressing any opinion in the presence of the jury on any question of fact to be decided by the jury." *Castaneda*, 196 N.C. App. at 117, 674 S.E.2d at 713. In *Castaneda*, the sole issue of fact at trial was whether the defendant acted as an accomplice. This Court held that the trial court's use of "accomplice" was prejudicial error. *Castaneda*, 196 N.C. App. at 118, 674 S.E.2d at 713.

In the present case, the trial court denied Defendant's request to modify the pattern jury instructions from "victim" to "alleged victim" to avoid the implication that the trial court "has reached some conclusion." The issue of whether E.C. and J.C. were indeed the victims of the charged offenses was in dispute at trial. E.C. and J.C. testified as to several incidents of sexual assault, whereas Defendant presented evidence that there "were no signs of sexual assault" in 1994 and that an investigator did not pursue a physical examination because "[n]othing in the interview [of E.C. and J.C.] indicated there was any type of sexual

assault[.]" The issue of whether sexual offenses occurred and whether E.C. and J.C. were "victims" were issues of fact for the jury to decide.

In contending that the trial court's use of the term "victim" was not error, the State cites *State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988), *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), and *State v. Henderson*, 155 N.C. App. 719, 574 S.E.2d 700 (2003).

In *Allen*, this Court noted that, by using the term "victim," the trial court "was not intimating that [the] defendant had committed any crime." *Allen*, 92 N.C. App. at 171, 374 S.E.2d at 121. However, the use of the term "victim" in the case before us does intimate the trial court's belief that E.C. and J.C. were sexually assaulted. As discussed above, whether sexual offenses occurred was a disputed issue of fact for the jury to resolve. Whether Defendant was the perpetrator was not the sole issue of fact for the jury to determine, as presumably was the case in *Allen*. Because it is distinguishable, *Allen* does not conclusively determine the issue in the present case. By using the term "victim," the trial court resolved a disputed issue of fact that was for the jury to determine. The use of the word "victim" was therefore error.

In *Richardson*, cited by the State, this Court reviewed only for plain error because the defendant failed to object at trial. *Richardson* is distinguishable because Defendant in the present case objected repeatedly to the proposed instructions. Moreover, the Court found no prejudice in *Richardson* because the defendant was not convicted on charges for which the instructions contained the word "victim." *Richardson*, 112 N.C. App. at 67, 434 S.E.2d at 663.

In the case before us, Defendant was convicted of offenses for which the jury instructions contained the word "victim."

> [D]efendant has been charged with three counts of first degree rape. For you to find [D]efendant guilty of this offense the State must prove three things beyond a reasonable doubt.
>
> First, that [D]efendant engaged in vaginal intercourse with the victim. . . .
>
> Second, at the time of the acts alleged the victim was a child under the age of 13 years.
>
> And third, that at the time of the acts alleged [D]efendant was at least 12 years old and was at least four years older than the victim.

> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date [D]efendant engaged in vaginal intercourse with the victim, [J.C.], in [D]efendant's car and that at the time the victim was a child under the age of 13 years, and that [D]efendant was at least 12 years old and was at least four years older than the victim, it would be your duty to return a verdict of guilty.

The jury convicted Defendant of all three charges of first-degree rape. "It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect." *Castaneda*, 196 N.C. App. at 117, 674 S.E.2d at 713. The jury convicted Defendant of offenses for which the jury instructions contained error.

In *Henderson*, this Court rejected the argument that, because the "defendant was acquitted of 9 of the 13 charges brought against him[,]" the State's case was weak. *Henderson*, 155 N.C. App. at 723, 574 S.E.2d at 703. This Court concluded that the defendant failed to show prejudice. The Court does not explain how the defendant fails to show prejudice, but quotes a statement from *Richardson* that the North Carolina Conference of Superior Court Judges promulgated the pattern jury instructions used. *Henderson*, 155 N.C. App. at 723, 574 S.E.2d at 703-04. Our Supreme Court has held that the pattern jury instruction "has neither the force nor the effect of law[.]" *State v. Warren*, 348 N.C. 80, 119, 499 S.E.2d 431, 453 (1998). *Henderson* does not conclusively determine the issue because the balance of the evidence evidently was not as close as in the present case.

For the reasons discussed in Section I.B.ii of this opinion, we must conclude the error was prejudicial. The State's and Defendant's evidence were in equipoise, such that the jury reasonably might have reached a different verdict had this error not occurred.

III. Excluded Expert Testimony

[5] Defendant next argues the trial court erred in excluding expert testimony.

The State filed a motion *in limine*, seeking the suppression of Defendant's proposed expert testimony regarding "repressed" or "recovered" memories. The trial court excluded the testimony of the expert witness.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

> by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2011). The rule reflects recent amendments by the General Assembly. The amended Rule 702 applies to actions "arising on or after" 1 October 2011. 2011 N.C. Sess. Laws ch. 317, § 1.1; 2011 N.C. Sess. Laws ch. 283, § 4.2.

In *State v. Gamez*, ___ N.C. App. ___, ___ S.E.2d ___, 2013 WL 3663744 (16 July 2013), this Court recently held "the trigger date for applying the amended version of Rule 702(a) is . . . the date that the bill of indictment was filed." The indictments in the present case were originally filed on 12 January 2009. However, the superseding indictments were filed on 14 November 2011.

Gamez does not contemplate a superseding indictment. *Black's Law Dictionary* defines "supersede" as "annul, make void, or repeal by taking the place of[.]" *Black's Law Dictionary* (9th ed. 2009). The superseding indictment annuls or voids the original indictment. We hold that the "trigger date" is the date the superseding indictment was filed. Because there is no discussion of the amendments to Rule 702 in the record, it appears that the trial court applied the prior version of Rule 702. Should this issue recur upon retrial, we remand for application of the amended Rule 702.

IV. Evidence of Prior Acts

[6] Defendant next argues the trial court erred in admitting testimony under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). We disagree.

A. Summary of Prior Acts

The State offered testimony from K.B., a witness who testified that, when she was somewhere "between the ages of eight and ten, eight and nine[,]" and Defendant was "[a]pproximately 18, 19[,]" he took her for a ride on his motorcycle. Defendant was a neighbor of K.B. Defendant and K.B. were alone, and he drove down an unpaved "service road[.]" Defendant "came up behind [K.B.]." He "placed one of his hands on [her]

breast area over [her] shirt." "Then he reached the other hand down and started rubbing [her] genital area again on the outside of [her] clothing, kind of pulled [her] closer to him and pressed himself into [her] buttocks, lower back area." K.B. did not report the incident to anyone. K.B. was forty-one years old at the time of trial. Defendant moved *in limine* to exclude this evidence. The trial court admitted the testimony.

B. Summary of Alleged Acts

E.C. testified that Defendant's wife used to babysit E.C. and J.C. and that they would go to Defendant's house for the babysitting. When Defendant's wife was away from the house, Defendant told E.C. "that he needed to talk to [her]." Defendant picked up E.C. and put her on his lap. He "stuck his hands first underneath [her] shirt and [rubbed her] chest area." Defendant "went still down through the side buttons under [her] underwear and started rubbing the outside of [her] vagina." Then, Defendant "stuck his finger inside [her] vagina." Defendant told E.C. "that it was [their] secret and that if [she] told anyone that he would kill [her] mom and dad and [E.C. and J.C.] would have to live with him forever."

J.C. testified that she and E.C. went to Defendant's home for Defendant's wife to babysit them. On an occasion in which E.C. and J.C. were left alone with Defendant, Defendant called J.C. over. Defendant picked J.C. up and put her in his lap. Defendant "began rubbing the inside of [her] legs and rubbing [her] vagina through [her] pants." He carried J.C. to the bathroom and "stuck his penis in [her] vagina." Defendant told J.C. that "it was [their] little secret and that if [she] told that he would hurt [her] family or [she] would never see [her family] again." On another occasion, Defendant was alone with J.C. and drove her to the dead end of a gravel road. J.C. testified that Defendant put "his penis in [her] vagina at that time."

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Our Supreme Court "has been markedly liberal in admitting evidence of similar sex offenses by a defendant." *Id.*

"Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (internal quotation marks omitted). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre." *Id.* (internal citation and quotation marks omitted).

The acts and the charged offenses are similar in: Defendant's access to the girls: in the prior act, by living down the street from the girl, and in the charged cases, by the girls being left in the care of Defendant and his wife; the girls' relatively young ages at the time of the acts; and that the touchings occurred while Defendant was alone with the girls. These similarities are sufficient to support the State's theory of Defendant's plan or scheme.

As to temporal proximity, the prior acts occurred approximately nine to ten years before the charged acts occurred. "Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes." *Beckelheimer*, 366 N.C. at 132-33, 726 S.E.2d at 160. Our Supreme Court in *Beckelheimer* relied on *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994) (holding 404(b) evidence admissible despite eight-year lapse). *Beckelheimer*, 366 N.C. at 132-33, 726 S.E.2d at 160. Given the similarities in the incidents, the remoteness in time here was not so significant as to mandate the exclusion of the evidence of the prior acts.

As to the Rule 403 prejudice determination, the trial court gave a limiting instruction to the jury that evidence

> is about to be received tending to show that [Defendant] engaged in sexual activity with [K.B.]. This evidence is being received solely for the purpose of showing that [D]efendant had a motive for the commission of the crime charged in this case, that [D]efendant had the intent which is a necessary element of the crime charged in this case, and there existed in the mind of [D]efendant a plan, scheme, system or design involving the crime charged in this case or that [D]efendant had the opportunity to commit the crime.

The trial court instructed the jury that if it believed "this evidence [the jury] may consider it but only for the limited purpose for which it [was]

received." Although Defendant contends the trial court did not give the same careful consideration to Defendant's objection that the trial court in *Beckelheimer* apparently afforded the defendant's objection, we cannot conclude that the trial court abused its discretion in admitting this evidence.

V. Conclusion

First, Defendant adequately preserved for our review the issue regarding excluded good character evidence. The trial court erred in excluding the testimony of these witnesses, and this error was prejudicial to Defendant. Second, the use of the word "victim" in the jury instructions was prejudicial error in this case. Third, should the issue regarding expert testimony recur upon retrial, we remand for application of the amended N.C.R. Evid. 702. Fourth, the trial court did not abuse its discretion in admitting N.C.R. Evid. 404(b) evidence regarding prior bad acts with K.B.

New trial.

Judges STEPHENS and HUNTER, JR. concur.

DAVID A. TYLL, PLAINTIFF
v.
MICHELLE WILLETS, DEFENDANT

No. COA13-105

Filed 20 August 2013

1. Jurisdiction—subject and personal—no contact order

The trial court had subject matter and personal jurisdiction to enter a no contact order. N.C.G.S. § 50C-7 grants the trial court authority to issue a no-contact order and defendant answered plaintiff's complaint without raising personal jurisdiction.

2. Domestic Violence—no contact order—definition of victim—sibling—no evidence of living together

The trial court did not err by finding that defendant, plaintiff's sister, is a person who may be a victim for purposes of a no contact order. The statutes provide a method of obtaining a no-contact order against another person when the relationship is not romantic, sexual, or familial, but a sibling relationship standing alone is not

included under the definitions. The record in this case did not disclose that plaintiff and defendant have ever lived together or been household members.

3. Domestic Violence—no contact order—no statutory ground to support

The trial court erred by concluding that plaintiff was entitled to issuance of a no-contact order where there was no evidence of a statutory ground to support the order. Plaintiff's claim was based entirely upon harassment, but, even if defendant's actions constituted harassment, plaintiff did not allege any facts sufficient to sustain a finding that defendant caused plaintiff to suffer substantial emotional distress.

Appeal by defendant from order entered 11 July 2012 by Judge Joe Buckner in District Court, Orange County. Heard in the Court of Appeals 22 May 2013.

Michelle Willets, pro se defendant-appellant.

No appellee brief filed.

STROUD, Judge.

Defendant appeals order requiring she have no contact with plaintiff. For the following reasons, we reverse.

I. Background

"HAPPY FAMILIES ARE ALL ALIKE; every unhappy family is unhappy in its own way." Leo Tolstoy, *Anna Karenina* 3 (Melanie Hill & Kathryn Knight eds., Constance Garnett trans., 2005) (1875). The parties to this case are members of an unhappy family. Although the reasons for their unique unhappiness are not clear from the record before us, this case is one of the results. Plaintiff appears to be defendant's brother; from the record, they share the same mother. Without going into the sordid details, the record shows that this family is embroiled in a long-standing dispute about various personal issues. They have been involved in at least one other lawsuit involving a no-contact order related to these matters, wherein plaintiff obtained an order against defendant's "partner,"[1] Mr. Joey Berry.

1. The complaint refers to Mr. Berry as defendant's "partner[,]" so we shall as well, but from the record it appears he is defendant's husband and thus plaintiff's brother-in-law.

On or about 8 June 2012, plaintiff filed a complaint requesting a no-contact order for stalking or nonconsensual sexual conduct ("no-contact order") against defendant. Plaintiff alleged that

> [o]n May 23, 2012, the Honorable Judge Buckner ordered Joey Berry not to have contact with any members of my family, and to cease stalking and harassing us (case # 12 CV 000755) based on the numerous threatening emails he sent to me, my wife, my mother and my employer.
>
> As expected, his partner, Michelle Willets, is continuing the harassment through libel emails to my employer and mother.

Plaintiff then provided details and exhibits regarding defendant's "harassment[,]" including defendant's emails to his employer.

Defendant answered plaintiff's complaint, admitting some allegations and denying others. On 11 July 2012, the trial court entered a no-contact order against defendant finding that "defendant failed to . . . appear at this hearing and the allegations in the complaint are sufficient to justify a no-contact order for stalking or nonconsensual sexual conduct." Defendant appeals.

II. No-Contact Order

Defendant's arguments to support her claim that the trial court erred are confusing and illogical, but then, so is plaintiff's complaint. We recognize that defendant has appealed *pro se*, but the rules of this Court apply equally to *pro se* litigants. *See Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999) ("Furthermore, these rules[, the Rules of Appellate Procedure,] apply to everyone -- whether acting *pro se* or being represented by all of the five largest law firms in the state."). We will consider defendant's arguments to the extent we are able to discern them, as some do have merit.

A. Jurisdiction

[1] Defendant's brief generally challenges the trial court's jurisdiction. "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Cunningham v. Selman*, 201 N.C. App. 270, 281, 689 S.E.2d 517, 524 (2009) (citation and quotation marks omitted). In this case, North Carolina General Statute § 50C-7 grants the trial court authority to issue a no-contact order, so the trial court had subject matter jurisdiction. *See* N.C. Gen. Stat. § 50C-7 (2011) (stating that a trial court may issue a permanent civil no-contact order). As to

personal jurisdiction, defendant answered plaintiff's complaint without raising this issue, thus the trial court also had personal jurisdiction over defendant. *See* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2011) ("A defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof[.]"). As the trial court had subject matter and personal jurisdiction to enter the no-contact order, we next consider the order itself, as best we can, based upon defendant's brief.

B. North Carolina General Statute § 50C-2

Defendant contests various portions of the trial court's no-contact order. Essentially, defendant contends that the trial court erred in finding that "the allegations in the complaint are sufficient to justify a no-contact order[.]"

> [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. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, ___ N.C. App. ___, ___, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted).

North Carolina General Statute § 50C-2(a)(1) provides that

> An action is commenced under this Chapter by filing a verified complaint for a civil no-contact order in district court or by filing a motion in any existing civil action, by any of the following:
>
> (1) A person who is a victim of unlawful conduct that occurs in this State.

N.C. Gen. Stat. § 50C-2(a)(1) (2011).

Therefore, in order for a no-contact order to be issued, there must be (1) "a victim" and (2) "unlawful conduct[.]" *Id.* Both "victim" and "unlawful conduct" are defined within North Carolina General Statute Chapter 50C, although not all of the terms which are necessary for the analysis of this claim are so defined. *Id.*; see N.C. Gen. Stat. § 50C-1 (7)-(8) (2011).

1. Victim

[2] A "[v]ictim" is "[a] person against whom an act of unlawful conduct has been committed by another person not involved in a personal relationship with the person as defined in N.C. Gen. Stat. § 50B-1(b)." N.C. Gen. Stat. § 50C-1(8) (2011). North Carolina General Statute § 50B-1(b) defines "personal relationship" as

> a relationship wherein the parties involved:
>
> (1) Are current or former spouses;
>
> (2) Are persons of opposite sex who live together or have lived together;
>
> (3) Are related as parents and children . . . or as grandparents and grandchildren . . . [;]
>
> (4) Have a child in common;
>
> (5) Are current or former household members; [or]
>
> (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship.

N.C. Gen. Stat. § 50B-1(b) (2011).

Thus, North Carolina General Statute § 50C-1 incorporates the definitions of "personal relationship" from North Carolina General Statute Chapter 50B and *excludes* them from the category of relationships upon which a Chapter 50C no-contact order can be premised. *See* N.C. Gen. Stat. § 50C-1(8). In doing so, Chapter 50C provides a method of obtaining a no-contact order against another person when the relationship is not romantic, sexual, or familial. *See* N.C. Gen. Stat. §§ 50B-1(b), 50C-1(8). But the sibling relationship, standing alone, is not included under the definitions in North Carolina General Statute § 50B-1(b). *See* N.C. Gen. Stat. § 50B-1.

Although it appears clear from the record that plaintiff and defendant are brother and sister, the record does not disclose that they have ever "lived together" or have been "household members[.]" N.C. Gen. Stat. § 50B-1(b)(2), (6). Defendant does challenge the plaintiff's entitlement to a no-contact order in her answer by her allegation that she and plaintiff were "former members of the same household[,]" but defendant failed to either sign or verify her answer. *See generally Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) ("There is nothing in the rules which precludes the judge from considering a verified

answer as an affidavit in the cause." (citation, quotation marks and brackets omitted)). We cannot assume that plaintiff and defendant have actually ever lived together in the absence of any evidence.

We realize that plaintiff and defendant, at some point, most likely did live in the same household, but not all biological brothers and sisters do. Thus, nothing in the record before us -- a record which is certainly lacking in many regards -- appears to support defendant's argument that plaintiff is not entitled to a no-contact order because he cannot be a "victim[.]" *See* N.C. Gen. Stat. §§ 50B-1(b), 50C-1(8), 50C-2(a)(1). We therefore cannot find that the trial court erred by finding that defendant is a person who may be a "victim[.]" *See* N.C. Gen. Stat. §§ 50C-1(8), 50C-2(a)(1).

2. Unlawful Conduct

[3] As noted above, there is a second requirement for issuance of a no-contact order: the defendant must commit "unlawful conduct[.]" N.C. Gen. Stat. § 50C-2(a)(1). This term incorporates many other terms which are defined by statute. *See*, *e.g.*, N.C. Gen. Stat. §§ 14-277.3A(b)(2), 50C-1(6)-(7) (2011). North Carolina General Statute § 50C-1(7) defines "[u]nlawful conduct" as "[t]he commission of . . . [n]onconsensual sexual conduct . . . [or] [s]talking." N.C. Gen. Stat. § 50C-1(7). As plaintiff does not allege nonconsensual sexual contact, we must decide whether defendant stalked plaintiff. *See id.*

"[S]talking" is defined as

> [o]n more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat. § 50C-1(6) (2011). There are no specific allegations that defendant has "follow[ed]" or endangered plaintiff's "safety" or that of plaintiff's "immediate family or close personal associates[,]" so plaintiff's

claim is based entirely upon "harass[ment]" and "substantial emotional distress" placing plaintiff "in fear of . . . continued harassment[.]"[2]

Even if we assume *arguendo* that defendant did at least "harass" plaintiff in the sense that her communications were "annoying" or "pestering" to plaintiff, *see Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005), plaintiff must also prove that defendant either (1) intended to place plaintiff "in reasonable fear" for his or his family's safety or (2) intended to and in fact caused plaintiff "to suffer substantial emotional distress[.]" N.C. Gen. Stat. § 50C-1(6)(b). Neither North Carolina General Statutes Chapter 50B or 50C define "substantial emotional distress[;]" however, North Carolina General Statute § 14-277.3A, entitled "[s]talking" defines "[s]ubstantial emotional distress" as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4).

Again, the record leaves us with just the allegations of plaintiff's complaint. Plaintiff's specific allegations are:

> 1. May 23rd, 9:19am, during the previously mentioned hearing [, referring to the proceeding against Joey Berry,] Michelle Willets sent an email to my employer stating, "I am not sure why David is encouraging all the potential negative, as outlined in that email [May 7th, by Joey Berry] on himself and the school…" (see attached emails dated May 23rd and May 7th)
>
> 2. May 25th, Michelle Willets stated in an email to my mother that, "This restraining order didn't change Joey's nature at all. It just means that he can't warn David and Jenny about any possible problems." (see attached email dated May 25th)

---

2. North Carolina General Statute § 14–277.3A(b)(2) defines "[h]arasses or harassment" as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14–277.3A(b)(2). This Court has previously noted that "[s]everal of these words are of common usage and their plain meaning should be given. 'Torment' is defined as 'to annoy, pester, or harass.' 'Terrorize' is defined as 'to fill or overpower with terror; terrify.' " *State v. Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005) (citations omitted). Unfortunately, these definitions are recursive, as "harass" is statutorily defined as "torments, terrorizes, or terrifies" while the definition of "[t]orment" is "harass" and "terrorize" is defined as to "terrify." N.C. Gen. Stat. § 14-277.3A(b)(2); *Watson*, 169 N.C. App. at 377, 610 S.E.2d at 477. We will not seek to untangle this definitional Gordian Knot.

3. May 29th, our lawyer, Ann Marie Vosburg, sent Michelle Willets a letter on our behalf stating our desire for no contact with her. It stated, "Any contact from you to them or to any individuals regarding them, and especially to any employers of either of them will be perceived as harassment and they will be forced to seek legal action against you." (see attached letter dated May 29th)

4. June 7th, Michelle Willets sent a lengthy and defamatory email (see attached, dated June 7th) to my employer, as previously threatened by Joey Berry in the attached email dated May 7th. She carries out Joey Berry's previous threat to share "deeply personal information" that "may even call into question David's fitness to be around children (much less supervise them)."

5. In the June 7th email, Michelle Willets references, "struggling on whether to contact Social Services based on this concern and others." While she has no grounds for such an intervention, we see this statement as an intended threat to our family, and seek relief from her continued harassment.

6. I am concerned that Michelle Willets and Joey Berry will continue to attempt to torment and harass us through any means possible, given statements by them such as, "This (contacting my employer) is the tip of the iceberg of what we are willing to do." (May 7th phone conversation with David Tyll)

7. Since Michelle Willets has disregarded our request for no contact, and since she clearly is partnered with Joey Berry in the effort to harass and defame me, I beg the court to put this order in place for the mental, physical, and emotional well being of my entire family.

Plaintiff included two emails from defendant as attachments.

Even if defendant's actions were "annoying" to plaintiff and thus constituted "harassment," plaintiff has not alleged any facts sufficient to sustain a finding that defendant caused plaintiff "to suffer substantial emotional distress[.]" N.C. Gen. Stat. § 50C-1(6)(b); *see* N.C. Gen. Stat. § 14-277.3A(b)(2), (4); *Watson*, 169 N.C. App. at 337, 610 S.E.2d at 477. The allegations of plaintiff's complaint actually come closer to a claim

for defamation than a claim for "stalking" via "harassment," *see* N.C. Gen. Stat. §§ 14–277.3A(b)(2), 50C-1(6), but even if we assume that defendant has "defamed" plaintiff, Chapter 50C provides no remedy for defamation.[3] The "threats" of which plaintiff complains are clearly not threats of physical harm but instead are threats to make statements about plaintiff to various others, including plaintiff's employer and the Department of Social Services. Defendant's statements as alleged by plaintiff are comparable to those in *Ramsey v. Harman*, where this Court noted that "the statute does not allow parties to implicate and interject our courts into juvenile hurls of gossip and innuendo between feuding parties where no evidence of any statutory ground is shown to justify entry of a no-contact order." 191 N.C. App. 146, 151, 661 S.E.2d 924, 927 (2008). Accordingly, plaintiff did not present any evidence upon which the trial court could properly conclude that defendant "stalked" plaintiff, and therefore the trial court erred in concluding that plaintiff was entitled to issuance of a no-contact order. *See* N.C. Gen. Stat. §§ 50C-1(6)-(7), 50C-2(a)(1).

III. Conclusion

For the foregoing reasons, we reverse.

REVERSED.

Judges HUNTER, Robert C. and ERVIN concur.

3. We do not suggest that defamatory comments could never be a part of a pattern of harassment, but in this case, plaintiff's complaint does not support such a claim.

WELLONS v. WHITE

[229 N.C. App. 164 (2013)]

FRANCES LEANNE WELLONS, PLAINTIFF
v.
WILLIAM ZACHARY WHITE, DEFENDANT
v.
JOHN F. WELLONS, AND WIFE, BOBBIE B. WELLONS, INTERVENORS

No. COA 12-1205

Filed 20 August 2013

1. Child Visitation—standing—grandparents—show cause motion

The trial court did not err in a child custody case by declining to dismiss the grandparents' show cause motion for lack of standing. The grandparents had standing to pursue visitation rights because there was an ongoing custody dispute and the trial court had jurisdiction to award them visitation. Thus, the grandparents later had standing to enforce their visitation rights through a show cause motion.

2. Jurisdiction—child custody—grandparent visitation—law of the case doctrine—collateral attack

Based on the law of the case doctrine and the prohibition against collateral attacks on underlying judgments, the Court of Appeals did not have jurisdiction to review defendant father's argument in a child custody appeal that the trial court erred by granting the grandparents visitation.

3. Contempt—civil—purge

The trial court erred in a child custody case by finding defendant father in civil contempt of court. The court failed to clearly specify what defendant could and could not do to purge himself of contempt.

Appeal by defendant from order entered 5 July 2012 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 27 February 2013.

Rice Law, PLLC, by Richard Forest Kern and Mark Spencer Williams, for defendant-appellant.

J. Albert Clyburn for intervenors-appellees.

HUNTER, JR., Robert N., Judge.

William Zachary White ("Mr. White") appeals a trial court order: (i) denying his motion to dismiss; (ii) holding him in civil contempt; (iii) granting grandparent visitation; and (iv) rejecting his constitutional challenge. Upon review, we affirm in part, dismiss in part, and reverse as to contempt.

I. Facts & Procedural History

On 24 July 2003, Mr. White and Frances Leanne Wellons ("Ms. Wellons") married. Mr. White served as a Marine Corps Lance Corporal. On 4 April 2005, the couple had a son ("the child"). Given Mr. White's active military service, the child lived with Ms. Wellons in Alamance County immediately after his birth. In June 2005, Ms. Wellons and the child moved to New Hanover County to live with Ms. Wellons' parents, John Wellons and Bobbie Wellons (the "Grandparents").[1]

On 13 December 2005, Mr. White and Ms. Wellons divorced. Mr. White's mother acted as his attorney-in-fact for the divorce proceedings because Mr. White was serving in Iraq. After the divorce, the child continued to live with Ms. Wellons at the Grandparents' New Hanover County home.

A. 4 April 2006 Child Custody Order

On 27 January 2006, Ms. Wellons filed a complaint against Mr. White in New Hanover County District Court seeking sole custody and child support. The complaint noted that Mr. White still served in Iraq. A few weeks after Ms. Wellons filed the complaint, Mr. White returned to the United States and lived at the barracks of Camp Lejeune in Jacksonville.

On 4 April 2006, the district court entered an order granting Ms. Wellons and Mr. White "joint legal custody of the minor child." Since Mr. White still lived in the Marine Corps barracks, the district court determined he had no "suitable residence to have visits with the child overnight."[2] Therefore, the district court gave Ms. Wellons primary custody. Because Mr. White planned to leave the Marine Corps in December 2006, the district court allowed Mr. White to gain increased custody when he "has set up a residence suitable to care for the minor child." The district court also ordered Mr. White to pay $820 per month in child support. Lastly, the district court determined the order resolved all pending

1. Although the Grandparents' primary residence is in New Hanover County, they also own a house in Burlington. Nothing in the record indicates whether Ms. Wellons or the child ever lived at the Grandparents' Burlington home.

2. The district court also expressed concern over Mr. White's driving while impaired ("DWI") conviction in Virginia.

issues between the parties. After this order, the child continued to live with Ms. Wellons at the Grandparents' home in New Hanover County.

B. 30 November 2006 Temporary Child Custody Order

On 3 August 2006, the Grandparents filed a motion to intervene, seeking "temporary custody of the minor child." *See* N.C. Gen. Stat. § 50-13.1(a) (2011) ("Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child.").

The Grandparents first argued they already had *de facto* custody of the child because he had resided at their home since June 2005. The Grandparents further contended "neither [Ms. Wellons] nor [Mr. White] are fit and proper persons to have the primary care of the minor child." Specifically, they alleged: (i) Ms. Wellons was currently receiving inpatient treatment for mental illness; (ii) Mr. White "ha[d] not yet exercised visitation alone with the minor child without the aid or assistance of either his mother or girlfriend since the entry of the April 2006 Custody Order;" (iii) Mr. White cannot provide a "stable home environment" for the child; and (iv) Mr. White willfully withheld custody from Ms. Wellons.

On 9 August 2006, Mr. White moved to dismiss the Grandparents' motion because they failed to allege sufficient facts supporting their claim. *See* N.C. R. Civ. P. 12(b)(6). Mr. White also argued he never acted inconsistently with his constitutionally-protected parental status.

Although a hearing was held in August 2006, the district court did not enter a written temporary child custody order until 30 November 2006. The order stated the Grandparents "have been allowed to intervene in this action pursuant to Rule 24 of the North Carolina Rules of Civil Procedure."[3]

The order also granted Mr. White primary custody and suspended his monthly child support payments. Still, it granted Ms. Wellons visitation every other weekend at the Grandparents' New Hanover County home. The order elaborated that if Ms. Wellons did not exercise weekend visitation, the Grandparents could still exercise visitation every other weekend at their home. The order required Mr. White, Ms. Wellons, and the Grandparents to select an exchange "point equidistant between the residences of the parties."

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3. The district court mistakenly failed to actually enter an order allowing intervention. The district court entered an order correcting this oversight on 25 November 2009, *nunc pro tunc*, 7 August 2006.

After this order, the child first lived with Mr. White and his new girlfriend Christina Ross ("Ms. Ross") in Jacksonville.[4] The record does not indicate whether Mr. White still lived in the Marine Corps barracks at this time. Mr. White left the Marine Corps on 9 December 2006 and moved to Greensboro with Ms. Ross and the child.

C. 15 December 2006 Consent Custody Order

On 14 December 2006, Ms. Wellons filed a motion for emergency custody because the previous orders did not establish a holiday visitation schedule. Ms. Wellons argued that given her animosity with Mr. White's girlfriend, the parties would not otherwise agree to a holiday schedule.

This hostility arose from an incident on 10 December 2006. Ms. Wellons still lived with her parents and exercised visitation at the Grandparents' home. On 10 December 2006, Mr. White sent Ms. Ross to pick up the child at a scheduled custody exchange. Ms. Wellons arrived late to the exchange because the child had napped longer than expected.[5] When Ms. Wellons got to the exchange place, Ms. Ross yelled at Ms. Wellons for her tardiness. The conflict escalated, and Ms. Wellons asked a gas station attendant to call 911.

On 15 December 2006, the district court granted Ms. Wellons and the Grandparents extended holiday visitation. The district court also required Ms. Ross not to attend any more custody exchanges. Finally, the district court again retained ongoing jurisdiction over the case.

D. 28 December 2007 Child Custody Order

On 6 March 2007, Mr. White filed a motion in the cause and a showing of changed circumstances seeking sole custody and child support from Ms. Wellons.[6] *See* N.C. Gen. Stat. § 50-13.7(a) (2011). On 21 May 2007, Ms. Wellons filed a reply asking the court to: (i) dismiss and deny Mr. White's request; (ii) return primary custody to her; (iii) reinstate Mr. White's child support obligations; and (iv) grant her attorneys' fees. The matter came

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4. Based on the trial court's announcement of its decision at the hearing, the child actually resided with Mr. White and Ms. Ross since August 2006.

5. Ms. Wellons' father drove her to the exchange point.

6. Mr. White labeled his motion as "Answer and Counterclaim." Since the document was filed more than a year after the complaint, the district court appears to have treated it as a motion in the cause and a showing of changed circumstances. *See* N.C. Gen. Stat. § 50-13.7(a) (2011) ("[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."). Therefore, we treat it as such on appeal.

on for hearing during the 13 September, 14 September, and 2 November 2007 Family Court Sessions of New Hanover County District Court. On 28 December 2007, the district court issued a custody order superseding all previous orders. The order made the following factual findings.

Since the 30 November 2006 order, Ms. Wellons had lived at her parents' home in New Hanover County. She did not pay rent or utilities. For 26 days from 12 July 2006 to 7 August 2006, Ms. Wellons was involuntarily committed by her parents for mental illness at The Oaks at New Hanover Regional Medical Center. After her release, she did not take her medication or comply with recommended follow-up treatment. On 15 August 2006, she also tested positive for marijuana in a drug screen at a follow-up hospital visit.

Ms. Wellons was again involuntarily committed for nine days from 22 August 2006 to 31 August 2006 at Cherry Hospital in Goldsboro. During that time, Dr. Jerry Sloan, a psychologist at Cherry Hospital, diagnosed Ms. Wellons with "Bipolar 1 Disorder, single manic episode, severe, with psychotic features; Mixed Personality Disorder, antisocial and hysterical traits; and possibly a brief psychotic disorder." Dr. Sloan determined "[Ms. Wellons] does not appreciate the full extent of her symptoms that caused her hospitalization."

The district court also examined certain photographs Mr. White offered into evidence. These photographs, posted on various websites, showed Ms. Wellons at bars on dates when she had custody of the child. The record does not indicate whether the Grandparents supervised the child on these dates. Ms. Wellons contended the photographs were part of her job in nightlife marketing; however, the district court determined that "due to the number of pictures, the various activities that were depicted in the pictures, and the pictures being found at websites other than [her company's website]," Ms. Wellons' explanation was not credible.

The district court further noted that Ms. Wellons was convicted of DWI on 27 April 2006. Although the DMV revoked her driver's license after her DWI conviction, she continued to drive with the child as a passenger.

The district court then described how Mr. White lived with his girlfriend in a safe neighborhood where the child had his own bedroom. Mr. White had enrolled in Guilford Technical Community College and lived near his extended family. His family cared for the child while he was at school and work.[7] The district court also mentioned that Ms. Ross had full-time employment.

7. Later, in early 2010, Mr. White became a police officer with the Greensboro Police Department.

At the 13 September 2007 hearing, the Grandparents dismissed their initial 3 August 2006 request for primary custody. Instead, they told the court they now only sought "grandparent visitation privileges with the minor child." At the hearing, Mr. White, Ms. Wellons, and the Grandparents also stipulated that "a material change in circumstances had occurred as a result of the Plaintiff's involuntary commitments."

Based on its factual findings, the district court determined Mr. White was a "fit and proper person to continue to have the primary custody of the minor child, and it [was] in the best interest of the minor child that . . . permanent primary custody remain with [Mr. White]."

Still, the district court granted Ms. Wellons: (i) weekend visitation privileges every two weeks during the school year; (ii) alternating week-long visitation during the summer months; and (iii) alternating holiday visitation. It also granted the Grandparents visitation concurrent with Ms. Wellons' visitation. The district court stated the Grandparents "may exercise their visitation privileges in the event . . . [Ms. Wellons] is not able to be present" at scheduled visitations. It further elaborated that if Ms. Wellons moved from the Grandparents' home, the Grandparents could "file an appropriate Motion for the Court to establish their specific grandparent visitation privileges with the minor child."

E. Other Interim Orders and Motions

On 22 December 2008, Ms. Wellons filed a motion to show cause why Mr. White was not in contempt. Ms. Wellons alleged Mr. White violated the 28 December 2007 order by refusing to allow her visitation during school holidays. Although a hearing was scheduled for 16 February 2009, the record does not indicate the outcome of this motion.

On 24 July 2009, Mr. White filed a motion in the cause to modify Ms. Wellons' visitation. In his motion, Mr. White noted Ms. Wellons was now living with a boyfriend in New Hanover County. He argued the child should not visit Ms. Wellons because her smoking exacerbated the child's asthma.

On 3 March 2010 the parties resolved the issue by entering into a memorandum of consent judgment and order. This order modified the 28 December 2007 order to incorporate certain parenting guidelines. Because Ms. Wellons had recently moved to Burlington for work, the order also modified the custody exchange schedule to require Ms. Wellons and Mr. White to deliver the child directly to each other's residence, rather than meeting halfway between the residences.

On 11 May 2010, Ms. Wellons and the Grandparents filed a motion in the cause to change custody plans because Ms. Wellons had moved back to the Grandparents' home. On 27 July 2010, the district court modified the 28 December 2007 order and retained ongoing jurisdiction.

F. 1 April 2011 *Ex Parte* Order

On 1 April 2011, Mr. White filed: (i) a motion to modify the 28 December 2007 custody order based on a substantial change in circumstances; and (ii) a motion for an emergency *ex parte* child custody order. Mr. White alleged Ms. Wellons and the Grandparents neglected the child by creating "an injurious and dangerous environment for the minor child when he visits with his mother."

On 4 February 2011, Mr. White's wife (Mrs. White, formerly Ms. Ross) noticed a bruise on the child and reported Ms. Wellons to the Guilford County Department of Social Services ("Guilford County Social Services" or "Social Services") for abuse. When Social Services met with Ms. Wellons, she said the child received the bruise while playing with another child. On 6 February 2011, Mr. White's wife reported a new scratch on the child. Ms. Wellons said the child received the scratch while playing with a neighbor's dog. On 8 February 2011, a social worker met with the child and believed Mr. White's wife coached the child on what to say during the interview.

On 20 February 2011, Mr. White's wife reported that the child did not appear to have received a bath while visiting Ms. Wellons and the Grandparents. On 7 March 2011, Mr. White reported to Guilford County Social Services that Ms. Wellons had previously been involuntarily committed for mental illness. On 15 March 2011, Social Services received a report alleging Ms. Wellons socialized with heroin users. Throughout all these events, although Ms. Wellons still lived with her parents, the record does not indicate the Grandparents' supervisory role over the child.

Ultimately, Social Services determined Ms. Wellons neglected, but did not abuse, the child. It later specified that: (i) Ms. Wellons did not cooperate with the Social Services investigation; (ii) Ms. Wellons refused to enact a safety plan or follow through with recommended services; and (iii) the Grandparents refused to enact a safety plan. Resultingly, Social Services recommended the child not have visitation with either Ms. Wellons or the Grandparents. It also recommended Ms. Wellons complete a parenting evaluation and substance abuse assessment.

On 1 April 2011, the district court entered an *ex parte* order granting Mr. White temporary sole custody. Until future hearing, the district

court granted the Grandparents visitation only as permitted by Guilford County Social Services. The district court did not grant Ms. Wellons any temporary visitation privileges. Lastly, the *ex parte* order allowed Mr. White to request "the Sheriff of New Hanover County or any law enforcement officer into whose hands a copy of this Ex Parte Order of Temporary Custody shall come, . . . to take such steps as may be necessary to physically secure the body of the child, and return that child to the actual custody of [Mr. White]."

G. 15 August 2011 Custody Order

A subsequent hearing occurred during the 15 April 2011 session of New Hanover County District Court. At the end of the hearing, the district court announced it was dissolving the *ex parte* order as to the Grandparents on the condition that they not allow Ms. Wellons to contact the child. The district court also required that the Grandparents' next weekend visit occur in Burlington, but that all other visits occur as outlined in the previous orders.

On 19 April 2011, a Guilford County social worker prepared a safety assessment requiring all the Grandparents' future visits to occur in Burlington to prevent Ms. Wellons from contacting the child. Because the Grandparents believed this assessment contradicted the district court's 15 April 2011 requirements, they refused to execute it.

Over the next several months, the parties disputed how to draft the written order. On 15 August 2011, the trial court resolved the disputes by entering a written order modifying the 1 April 2011 *ex parte* order. The new order: (i) dissolved the 1 April 2011 *ex parte* order as to the Grandparents (allowing them full visitation under the 28 December 2007 order); (ii) instructed the Grandparents not to allow Ms. Wellons to have any contact with the child; and (iii) granted the Guilford and New Hanover County Departments of Social Services exclusive authority to authorize and supervise Ms. Wellons' visitation with the child. The court retained ongoing jurisdiction for future orders.

H. 5 July 2012 Contempt Order

On 22 September 2011, the Grandparents filed a motion to show cause why Mr. White was not in contempt.

They referenced a particular incident that occurred on 27 June 2011. On that date, Mr. White met with Guilford County Social Services for a Child Family Team Meeting. At the meeting, he told Social Services: (i) the child was exposed to drugs and alcohol when he visited the

Grandparents; (ii) the Grandparents let Ms. Wellons contact the child; (iii) Ms. Wellons had severe mental problems; and (iv) Ms. Wellons was "on a heroin binge." As a result, Guilford County Social Services desired to suspend the Grandparents' visitation.

That day, the child was visiting the Grandparents in Burlington. After the meeting with Social Services, Mr. White used the 1 April 2011 *ex parte* order to have police retrieve the child from the Grandparents' Burlington residence. The Grandparents alleged Mr. White has not let them see the child since this encounter.

On 28 October 2011, Mr. White filed a motion to dismiss the Grandparents' motion. Mr. White did not deny the Grandparents' allegations; instead he argued the Guilford County and New Hanover County Departments of Social Services, as well as the child's therapist, had advised him not to allow the Grandparents to have visitation. Mr. White further contended: (i) the district court never actually granted the Grandparents visitation; (ii) the 28 December 2007 order failed to make specific findings regarding the Grandparents' fitness; (iii) the Grandparents lacked standing; and (iv) Mr. White had a fundamental right to "make decisions concerning the care, custody, and control" of his child.

On 30 March 2012, the district court entered an interim order: (i) denying Mr. White's motion to dismiss; (ii) granting the Grandparents' motion to show cause; and (iii) declaring Mr. White to "be in direct and wilful [sic] civil contempt of the prior Orders of the Court." The court then dissolved the 15 April 2011 order and reinstated the 28 December 2007 order in full. It also allowed the Grandparents to "continue to remain the Interveners [in the case], with all of the rights and privileges of visitation given to them by the prior Order of 28 December 2007, without supervision." Lastly, it permitted Ms. Wellons to have the visitation privileges outlined in the 28 December 2007 order.

The district court allowed Mr. White to "purge his contempt by fully complying with the [30 March 2012] order." Additionally, the district court required Mr. White to "fully comply[] with each subsequent custody order that's entered." The district court threatened imprisonment if Mr. White did not adhere to these terms.

On 5 July 2012, the district court entered a final order containing the same terms as the interim order. On 10 July 2012, Mr. White filed timely notice of appeal from the 5 July 2012 order.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to review the trial court's contempt ruling pursuant to N.C. Gen. Stat. § 7A-27(c) (2011).[8]

"When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions [of law]." *Shumaker v. Shumaker*, 137 N.C. App. 72, 77, 527 S.E.2d 55, 58 (2000). "The trial court's conclusions of law drawn from the findings of fact [in civil contempt proceedings] are reviewable *de novo*." *See Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009) (quotation marks and citation omitted).

We review questions of standing in child custody actions *de novo*. *See McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal."); *Estate of Apple ex rel. Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.").

" '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) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

On appeal, Mr. White makes four arguments. First, he contends the Grandparents lacked standing. Second, he argues the district court erred by granting the Grandparents visitation when: (i) he is a fit parent; (ii) the Grandparents initially intervened seeking custody, not visitation; and (iii) the Grandparents never filed a motion seeking visitation. Alternatively, Mr. White contends N.C. Gen. Stat. §§ 50-13.2(b1) and 50-13.5(j) are unconstitutional. Lastly, Mr. White argues the district court erred by holding him in contempt. Upon review, we affirm in part, dismiss in part, and reverse as to contempt.

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8. We note that the last sentence of the 5 July 2012 final order states "This Cause is retained for further Final Order of the Court." We believe the district court mistakenly retained this language from the 30 March 2012 interim order. Therefore, we determine this clerical mistake does not divest us of jurisdiction. *See* N.C. R. Civ. P. 60(a).

A. Grandparent Visitation Statutes[9]

"At common law, grandparents [have] no standing to sue for visitation of their grandchildren." *Montgomery v. Montgomery*, 136 N.C. App. 435, 436, 524 S.E.2d 360, 361 (2000). However, our legislature has enacted four statutes providing grandparents statutory standing to seek custody or visitation. Preliminarily, we discuss those four statutes.

First, N.C. Gen. Stat. § 50-13.1(a) grants grandparents standing to seek custody at any time. *See* N.C. Gen. Stat. § 50-13.1(a) (2011) (providing standing to "any . . . person . . . claiming the right of . . . custody or visitation"). Although this broad statute describes general standing to seek custody or *visitation*, our Supreme Court has applied canons of statutory construction to determine the statute only grants grandparents standing for custody, not visitation. *See McIntyre v. McIntyre*, 341 N.C. 629, 635, 461 S.E.2d 745, 750 (1995);[10] *see also Sharp v. Sharp*, 124 N.C. App. 357, 360, 477 S.E.2d 258, 260 (1996) ("The *McIntyre* holding [that the grandparents did not have standing] was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*.").

To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must prove parental unfitness. *See Eakett v. Eakett*, 157 N.C. App. 550, 553, 579 S.E.2d 486, 489 (2003) (holding that grandparents must "show that the parent is unfit or has taken action inconsistent with [his or] her parental status in order to gain custody of the child" (citations omitted)). "The requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right to the care, custody and control of the child." *Id.* (citing *Troxel v. Granville*, 530 U.S. 57 (2000)). However, under N.C. Gen. Stat. § 50-13.1(a), "grandparents are not required to prove the grandchild is not living in an intact family in order to gain custody." *Id.* (citations omitted).

Second, N.C. Gen. Stat. § 50-13.2(b1) provides grandparents standing to seek visitation during an ongoing parental custody dispute. *See*

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9. For a more detailed discussion of grandparent visitation statutes, see Cheryl Daniels Howell, *Third Party Custody and Visitation Actions: 2010 Update to the State of the Law in North Carolina*, UNC Sch. of Gov't Family Law Bulletin, Jan. 2011, at 22–29.

10. Specifically, the *McIntyre* court held, "The legislature's creation of special statutes to provide for grandparents' visitation rights suggests that it did not intend N.C. [Gen. Stat.] § 50-13.1(a) as a broad grant to grandparents of the right to visitation." *McIntyre*, 314 N.C. at 634, 461 S.E.2d at 749. Instead, "the legislature intended to grant grandparents a right to visitation only on [the] situations specified in [those] three statutes," not in situations covered by N.C. Gen. Stat. § 50-13.1(a). *Id.*

N.C. Gen. Stat. § 50-13.2(b1) (2011) ("An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate."); *see also Sharp*, 124 N.C. App. at 363, 477 S.E.2d at 262 ("[N.C. Gen. Stat. § 50-13.2(b1)] simply makes clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding.").

Third, N.C. Gen. Stat. § 50-13.5(j) provides grandparents standing to seek visitation after a court has entered a final custody order. However, grandparents must meet certain conditions:

> [i]n any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate.

N.C. Gen. Stat. § 50-13.5(j) (2011). Our courts have added an additional requirement: the "intact family" rule. *Eakett*, 157 N.C. App. at 554, 579 S.E.2d at 489.

Under the "intact family" rule, "[a] grandparent cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle." *Id.* The "intact family" rule is intended to protect parents' constitutional right "to determine with whom their child shall associate." *Sharp*, 124 N.C. App. at 360, 477 S.E.2d at 260)(quotation marks and citation omitted); *see also Eakett*, 157 N.C. App. at 554, 579 S.E.2d at 489. In North Carolina, an "intact family" is not limited to situations where "both natural parents [live] together with their children;" instead, it may "include a single parent living with his or her child." *Fisher v. Fisher*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996) (quotation marks and citation omitted).

Fourth, N.C. Gen. Stat. § 50-13.2A provides standing for grandparents to seek visitation when a child is adopted by a stepparent or relative. *See* N.C. Gen. Stat. § 50-13.2A (2011) ("A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.").

B. Standing

[1] Mr. White first argues the Grandparents lacked standing to: (i)

pursue visitation rights; and (ii) file a subsequent show cause motion. We disagree.

In North Carolina, "[i]t is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (quotation marks and citation omitted). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970).

This Court has previously clarified that "[a]lthough it is axiomatic in custody disputes *between parents* that [v]isitation privileges are but a lesser degree of custody[,] when a grandparent is seeking visitation with grandchildren, a claim for visitation may be distinct from a claim for custody and standing requirements differ for each claim." *Rodriguez*, 211 N.C. App. at 273, 710 S.E.2d at 240 (second and third alteration in original)(quotation marks and internal citation omitted).

First, we discuss standing requirements when grandparents seek custody. Under N.C. Gen. Stat. § 50-13.1(a), grandparents have standing to intervene for custody when they "allege acts that would constitute '[parental] unfitness, neglect [or] abandonment,' or any other type of conduct so egregious as to result in [the parent's] forfeiture of his [or her] constitutionally protected status as a parent." *McDuffie v. Mitchell*, 155 N.C. App. 587, 591, 573 S.E.2d 606, 608–09 (2002) (second alteration in original).

Grandparents do not attain standing under N.C. Gen. Stat. § 50-13.1(a) when they merely argue they have been "estranged from the children for some time." *Id.* at 591, 573 S.E.2d at 609. Instead, they must allege specific facts showing parental unfitness, such as: (i) the parents have not provided "safe and suitable housing" for their children; (ii) the parents have not contributed to child support; (iii) the parents have not been involved in the children's upbringing; and (iv) the children are at "substantial risk of harm" from the parents. *Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260.[11]

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11. In *Sharp*, the maternal grandparents filed a complaint against their daughter seeking custody of their grandchildren under N.C. Gen. Stat. § 50-13.1(a). *Id.* at 357, 477 S.E.2d at 258. The grandparents alleged she was unfit because she:

Next, we discuss standing requirements when grandparents seek visitation under N.C. Gen. Stat. § 50-13.2(b1) (2011). When "the custody of the child [is] still in issue and [is] being litigated by the parents, then [t]he grandparents . . . [have] standing to seek intervention under N.C. Gen. Stat. § 50-13.2(b1)." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 122, 674 S.E.2d 775, 778 (2009) (quoting *Smith v. Barbour*, 195 N.C. App. 244, 252, 671 S.E.2d 578, 584 (2009) (quotation marks omitted) (alterations in original)).[12] Under N.C. Gen. Stat. § 50-13.2(b1), grandparents need not prove lack of intact family since an ongoing parental custody dispute exists. *See Eakett*, 157 N.C. App. at 554, 579 S.E.2d at 489. The trial court may award grandparent visitation in the subsequent custody order at its discretion. *See* N.C. Gen. Stat. § 50-13.2(b1) (2011).

In the instant case, Mr. White argues the Grandparents did not have standing to file a show cause motion. We disagree.

First, the Grandparents had standing to seek custody when they filed their initial 3 August 2006 motion to intervene. There they alleged, *inter alia*, that: Mr. White "had not yet exercised visitation alone" with the child; and (ii) Mr. White is "not currently able to provide a stable home environment." These allegations, if proven, could support a finding of conduct inconsistent with parental status. *See Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260 (holding that failure to participate in a child's upbringing or provide "safe and suitable housing" for a child could rise to the level of parental unfitness). Thus, they initially had standing to

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> had not yet found suitable housing; [] had not provided a safe or stable home for the children; [] had relationships with several men and had moved around in both North Carolina and Pennsylvania; [] since the children resided with plaintiffs, she had not contributed to the support of the children; [] "there is a substantial risk of harm to the minor children if in the physical custody of the defendant-mother"; and [] she was not emotionally stable enough to care for the children.

Id. at 358, 477 S.E.2d at 258–59. The trial court dismissed the grandparents' claim for lack of subject matter jurisdiction because there was no ongoing custody proceeding and the children's family was intact. *Id.* at 358, 477 S.E.2d at 259. In *Sharp*, this Court reversed and remanded because the grandparents alleged sufficient facts regarding parental unfitness to give them standing to intervene for custody. *Id.* at 363, 477 S.E.2d at 262.

12. In *Quesinberry*, both the maternal and paternal grandparents sought visitation during an ongoing parental custody dispute. *Id.* at 119, 574 S.E.2d at 776. The trial court subsequently entered a consent judgment resolving custody issues between the parents. *Id.* at 120, 574 S.E.2d at 777. Less than a month later, it awarded visitation to both sets of grandparents. *Id.* There, we affirmed the trial court's grandparent visitation determination because the grandparents initially sought visitation during an ongoing parental custody dispute. *Id.* at 123–24, 574 S.E.2d at 779.

seek custody under N.C. Gen. Stat. § 50-13.1(a). *See McDuffie*, 155 N.C. App. at 591, 573 S.E.2d at 608–09.

The trial court addressed the Grandparent's motion to intervene in its 30 November 2006 temporary custody order. There, the district court: (i) temporarily transferred primary custody of the child from Ms. Wellons to Mr. White; and (ii) awarded the Grandparents visitation in lieu of custody.[13] Although the 4 April 2006 order had resolved all ongoing parental custody issues at the time, the district court created a new ongoing parental custody dispute when it transferred temporary primary custody to Mr. White. *See Quesinberry*, 196 N.C. App. at 122, 674 S.E.2d at 778 (holding that grandparents have standing to seek visitation under N.C. Gen. Stat. § 50-13.2(b1) during an ongoing custody dispute). At the subsequent 13 September 2007 hearing, the Grandparents dismissed their custody claim and instead sought only visitation under N.C. Gen. Stat. § 50-13.2(b1). Since there was a predicate ongoing dispute, the Grandparents had standing to seek visitation at the 13 September 2007 hearing. As a result, the trial court had jurisdiction to award them visitation in its 28 December 2007 custody order, and the Grandparents later had standing to enforce their visitation rights through their 22 September 2011 show cause motion. Therefore, the trial court did not err by declining to dismiss the Grandparents' show cause motion for lack of standing.

C. Grandparent Visitation

[2] Next, Mr. White argues the trial court erred by granting the Grandparents visitation when: (i) he is a fit parent; (ii) the Grandparents initially intervened seeking custody, not visitation; and (iii) the Grandparents never filed a motion seeking visitation. In the alternative to this argument, Mr. White contends N.C. Gen. Stat. §§ 50-13.2(b1) and 50-13.5(j) are unconstitutional. Upon review, we dismiss for lack of jurisdiction.

In North Carolina, permanent child visitation and custody orders resolving all pending issues are generally final and appealable. Temporary custody and visitation orders, on the other hand, are interlocutory and not immediately appealable. *See Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986); *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992) ("A temporary child custody order is

13. N.C. Gen. Stat. § 50-13.2(b1) allows a trial court's custody order to "provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 50-13.2(b1) (2011).

interlocutory and does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition . . . on the merits." (quotation marks and citation omitted) (first alteration in original)). However,

> [t]he trial court's mere designation of an order as "temporary" is not sufficient to make the order interlocutory and nonappealable. Rather, an appeal from a temporary custody order is premature only if the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief.

Brewer v. Brewer, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). Thus, when a custody or visitation order resolves all pending issues and does not state a clear and specific reconvening date within a reasonably brief time, the order is final and appealable. *See id.*

Once a trial court issues a final appealable child custody or visitation order, it becomes the law of the case. The law of the case doctrine "provides that when a party fails to appeal [that order], the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boie v. D.W.I.T.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). Still, "when a tribunal is faced with a question of its subject matter jurisdiction, . . . the goals of the law of the case doctrine are outweighed by the overriding importance and value of a correct ruling on this issue." *Watts v. N.C. Dep't of Envtl. & Natural Res.*, No. COA09-1499, 2010 WL 2817055, at *3 (N.C. Ct. App. 20 July 2010); *see also Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003); *Pub. Int. Res. Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3rd Cir. 1997).

The jurisprudential desire for finality giving rise to the law of the case doctrine also underlies North Carolina's prohibition on collateral attacks of previous orders. "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (quotation marks and citation omitted). North Carolina case law clearly prohibits this type of argument. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (holding that the proper route to remedy erroneous orders is appeal, not collateral attack); *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987) (holding that for parties seeking relief from a prior erroneous order, "the proper avenues [are] 1) appeal . . ., or

2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60."). For instance, parties may not defend themselves in contempt proceedings by collaterally attacking the underlying judgment or order they allegedly violated. *See Wells v. Wells*, 92 N.C. App. 226, 229, 373 S.E.2d 879, 882 (1988) (holding that a plaintiff held in contempt for failure to pay alimony could not collaterally attack the underlying alimony judgment).

In the present case, Mr. White argues the trial court erred by granting the Grandparents visitation when: (i) he is a fit parent; (ii) the Grandparents initially intervened seeking custody, not visitation; and (iii) the Grandparents never filed a motion seeking visitation. Alternatively, he contends N.C. Gen. Stat. §§ 50-13.2(b1) and 50-13.5(j) are unconstitutional. Upon review, we conclude we do not have jurisdiction to decide these arguments based on the law of the case doctrine and the prohibition on collateral attacks.

Here, Mr. White had a right to appeal the 28 December 2007 order granting him custody and granting the Grandparents visitation. Specifically, since the order provided a permanent custody and visitation schedule and did not state a clear and specific reconvening date within a reasonably brief time, the order was final and appealable. *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. When Mr. White failed to appeal the 28 December 2007 order it became the law of case, only subject to modification in subsequent orders upon a showing of a change of circumstances. *See Gower v. Aetna Ins. Co.*, 281 N.C. 577, 579, 189 S.E.2d 165, 167 (1972) ("Since neither party appealed, the judgment entered . . . became the law of the case and established the respective rights of the parties to that action."); *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, __ N.C. App. __, __, 713 S.E.2d 511, 518 (2011). Thus, Mr. White may not now challenge that order in his appeal from a related contempt order several years later.

Furthermore, the law of the case doctrine applies here because, unlike his standing argument, Mr. White's arguments about grandparent visitation do not implicate subject matter jurisdiction. First, mere procedural deficiencies like the ones Mr. White alleges are not jurisdictional. *See, e.g., In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009). Second, as to Mr. White's constitutional challenge, this Court has previously declined to consider arguments that parties should not have been found in contempt because the statutes on which the underlying judgment was based were unconstitutional. *See State ex rel. N.C. State Bd. of Registration for Prof'l Engineers & Land Surveyors v. Testing Laboratories, Inc.*, 52 N.C. App. 344, 347–48, 278 S.E.2d 564, 565–66 (1981). Consequently, we conclude the law of the case doctrine

prohibits Mr. White from now challenging the 28 December 2007 visitation order in his appeal of the 5 July 2012 contempt order.

Additionally, Mr. White's arguments about grandparent visitation constitute impermissible collateral attacks on the 28 December 2007 custody and visitation order. Here, Mr. White argues the trial court erred in its 5 July 2012 contempt order by reinstating the Grandparents' visitation schedule from the 28 December 2007 order. Thus, his argument necessarily depends on his challenge to the validity of the 28 December 2007 order. Our case law prohibits this type of collateral attack. *See Thrasher*, 4 N.C. App. at 540, 167 S.E.2d at 553. In fact, our case law has expressly prohibited parties in contempt proceedings from collateral attacking the underlying orders they allegedly violated. *See*, *e.g.*, *Wells*, 92 N.C. App. at 229, 373 S.E.2d at 882. In light of this precedent, we dismiss Mr. White's arguments regarding grandparent visitation as impermissible collateral attacks.

Consequently, based on the law of the case doctrine and the prohibition on collateral attacks, we dismiss Mr. White's arguments about grandparent visitation for lack of jurisdiction.

D. Contempt

[3] Third, Mr. White argues the district court erred by holding him in civil contempt. We agree.

"The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999); *see also Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984). This Court has elaborated that:

> [a] defendant's failure to comply with a court order [must be] willful. Then, following from this concept, for civil contempt to be applicable, the defendant must have the present ability to comply with the court order. Moreover, our Courts have required the trial court to make a specific finding as to the defendant's ability to comply during the period in which he was in default.

Scott v. Scott, 157 N.C. App. 382, 393–94, 579 S.E.2d 431, 439 (2003) (internal citations omitted). Furthermore, a contempt order "must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2011); *see also Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65 (holding that a contempt order must "clearly specify what the defendant can and cannot do"); *Scott*, 157 N.C. App. at 394, 579 S.E.2d at 439 (holding that requirements to purge civil contempt may not be "impermissibly vague").

In the instant case, the district court erred by failing to provide Mr. White a method to purge his contempt.

On 5 July 2012, the district court "declared [Mr. White] to be in direct and wilful [sic] civil contempt of the prior Orders of the Court." It suspended Mr. White's arrest based on the following condition: "Defendant can purge his contempt by fully complying with the terms of the [30 March 2012] Interim Order, the prior Orders of 28 December 2007 and 27 July 2010 . . . , and this Order." The order did not establish a date after which Mr. White's contempt was purged or provide any other means for Mr. White to purge the contempt.

We have previously reversed similar contempt orders. For instance, in *Cox* a contempt order stated the defendant could purge her contempt by not:

> plac[ing] either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.

Cox, 133 N.C. App. at 226, 515 S.E.2d at 65. There, we reversed because the trial court failed to "clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt." *Id.*

Similarly, in *Scott* a contempt order stated:

> Defendant may postpone his imprisonment indefinitely by *(1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; (2) by not interfering with the Plaintiff's custody of the minor children and (3) by not threatening, abusing, harassing or interfering with the Plaintiff or the Plaintiff's custody of the minor children[.]*

Scott, 157 N.C. App. at 393, 579 S.E.2d at 438 (alteration in original). There, although we indicated the requirement to attend a Controlled Anger Program may "comport[] with the ability of civil contemners to purge themselves," we reversed because the other two requirements were "impermissibly vague." *Id.* at 394, 579 S.E.2d at 439.

In the case at hand, the district court did not "clearly specify what [Mr. White] can and cannot do" to purge himself of contempt. *Cox*, 133

N.C. App. at 226, 515 S.E.2d at 65. Although the district court referenced previous orders containing specific provisions, it did not: (i) establish when Mr. White's compliance purged his contempt; or (ii) provide any other method for Mr. White to purge his contempt. We will not allow the district court to hold Mr. White indefinitely in contempt. Consequently, we reverse the portion of the 5 July 2012 order holding Mr. White in civil contempt.

IV. Conclusion

In conclusion, we first determine the Grandparents had standing. Second, we dismiss Mr. White's arguments regarding grandparent visitation for lack of jurisdiction. Lastly, the trial court erred by failing to provide Mr. White a method to purge his contempt.

AFFIRMED in part, DISMISSED in part, and REVERSED as to contempt.

Judges STEELMAN and GEER concur.

REBECCA S. WHITE, PLAINTIFF
v.
CURTIS COCHRAN AND WESTERN SURETY COMPANY, DEFENDANTS

No. COA13-155

Filed 20 August 2013

1. Appeal and Error—interlocutory orders and appeals—denial of summary judgment—sovereign immunity

The denial of summary judgment was immediately appealable where the motion was made on the grounds of sovereign immunity.

2. Appeal and Error—standard of review—summary judgment

A trial court's decision to grant or deny a summary judgment motion is subject to *de novo* review on appeal.

3. Appeal and Error—preservation of issues—issue not raised at trial

An issue regarding the amount of a sheriff's liability under a surety bond was not addressed on appeal where it was not raised at trial.

4. Immunity—governmental—sheriff's surety bond—claim with scope of bond

Defendants were not entitled to summary judgment based on governmental immunity in an action by a detention officer for wrongful discharge after a workers' compensation claim. Defendants raised governmental immunity through the sheriff's purchase of a surety bond, which waived liability only to the extent of coverage. Plaintiff's claim came within the scope of the sheriff's official duties, if supported by adequate proof, and is covered by the sheriff's bond.

5. Immunity—governmental—purchase of insurance

Defendants were not entitled to summary judgment based on governmental immunity in an action by a detention officer for wrongful discharge after a workers' compensation claim. Defendants raised governmental immunity through the county's purchase of insurance, which waived liability only to the extent of coverage. Although plaintiff argued that plaintiff's claim fell between policies, the sheriff received notice of the claim in a form consistent with the policy before the policy period expired, and considerably before the end of the extended reporting period. Defendants also pointed to a clause in the policy excluding Equal Employment Opportunity Commission (EEOC) hearings, but offered no support for the contention that plaintiff's retaliatory discharge claim was either an EEOC claim or a similar state proceeding.

Appeal by defendants from order entered 26 November 2012 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 22 May 2013.

The Moore Law Office, PLLC, by George W. Moore, for Plaintiff.

Melrose, Seago & Lay, PA, by Mark R. Melrose, Joshua Nielsen, and Kimberly C. Lay, for Defendant.

ERVIN, Judge.

Defendants Curtis Cochran, Sheriff of Swain County, and Western Surety Company appeal from an order denying Defendants' summary judgment motion. On appeal, Defendants argue that the trial court erred by failing to conclude that there was no genuine issue of material fact and that Defendants were entitled to judgment in their favor as a matter of law on governmental immunity grounds. After careful consideration of Defendants' challenges to the trial court's judgment in light of the

record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff Rebecca White was hired to work as a detention officer with the Swain County Sheriff's Department on 5 November 2008. On 24 January 2009, Plaintiff slipped, fell, and sustained a work-related injury. As a result of her injury, Plaintiff did not work from 24 January through 25 February 2009. Subsequently, Plaintiff filed a claim for workers' compensation benefits with the North Carolina Industrial Commission, ultimately receiving an award of medical expenses and temporary total disability benefits. During her period of disability, Plaintiff received a letter dated 4 February 2009 informing her that she would be eligible for insurance coverage under COBRA. Although Plaintiff asked her employer why she had received this letter, her question was never answered.

Following her period of disability, Plaintiff worked on 25 February 2009, 26 February 2009, 2 March 2009, and 6 March 2009. On 6 March 2009, Plaintiff was informed that she should not return to work. Subsequently, Plaintiff's employment was terminated.

On 5 June 2009, Plaintiff filed a complaint with the North Carolina Department of Labor in which she alleged that she had been wrongfully terminated from her employment for seeking workers' compensation benefits in violation of N.C. Gen. Stat. § 95-240, *et seq.* On the same date, the Department of Labor sent a letter to "County of Swain – Sheriff's Department," providing notice of Plaintiff's complaint. On 8 June and 10 June 2009, the Department of Labor sent information requests and other communications to the Swain County Sheriff's Department. On 19 June 2009, the Sheriff's Department responded to Plaintiff's complaint by providing, among other things, a position statement. On 26 June 2009, the Sheriff's Department provided a supplemental response to Plaintiff's complaint and requested that her complaint be dismissed. On 26 August 2009, the Department of Labor denied Plaintiff's claim and issued Plaintiff a right to sue letter, which was copied to Swain County and the Swain County Sheriff's Department, pursuant to N.C. Gen. Stat. § 95-242 authorizing her to initiate civil litigation within 90 days of the date upon which the right to sue letter was issued.

At all relevant times, public officials and law enforcement officers employed by Swain County were covered by a number of liability insurance policies or similar instruments. From 1 July 2008 through 1 July 2009,

coverage was provided pursuant to a policy issued by Argonaut Group Insurance. From 1 July 2009 through 1 July 2010, coverage was provided under the North Carolina Association of County Commissioners Risk Management Pools. Finally, as required by N.C. Gen. Stat. § 162-8, Sheriff Cochran was covered by a bond issued by Western Surety Company from 4 December 2006 through 4 December 2010. After the initiation of the present litigation, Argonaut, NCACC, and Western Surety each denied that coverage was available under the applicable policies or bonds.

B. Procedural History

On 20 October 2009, Plaintiff filed a complaint against Sheriff Cochran asserting a claim for retaliatory termination stemming from her decision to file a workers' compensation claim in violation of N.C. Gen. Stat. § 95-241 and wrongful discharge, and seeking damages, including treble damages and punitive damages, as a result of the injury which she claimed to have sustained as a result of Sheriff Cochran's conduct. On 16 December 2009, Sheriff Cochran filed an answer denying the material allegations of Plaintiff's complaint and asserting that he would have terminated her employment even if she had not filed a workers' compensation claim. On 6 January 2010, Sheriff Cochran amended his answer to include a request for an award of costs and attorney's fees.

On 28 April 2010, Sheriff Cochran filed a motion for judgment on the pleadings and a motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. On 19 May 2010, Sheriff Cochran filed a second motion for judgment on the pleadings and motion to dismiss for lack of subject matter jurisdiction based upon Plaintiff's failure to join Sheriff Cochran's surety as required by N.C. Gen. Stat. § 58-76-5. On 28 June 2010, Judge Bradley B. Letts entered an order granting Sheriff Cochran's first motion for judgment on the pleadings and for dismissal of Plaintiff's complaint for lack of subject matter jurisdiction. The essential basis for Judge Letts' decision to dismiss Plaintiff's complaint was that, although the defendant named in Plaintiff's complaint was Sheriff Cochran, the right to sue letter issued to Plaintiff authorized her to bring suit against Swain County and the Swain County Sheriff's Department. Plaintiff noted an appeal to this Court from Judge Letts' order.

On 4 October 2011, this Court filed an opinion reversing Judge Letts' order. *White v. Cochran*, __ N.C. App. __, 716 S.E.2d 420 (2011). In the course of making that decision, we held that Plaintiff had asserted both a common law wrongful discharge claim and a statutory retaliatory discharge claim against Sheriff Cochran, that Plaintiff's retaliatory discharge claim had been asserted against Sheriff Cochran in his official

capacity, and that a suit against Sheriff Cochran in his official capacity was tantamount to a suit against the Swain County Sheriff's Department, so that Plaintiff's claim was, contrary to the trial court's decision, brought against a party named in the right to sue letter. *White*, __ N.C. App. at __, 716 S.E.2d at 423-26. In addition, we held that Plaintiff's common law wrongful discharge claim had been asserted against Sheriff Cochran in his official capacity, that any common law wrongful discharge complaint that Plaintiff might wish to assert against Sheriff Cochran in his official capacity was subject to Sheriff Cochran's right to assert a governmental immunity defense, and that, since the parties had not discussed, either before the trial court or in their briefs before this Court, the issue of whether Plaintiff's claim was barred by governmental immunity or by Plaintiff's failure to join Sheriff Cochran's surety was not properly before the Court at that time. *Id.* at __, 716 S.E.2d at 426.

On 8 December 2011, Plaintiff filed a motion seeking leave of court to amend her complaint to "add Western Surety Company as a defendant" and to allege that Sheriff Cochran had waived governmental immunity by purchasing an official bond and by the fact that Swain County had purchased liability insurance which covered Sheriff Cochran. On 10 February 2012, Judge Marvin P. Pope, Jr., entered an order allowing Plaintiff's amendment motion and denying Sheriff Cochran's second motion for judgment on the pleadings and to dismiss for lack of subject matter jurisdiction. On 26 March and 26 April 2012, Defendants, respectively, filed separate answers to Plaintiff's amended complaint in which they denied the material allegations of Plaintiff's complaint and asserted that Sheriff Cochran would have terminated Plaintiff even if she had not filed a workers' compensation claim, public official immunity, and governmental immunity as affirmative defenses.

On 20 August 2012, Defendants filed a motion seeking the entry of summary judgment in their favor on the grounds that "Defendants are immune from liability because the actions brought against them are excluded from coverage under the Swain County's insurance policies." On 7 November 2012, Defendants filed an amended summary judgment motion which rested on the same contention. On 9 November 2012, Plaintiff filed a motion to strike portions of the affidavits that Defendants had filed in support of their summary judgment motion. On 14 November 2012, Defendants filed a second amended summary judgment motion. On 26 November 2012, the trial court entered an order denying Defendants' summary judgment motion on the grounds that "there are genuine issues of material fact to be determined in this action." Defendants noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

A. Appealability

[1] As a general proposition, no appeal lies from an order denying a summary judgment motion on the grounds that such an order is interlocutory and is not, for that reason, immediately appealable. *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). However, "when the motion is made on the grounds of sovereign . . . immunity, such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Id.* As a result, given that Defendants sought to have summary judgment entered in their favor on governmental immunity grounds, their appeal is properly before us pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (allowing interlocutory appeals from orders which "affect[] a substantial right").

B. Standard of Review

[2] According to well-established North Carolina law, summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (*see also Smith*, 117 N.C. App. at 380-81, 451 S.E.2d at 312). For that reason, the moving party bears the burden of establishing "the absence of any triable issue of fact." *Goynias v. Spa Health Clubs, Inc.*, 148 N.C. App. 554, 555, 558 S.E.2d 880, 881, *aff'd*, 356 N.C. 290, 569 S.E.2d 648 (2002). A trial court's decision to grant or deny a summary judgment motion is subject to *de novo* review on appeal. *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). We will now review Defendants' challenges to the trial court's order utilizing the applicable standard of review.

C. Waiver of Governmental Immunity

[3] In their brief, Defendants argue that the trial court's order should be overturned because Plaintiff failed to forecast sufficient evidence to show that Sheriff Cochran had waived sovereign immunity through the purchase of liability insurance, that the Western Surety bond does

not work a waiver of Sheriff Cochran's ability to avoid suit on the basis of governmental immunity, and, in the alternative, that Sheriff Cochran could not be held liable under the Western Surety bond in an amount in excess of the face amount of the bond. However, given that Defendants did not raise the third of these three contentions before the trial court, that issue is not properly before us and we decline to address it at this time. N.C.R. App. P. 10(a)(1) (stating that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). As a result, we will focus our attention on the first two contentions advanced in Defendants' brief.

The doctrine of sovereign immunity provides "the state, its counties, and its public officials, in their official capacity[ies], [with] an unqualified and absolute immunity from law suits." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citing *Messick v. Catawba County*, 110 N.C. App. 707, 717, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993)), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). "[I]t is generally established that a sheriff is a public official entitled to sovereign immunity and, unless the immunity is waived pursuant to a statute, is protected from suit against him in his official capacity." *Myers v. Bryant*, 188 N.C. App. 585, 587, 655 S.E.2d 882, 885 (quoting *Smith*, 117 N.C. App. at 381, 451 S.E.2d at 312) (internal quotation marks omitted), *disc. review denied*, 362 N.C. 360, 664 S.E.2d 309 (2008). A plaintiff seeking to overcome a governmental immunity defense must specifically allege that the official or governmental entity has waived the right to rely on such an immunity-related defense. *Phillips v. Gray*, 163 N.C. App. 52, 56, 592 S.E.2d 229, 232 (citing *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994)), *disc. review denied*, 358 N.C. 545, 599 S.E.2d 406 (2004). In accordance with this fundamental procedural principle, Plaintiff has alleged that Sheriff Cochran waived the right to assert a defense of governmental immunity based upon the fact that Swain County purchased insurance which provided Sheriff Cochran with liability coverage and the fact that Sheriff Cochran purchased a surety bond.

As Plaintiff's argument suggests, a sheriff may waive governmental immunity in at least two different ways. *Smith*, 117 N.C. App. at 383, 451 S.E.2d at 313. According to N.C. Gen. Stat. § 58-76-5, a sheriff waives governmental immunity by purchasing a bond as is required by N.C. Gen. Stat. § 162-8. *See also Sellers v. Rodriguez*, 149 N.C. App. 619, 624, 561 S.E.2d 336, 339 (2002) (stating that "a sheriff may also waive

governmental immunity by purchasing a bond"). However, the purchase of a bond precludes a sheriff from relying upon "the protective embrace of governmental immunity . . . only where the surety is joined as a party to the action," *Summey v. Barker*, 142 N.C. App. 688, 691, 544 S.E.2d 262, 265 (2001) (citing *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494), and only to the extent of the amount of the bond. *Hill v. Medford*, 158 N.C. App. 618, 623, 582 S.E.2d 325, 328-29 (Martin, J., dissenting) (citing N.C. Gen. Stat. § 58–76–5 and *Summey*, 142 N.C. App. at 691, 544 S.E.2d at 265), *rev'd per curiam on the basis of the dissenting opinion in the Court of Appeals*, 357 N.C. 650, 588 S.E.2d 467 (2003).

Secondly, a sheriff waives governmental immunity when a county purchases liability insurance which provides coverage to the sheriff. *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717 (stating that "[a] county may waive its sovereign immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 153A–435(a)"); *see also Smith*, 117 N.C. App. at 384, 451 S.E.2d at 314 (stating "that waiver of a sheriff's official immunity may be shown by the existence of his official bond as well as by his county's purchase of liability insurance"). As the language of N.C. Gen. Stat. § 153A-435(a) suggests, a waiver of immunity generally extends "only to the extent of the insurance obtained." *Evans v. Housing Auth. of Raleigh*, 359 N.C. 50, 57, 602 S.E.2d 668, 673 (2004). As a result, "immunity is waived only to the extent that [the insured] is indemnified by insurance for negligence or tort." *Overcash v. Statesville Bd. of Educ.*, 83 N.C. App. 21, 23-25; 348 S.E.2d 524, 526-27 (1986). Thus, both the purchase of a bond and the purchase of liability insurance only operate as a waiver of governmental immunity to the extent of the coverage provided by those insuring instruments.

1. Purchase of a Surety Bond

[4] As the record clearly reflects, given that Sheriff Cochran, in compliance with N.C. Gen. Stat. § 162-8, purchased a bond from Western Surety on 4 December 2006 and given that Western Surety has been joined as a party to this action, Sheriff Cochran has waived governmental immunity "to the extent of the amount of the bond." In seeking to persuade us that the purchase of the Western Surety bond did not operate to waive Sheriff Cochran's right to assert a defense of governmental immunity in this case, Defendants argue that claims of the nature asserted by Plaintiff are not covered by Sheriff Cochran's bond.[1] We disagree.

1. In support of this argument, Defendants point to affidavits suggesting that Western Surety appropriately denied coverage on the basis of the relevant bond language. However, as plaintiff correctly argued before the trial court and asserts before us, the

As is required by N.C. Gen. Stat. § 162-8, the bond purchased by Sheriff Cochran ensures that he

> shall in all things faithfully perform the duties of his office and shall honestly account for all moneys and effects that may come into his hands in his official capacity during the said term, then this obligation to be void, otherwise to remain in full force and effect.

Although Defendants argue that the provisions of the Western Surety bond do not cover claims such as those advanced by Plaintiff, they never explain why Plaintiff's allegations fail to implicate the extent to which Sheriff Cochran failed to "faithfully perform the duties of his office." In addition, Defendants' assertion conflicts with relevant decisions of the Supreme Court, which hold that "[t]he last clause of [N.C. Gen. Stat. § 58-76-5] has been held to enlarge the conditions of the official bond to extend to all official duties of the office." *State ex rel. Williams v. Adams*, 288 N.C. 501, 504, 219 S.E.2d 198, 200 (1975) (citing *Price v. Honeycutt*, 216 N.C. 270, 275, 4 S.E.2d 611, 613 (1939)); *see also Sellers*, 149 N.C. App. at 624, 561 S.E.2d at 339 (stating that N.C. Gen. Stat. § 58-76-5 only gives a plaintiff "the right of action" and "does not relieve [him] of the burden of proving that defendants either intentionally engaged in neglect, misconduct or misbehavior while performing their custodial duties, or that they acted negligently in performing those duties despite a duty to do otherwise"). As a result, a sheriff's official bond has been found applicable to claims "for wrongful death caused by the negligence of the defendant officers in not providing medical attention for the plaintiff's intestate," *Williams*, 288 N.C. at 505, 219 S.E.2d at 200, and to claims for false arrest involving the use of excessive force, *Price*, 216 N.C. at 276, 4 S.E.2d at 615. In view of the fact that Plaintiff has alleged that Sheriff Cochran wrongfully terminated her employment in retaliation for her decision to file a workers' compensation claim and the fact that acting in that matter would constitute a failure to properly perform his official duties,[2] we have no choice but to conclude that Plaintiff's

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statements in these affidavits are not competent evidence as to the scope of the coverage of the Western Surety bond. *Old S. Life Ins. Co. v. Bank of North Carolina*, 36 N.C. App. 18, 32, 244 S.E.2d 264, 272 (1978) (stating that "the assertion in defendant's . . . affidavit that the All States' CD was security for III's loan is incompetent as it adds to or varies the terms of the promissory note and the CD").

2. We do not, of course, wish to be understood as expressing an opinion as to whether Plaintiff's allegations have any merit, since we are, as we have noted above, required to base our decision in this case on the information contained in the record taken in the light most favorable to Plaintiff. A trier of fact, after the completion of the requisite procedural steps, may well conclude that Plaintiff's claims lack merit as a factual matter.

claim, if supported by adequate proof, comes within the scope of Sheriff Cochran's official duties.

2. Purchase of Liability Insurance

[5] Similarly, Defendants argue that the decision by Swain County to purchase liability insurance did not operate to waive Sheriff Cochran's right to assert a governmental immunity defense on the grounds that the policies on which Plaintiff relies did not provide him with coverage against Plaintiff's claims. More specifically, Defendants argue that, since the Argonaut policy had terminated and the extended reporting period provided for in that policy had ended before Plaintiff asserted her claim and since the NCACC policy had not come into effect as of the date upon which Plaintiff's claim arose, Sheriff Cochran did not have coverage against Plaintiff's claim under either policy. Secondly, Defendants argue that Plaintiff's claim is specifically excluded from coverage under an exclusion obviating any necessity for the carrier to provide coverage relating to a proceeding before the Equal Employment Opportunity Commission or some similar state proceeding. We do not find either argument persuasive.

a. Interpretation of Insurance Policies

A determination of the extent to which either the Argonaut policy or the NCACC policy provides coverage to Sheriff Cochran relating to Plaintiff's claims requires us to interpret the effective date and notice provisions contained in each policy. The interpretation of a contract of insurance is a question of law. *Old Line Life Ins. Co. of Am. v. Bollinger*, 161 N.C. App. 734, 736, 589 S.E.2d 411, 412 (2003) (citing *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). The traditional rules of contract construction are only useful in the event that relevant policy language is ambiguous. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 10, 692 S.E.2d 605, 612 (2010). "To be ambiguous, the language of an insurance policy provision must, 'in the opinion of the court, [be] fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *Id.* (quoting *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522) (alteration in original). As a result of the fact that the relevant language in both policies is clear and unambiguous, we need not resort to rules of construction in order to resolve the issue before us in this case. *Houpe v. City of Statesville*, 128 N.C. App. 334, 342, 497 S.E.2d 82, 88 (stating that, "[w]hen language is clear and unambiguous, . . . a policy provision will be accorded its plain meaning) (citing *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522)), *disc. review denied*, 348 N.C. 72, 505 S.E.2d

871 (1998). As a result, we will now look at the relevant policy language in order to determine whether either the Argonaut policy or the NCACC policy provides Sheriff Cochran with coverage against Plaintiff's claims.

b. Timeliness of Notice

In their brief, Defendants argue that the Argonaut policy is a "claims based" policy and that Plaintiff failed to provide notice of her claim within the policy period and related extended reporting period.[3] More specifically, Defendants argue that Plaintiff did not assert her claim until she filed her complaint in this case on 8 October 2009, a date which came slightly over one month after the end of the extended reporting period specified in the policy.[4] We do not find this argument persuasive.

According to the Argonaut policy, a claim arising from a "wrongful act"[5] has been asserted in a timely manner "if a claim for 'damages'[6] is first made in writing against any insured during the policy period or any Extended Reporting Period," with "[a] claim by a person or organization seeking 'damages' . . . deemed to have been made when written notice of such claim is received by any insured or by [Argonaut], whichever comes first." As a result, the only prerequisites set out in the relevant policy language for the provision of proper notice are that it be in writing and that it provide notice of the claim which the claimant seeks to assert against the insured. Nothing in the relevant policy language indicates that the required notice must take the form of the initiation of a civil action as contended for by Defendants, so we conclude that, as long as Plaintiff informed Sheriff Cochran in writing of the nature of her

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3. Although Defendants describe the Argonaut policy as a "claims based" policy, we believe that they are actually describing it as a "claims-made" policy. A "claims-made" policy is "[a]n agreement to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred." *Black's Law Dictionary* 877 (9th ed. 2009). The Argonaut policy provides that the "wrongful act" must occur during the policy period and that the claim must be asserted during the policy period or the extended reporting period. As a result, the Argonaut policy has features characteristic of a "claims made" policy without technically being one.

4. The NCACC policy is an "occurrence" policy, given that it covers "any loss from an event that occurs within the policy period, regardless of when the claim is made." *Black's Law Dictionary* 878 (9th ed. 2009). As a result of the fact that the events underlying Plaintiff's claim against Sheriff Cochran occurred prior to the effective date of the NCACC policy, it clearly does not provide any basis for a determination that Sheriff Cochran waived his right to assert a defense of governmental immunity.

5. A "wrongful act" is defined in the Argonaut policy as "any act, error or omission by an insured" or "flowing from or originating out of a 'law enforcement activity.'"

6. "Damages" are defined in the Argonaut policy as "money damages."

claim in a timely manner, Plaintiff will have adequately complied with the notice provision of the Argonaut policy.

As the record clearly reflects, Plaintiff filed a complaint alleging retaliatory discharge stemming from her decision to file a workers' compensation claim with the Department of Labor, which provided the Human Resources Manager of the Swain County Sheriff's Department with notice of Plaintiff's complaint by means of a letter dated 5 June 2009. In addition, facsimile transmissions requesting information were sent to Swain County's Human Resources Manager and to the Sheriff's Department by a Department of Labor investigator on 8 June and 9 June 2009. As is reflected in letters to the Department of Labor investigator from the attorney for Swain County dated 18 June and 25 June 2009, Sheriff Cochran and other county officials were clearly aware of both the existence and nature of Plaintiff's claim by the end of June 2009. As a result of the fact that the Argonaut policy ended on 1 July 2009 and the fact that the Extended Reporting Period set out in the Argonaut Policy ended on 1 September 2009, Sheriff Cochran clearly received notice of Plaintiff's claim in a form consistent with that required by the applicable policy language before the Argonaut policy expired, and considerably in advance of the end of the Extended Reporting Period. Thus, Defendants' argument that the Argonaut policy does not afford coverage for Plaintiff's claim against Sheriff Cochran is without merit.

c. Applicability of EEOC Exclusion

Finally, Defendants argue that Sheriff Cochran is not precluded from asserting a defense of governmental immunity on the basis of a policy provision excluding "[Equal Employment Opportunity Commission] hearings or similar proceedings conducted by state agencies or commissioners" from the scope of the coverage afforded by the Argonaut policy. Defendants have not, however, offered any support for their contention that Plaintiff's retaliatory discharge claim is either an EEOC claim or a similar state proceeding and, instead, simply refer to Plaintiff's claim as an EEOC claim on a number of occasions in their brief. Aside from the fact that Defendants' failure to provide any argumentation in support of their position would permit us to deem this aspect of their challenge to the trial court's order to have been abandoned, *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 358, 673 S.E.2d 667, 674 (stating that "[w]e note that Defendants include no authority in their brief in support of several of the following arguments, which constitutes a violation of [N.C.R. App. P. Rule 28(b)(6)] and subjects these arguments to dismissal") (citing *Dogwood Dev. & Mgmt. Co.*,

LLC v. White Oak Transp. Co., 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008)), *disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009), we need not rest our decision on this ground given our conclusion that the claims asserted in Plaintiff's complaint do not constitute an EEOC or similar state proceeding for purposes of the relevant policy language. The EEOC is responsible for "enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information." http://www.eeoc.gov/eeoc/index.cfm (last visited 8 August 2013). On the other hand, the Department of Labor is responsible for enforcing the Retaliatory Employment Discrimination Act, which is "intended to prevent employer retaliation from having a chilling effect upon an employee's exercise of his or her statutory rights under the Workers' Compensation Act," *Whiting v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005), or other specific statutory provisions. Simply put, the EEOC serves to protect individuals from discrimination based on certain characteristics or affiliations while the Department of Labor serves to protect individuals from retaliation stemming from their decision to exercise specific statutory rights. In view of the fact that the purposes sought to be served by proceedings before the Department of Labor differ substantially from the purposes sought to be served by proceedings before the EEOC, we have no difficulty in concluding that Plaintiff's claim is simply not an "EEOC proceeding or similar proceeding conducted by state agencies or commissioners" excluded from coverage under the Argonaut policy. As a result, neither of Defendants' contentions to the effect that the relevant policies did not provide Sheriff Cochran with coverage relating to Plaintiff's claim have merit, thereby establishing that Defendants were not entitled to the entry of judgment as a matter of law in their favor on the basis of governmental immunity considerations.

III. Conclusion

Thus, for the reasons set forth above, none of Defendants' challenges to the trial court's order have merit. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 AUGUST 2013)

BRYANT v. AP INDUS. No. 12-1456	Catawba (11CVS3106)	Affirmed in Part, Reversed and Remanded in Part.
CNTY. OF DURHAM v. ORR No. 13-109	Durham (92CVD5241)	Reversed
COLEMAN v. ORR No. 13-8	Wake (12CVD13147)	Dismissed
DUKE UNIV. HEALTH SYS., INC. v. SPARROW No. 13-12	Durham (10CVS2732)	Affirmed
EDGERTON v. OLIVER No. 12-1455	Buncombe (12CVD1061)	Affirmed
GOOD v. OMEGA V, LLC No. 12-1490	Watauga (11CVS862)	Affirmed
IN RE A.D.S. No. 13-147	Currituck (11J7) (11J9)	Affirmed
IN RE A.W. No. 13-161	Chatham (12JA32-33)	Affirmed in Part, Reversed in Part, Vacated and Remanded in Part.
IN RE G.P.C. No. 13-327	Henderson (09JT170-171)	Affirmed
IN RE K.B.G. No. 13-160	Mitchell (09J32)	Reversed and Remanded
IN RE L.L. No. 13-454	Orange (11JA1) (13CVD142)	Affirmed in part, Vacated and Remanded in part
IN RE N.B. No. 13-419	Robeson (11JT13-15)	Reversed and Remanded
IN RE S.E.A. No. 13-225	New Hanover (11JT131-135)	Affirmed

IN RE T.P. No. 13-280	Robeson (11JA226-227)	Affirmed in Part, Vacated and Remanded in Part.
IN RE S.S. No. 13-420	Currituck (11JA25-27)	Affirmed
STATE v. MILLER No. 13-54	Guilford (10CRS24332) (10CRS72033-34) (10CRS72112)	No Error
STATE v. ROBINSON No. 12-1578	Stokes (10CRS50861) (10CRS50865)	Vacated and Remanded
STATE v. TODD No. 13-67	Wake (12CRS200918)	No Error
STATE v. BOSHERS No. 12-1344	Union (09CRS53823)	No Error
STATE v. DIVINIE No. 12-1311	Rockingham (10CRS748)	No Error
STATE v. ELLERBEE No. 12-1007	Hoke (10CRS51073-74)	No error in part; reversed and remanded in part
STATE v. MORENO No. 12-1402	Randolph (08CRS53483)	No Error
STATE v. SAMMONS No. 12-1522	Buncombe (10CRS63418)	No Error in Part; Remanded for Correction of a Clerical Error in Part.
TEDDER v. HIGH No. 12-1397	Columbus (10CVS180)	Affirmed
TINCHER v. ADECCO No. 12-1153	N.C. Industrial Commission (712483)	Affirmed

IN RE A.S.

[229 N.C. App. 198 (2013)]

IN THE MATTER OF A.S., III

No. COA13-42

Filed 20 August 2013

Appeal and Error—mootness—appeal dismissed

Respondent father's appeal from an Adjudication-Disposition Order was dismissed as moot following the trial court's subsequent Review Order.

Appeal by respondent-father from order filed 27 September 2012 by Judge Nancy E. Gordon in Durham County District Court. Heard in the Court of Appeals 8 May 2013.

Assistant Appellate Defender J. Lee Gilliam for respondent-father appellant.

Assistant County Attorney Robin K. Martinek for Durham County Department of Social Services appellee.

Appellate Counsel Tawanda Foster for guardian ad litem appellee.

McCULLOUGH, Judge.

This appeal stems from an Adjudication-Disposition Order entered by the trial court on 27 September 2012, concerning four children with the same mother but different fathers. Respondent-father, the father of one of the children, appeals. For the following reasons, we dismiss the appeal.

I. Background

The child whose welfare is at stake in this appeal, A.S. III, was born 24 November 2008. At that time, respondent-father and A.S. III's mother were in a serious relationship and had lived together in Durham County for approximately one year. In February 2009, approximately 3 months after the birth of A.S. III, respondent-father lost his job, enlisted in the military, and left for boot camp. During the time respondent-father was away at boot camp, the mother began a relationship with another man and became pregnant, ending respondent-father's and the mother's relationship.

Upon respondent-father's completion of boot camp, respondent-father moved to Colorado Springs, Colorado, where he was stationed. Respondent-father began a year-long deployment to Afghanistan in

June 2011 and returned in June 2012. Despite respondent-father's relocation to Colorado Springs and deployment, respondent-father kept in contact with A.S. III through telephone calls and visits while on leave. Additionally, respondent-father remained up to date on all support obligations through the entry of the 27 September 2012 Adjudication-Disposition Order giving rise to this appeal.

On 18 February 2012, while respondent-father was deployed, a domestic altercation occurred between the mother and her boyfriend. Police responded to the incident. As a result of comments by the mother indicating that she was going to harm herself, police transported the mother to the hospital for evaluation. While hospitalized, the mother tested positive for marijuana, cocaine, and opiates. Durham County Department of Social Services ("DSS") received a report on the domestic incident on 21 February 2012. At that time, DSS chose not to take action regarding A.S. III, because A.S. III was safely in the custody of his maternal grandmother.

On 23 May 2012, the maternal grandmother reported to DSS that the mother threatened to remove A.S. III and his siblings from her care. As a result, on 4 June 2012, DSS filed a petition alleging A.S. III and his siblings were neglected and dependent. An adjudication hearing began on 3 August 2012 and concluded on 29 August 2012 with the trial court adjudicating the children neglected. A disposition hearing then began immediately following adjudication and concluded on 30 August 2012. Respondent-father was present.

As noted above, the trial court entered an Adjudication-Disposition Order on 27 September 2012. In regard to A.S. III, the trial court concluded that A.S. III was neglected and that the mother and respondent-father had acted inconsistent with their constitutionally protected parental rights. The trial court then determined it was in A.S. III's best interest that respondent-father have legal custody of A.S. III while the maternal grandmother maintain physical custody of A.S. III. Additionally, the court granted respondent-father unsupervised visitation and ordered respondent-father to "maintain a cell phone where he can [be] reached for legal decision about [A.S. III] within one half hour and complete a parenting class."

Respondent gave notice of appeal from the Adjudication-Disposition Order on 26 October 2012.

II. Analysis

On appeal, respondent-father raises the following issues regarding the trial court's 27 September 2012 Adjudication-Disposition Order:

whether the trial court erred in (1) concluding he acted inconsistent with his constitutionally protected parental rights; (2) awarding him legal custody but physically placing A.S. III with the maternal grandmother; (3) failing to establish a definitive visitation schedule; and (4) ordering him to attend parenting classes without verifying classes were available in Colorado Springs. Although we recognize respondent-father's arguments have some merit, we do not reach the issues on appeal as they are moot following the trial court's 11 March 2013 Review Order.

In state courts, the general refusal to decide moot cases is a form of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). As explained by our Supreme Court,

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

Id. at 147-48, 250 S.E.2d at 912 (citations omitted).

In juvenile cases, adjudication and disposition orders are not final but subject to review and modification based on the continuing circumstances of each case. *See generally* N.C. Gen. Stat. Chapter 7B (2011).

In this case, on 11 January 2013, DSS filed a motion pursuant to N.C. Gen. Stat. § 7B-1000(a) seeking review and modification of the trial court's disposition as it related to A.S. III. On 23 January 2013, an Order for Nonsecure Custody was filed placing A.S. III in nonsecure custody with DSS, approving placement with A.S. III's maternal grandmother, and scheduling the matter for further hearing on 30 January 2013 to determine the need for continued nonsecure custody. A review hearing of the 27 September 2012 Adjudication-Disposition Order was then held on 30 January 2013 as required by N.C. Gen. Stat. § 7B-906. Respondent-father was not present.

The trial court filed a Review Order on 11 March 2013 modifying the

previous disposition. Pertinent to this appeal, the trial court made the following findings:

> 19. [Respondent-father] . . . lives in Colorado Springs, Colorado. At last contact with . . . DSS, [respondent-father] was in the military and had been married for four years. [Respondent-father] has not had contact with [the social worker] since November 2012. The social worker has made numerous attempts to contact [respondent-father] during December 2012, but [respondent-father] has not responded to her calls. The social worker called Colorado Department of Health and Human Services, and they were not able to locate him at his listed address. The phone number [respondent-father] previously provided is no longer a working number. The social worker has contacted the military base [respondent-father] was stationed at, and [respondent-father] is no longer stationed at that base. [Respondent-father] has an order garnishing his military wages for child support nevertheless no child support has been received in since October 2012. These changes lead this Court to believe that [respondent-father] is no longer serving in the military and that his present whereabouts and circumstances are unknown.
>
> 20. The Mother reports that she has had contact with [respondent-father], but he has not inquired about [A.S. III]. The Mother has not been able to provide [respondent-father's] new number to the social worker.
>
> . . . .
>
> 25. [Respondent-father] has not visited [A.S. III] since October 2012, and has not had phone contact since November 2012. [Respondent-father] has visited his child one time at the daycare since the Adjudication-Disposition hearing in October 2012.
>
> 26. By failing to maintain contact with . . . DSS and his child, by failing to notify DSS about the apparent changes in his housing, contact information and employment, and not participating in and taking advantage of the opportunities to visit with his child, [A.S. III], both in Durham and in Colorado, respondent-father has acted inconsistent with his parental rights.

Based on these findings and pursuant to the trial court's authority to review custody orders, *see* N.C. Gen. Stat. § 7B-1003(b)(1) (2011) (Providing that a trial court shall "[c]ontinue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes" and "[e]nter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile[,]" pending disposition of an appeal[]), the trial court then determined it was in the best interest of A.S. III that DSS have legal custody while A.S. III's maternal grandmother maintain physical custody. Additionally, the trial court altered respondent-father's visitation to allow supervised visitation.

As a result of the trial court's additional findings concerning respondent-father's disregard for A.S. III and the trial court's 27 September 2012 Adjudication-Disposition Order, and as a result the trial court's modifications to custody and visitation, a determination by this Court of the issues now on appeal will have no practical effect. Consequently, the issues are moot. *See Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

Despite the fact that the issues on appeal are moot, "our appellate courts recognize at least five exceptions to the general rule that moot cases should be dismissed." *In re Investigation Into Injury of Brooks*, 143 N.C. App. 601, 604, 548 S.E.2d 748, 751 (2001). Although respondent-father contends that the issues on appeal are not moot, respondent-father argues in the alternative that, if the issues are moot, the exceptions to the mootness doctrine for issues that involve collateral legal consequences are capable of repetition yet evading review, or concern matters in the public interest, apply. We disagree and hold the exceptions inapplicable in the present case.

First, in regard to collateral legal consequences, respondent-father is correct that a finding that a parent has acted inconsistent with his parental rights may have collateral legal consequences in later actions. Nevertheless, in the present case, a reversal of the 27 September 2012 Adjudication-Disposition Order will have no practical effect, because the trial court made additional findings in the 11 March 2013 Review Order that respondent-father had acted inconsistently with his rights as a parent by failing to maintain contact with A.S. III and disobeying the 27 September 2012 Adjudication-Disposition Order. Second, in regard to the exception for cases capable of repetition yet evading review, the reason the appeal in the present case is moot is not because the

challenged action is too short in duration to be fully litigated on appeal, but because respondent-father disregarded the 27 September 2012 Adjudication-Disposition Order, resulting in a change in circumstances warranting modification of the prior disposition. Lastly, in regard to the public interest exception, respondent-father argues that this case presents the opportunity for this Court to determine what actions service members must undertake while deployed in order to avoid forfeiting their constitutionally protected rights as parents. Although we recognize that service members face unique circumstances when deployed, we refuse to establish a minimum standard of care by which service members may fulfill their parental responsibilities. As this Court has recognized, "[t]here is no bright line rule to determine what conduct on the part of a natural parent will result in a forfeiture of the constitutionally protected status[.]" *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999).

III. Conclusion

For the reasons discussed above, we will not address the moot arguments of respondent-father, who has demonstrated a lack of interest in A.S. III and disregarded the trial court's Adjudication-Disposition Order. Therefore, we dismiss respondent-father's appeal from the 27 September 2012 Adjudication-Disposition Order.

Dismissed.

Judges CALABRIA and STEELMAN concur.

MYERS PARK HOMEOWNERS ASSOCIATION, INC., a North Carolina non-profit corporation, and BRIAN THOMAS ATKINSON, Petitioners

v.

CITY OF CHARLOTTE, a North Carolina body politic and corporate, THE CITY OF CHARLOTTE ZONING BOARD OF ADJUSTMENT, an agency of the City of Charlotte, and QUEENS UNIVERSITY OF CHARLOTTE, a North Carolina non-profit corporation, Respondents

No. COA12-1346

Filed 20 August 2013

1. Zoning—ordinance—prior determination—Class V street—rational basis

The superior court did not err by failing to reverse the decision of The City of Charlotte Zoning Board of Adjustment (ZBA) that affirmed the prior determination that Wellesley Avenue is a Class V street under a zoning ordinance. It is neither the superior court's nor the Court of Appeals' duty to second guess the decision of ZBA where there is a rational basis in the evidence.

2. Zoning—prior determination—dormitories—residential buildings—excluded from floor area ratio calculations

The superior court did not err by failing to reverse the decision of The City of Charlotte Zoning Board of Adjustment that bound petitioners to the zoning administrator's prior determination that dormitories are residential buildings and excluded from floor area ratio calculations for R-3 zoning districts.

3. Pleadings—motion for amendment—motion for alteration—inapplicable

The superior court did not err in a zoning case by denying petitioners' motions for amendment and/or alteration pursuant to N.C.G.S. § 1A-1, Rules 52 and 59 to have the superior court issue findings of fact and conclusions of law. Rules 52 and 59 were inapplicable.

Appeal by petitioners from orders filed 19 July 2012 and 30 August 2012 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2013.

Kenneth T. Davies; and Currin & Currin, by Robin T. Currin, for petitioner appellants.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and John H. Carmichael, for Queens University of Charlotte respondent appellee.

Assistant City Attorney Thomas E. Powers III, and Senior Assistant City Attorney Terrie Hagler-Gray, for the City of Charlotte respondent appellee.

McCULLOUGH, Judge.

Myers Park Homeowners Association, Inc. ("MPHA"), and Brian Thomas Atkinson ("Mr. Atkinson") (together "petitioners") appeal from the superior court's orders affirming the decision of The City of Charlotte's Zoning Board of Adjustment ("ZBA") and denying petitioners' motion for amendment of order and/or alteration or amendment of order. For the following reasons, we affirm.

I. Background

This case concerns the recent expansion of Queens University of Charlotte ("Queens"), a university located on a 24.93-acre tract of land within the Myers Park neighborhood in the City of Charlotte. Pursuant to the Zoning Ordinance of the City of Charlotte (the "zoning ordinance"), Myers Park is zoned as an R-3 single family district. Under Section 9.201 of the zoning ordinance, R-3 districts are directed toward suburban single-family living. Nevertheless, Section 9.203 of the zoning ordinance provides that certain limited institutional uses are permitted under prescribed conditions. Universities, colleges, and junior colleges are one of the limited institutional uses permitted in a district zoned R-3 provided that, among other conditions, the primary vehicular access to the campus is not by way of a Class VI (local) street and the campus does not exceed the maximum floor area ratio ("FAR") for nonresidential buildings in an R-3 district. *See* Sections 9.203(22) & 9.205(b).

Relevant to this case, the recent expansion of Queens included the construction of two structures on their Myers Park campus: (1) a seven-story 210,495-square-foot structure consisting of a five-level parking deck and two-story dormitory above the parking deck (the "deck/dormitory"); and (2) a three-story 142,342-square-foot structure near the deck/dormitory to be used as an athletic facility (the "Levine Center"). While planning the expansion, Queens' Vice President for Campus Planning and Services, Mr. Bill Nichols, submitted an inquiry to Zoning Administrator Katrina Young (the "zoning administrator"), concerning

whether dormitories were properly excluded from the FAR calculations. On 28 January 2010, the zoning administrator provided an interpretation confirming that dormitories were properly excluded. Thereafter, Queens received administrative site plan approval from the City of Charlotte.

Following site plan approval, on 10 November 2011, Mr. Atkinson sent a letter to the Charlotte-Mecklenburg Planning Director, Ms. Deborah Campbell, raising potential zoning issues. The Planning Director responded to Mr. Atkinson's concerns by email on 22 November 2011. The pertinent portions of the Planning Director's interpretation are summarized as follows: (1) the Levine Center is a part of Queens and is considered an accessory use allowed in an R-3 zoning district; and (2) access to the Levine center is provided by Wellesley Avenue, a Class V (collector) street, compliant with the zoning ordinance.

On 22 December 2011, Mr. Atkinson and MPHA filed a Hearing Request Application and an Appeal Application to ZBA. Amended applications were later filed on 20 January 2012. In the amended applications, petitioners contended the following: (1) the Levine Center was erroneously defined as a general accessory use to Queens and is more properly defined as a stadium; (2) Wellesley Avenue was improperly categorized as a Class V street and is more appropriately categorized as a Class VI street; and (3) Queens exceeded the maximum FAR when considering the Levine Center and other recently approved construction projects.

ZBA held a hearing on petitioners' appeal on 28 February 2012. Thereafter, ZBA notified petitioners of its decision to uphold the prior interpretations, affirming that: (1) the Levine Center and uses within are accessory to Queens; (2) Wellesley Avenue is not a Class VI street; and (3) Queens does not exceed the maximum FAR. ZBA's decision was filed in the Charlotte-Mecklenburg Planning Department on 13 March 2012.

On 12 April 2012, petitioners filed a Petition for Review in the Nature of Certiorari in Mecklenburg County Superior Court seeking review of ZBA's decision. Additionally, petitioners asserted that ZBA violated their procedural due process rights. The petition was granted and a hearing was held in Mecklenburg County Superior Court before the Honorable Timothy S. Kincaid on 19 July 2012. Upon conclusion of the hearing, the trial court affirmed the decision of ZBA and dismissed petitioners' claims.

On 30 July 2012, petitioners filed a motion pursuant to Rules 52 and 59 of the North Carolina Rules of Civil Procedure seeking amendment and/or alteration of the trial court's 19 July 2012 order. Specifically, petitioners requested that the court make findings of fact and additional

conclusions of law. Following a 30 August 2012 hearing, the trial court denied petitioners' motion.

Petitioners' now appeal to this Court from the superior court's orders affirming the decision of ZBA and denying their motion for amendment and/or alteration.

II. Analysis

On appeal, petitioners raise two issues concerning the superior court's order upholding ZBA's decision: (1) whether the superior court erred in affirming ZBA's decision affirming the categorization of Wellesley Avenue as a Class V street; and (2) whether the superior court erred in affirming ZBA's decision affirming the interpretation that dormitories are excluded from FAR calculations in R-3 zoning districts. Additionally, petitioners contend that the superior court erred in denying their motion for amendment and/or alteration of order pursuant to Rules 52 and 59 of the North Carolina Rules of Civil Procedure. We address each issue.

Standard of Review

As this Court has recognized, a different standard of review applies at each level of an appeal from a decision of a zoning board. *Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs*, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007). ZBA's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (internal quotation marks and citation omitted). Thus, "[w]hen the Superior Court grants certiorari to review a decision of [ZBA], it functions as an appellate court rather than a trier of fact." *Hopkins v. Nash Cty.*, 149 N.C. App. 446, 447, 560 S.E.2d 592, 593–94 (2002).

"The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal." *Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17 (internal quotation marks and citations omitted).

> If the petitioner complains that the [ZBA's] decision was based on an error of law, the superior court should conduct a de novo review. If the petitioner complains that the decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test.

Hopkins, 149 N.C. App. at 448, 560 S.E.2d at 594 (citations omitted).

> Under a *de novo* review, the superior court considers the matter anew[] and freely substitut[es] its own judgment for the agency's judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." The "whole record" test does not allow the reviewing court to replace the [b]oard'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*.

Mann Media, Inc., 356 N.C. at 13-14, 565 S.E.2d at 17-18 (internal quotation marks and citations omitted) (alterations in original). "When the issue before the court is whether [ZBA] erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of [ZBA], but is not bound by that interpretation, and may freely substitute its judgment as appropriate." N.C. Gen. Stat. § 160A-393(k)(2) (2011). On appeal to this Court, "[o]ur review of a trial court's zoning board determination is limited to determining [(1)] whether the superior court applied the correct standard of review, and to determining [(2)] whether the superior court correctly applied that standard." *MNC Holdings, LLC v. Town of Matthews*, ___ N.C. App. ___, ___, 735 S.E.2d 364, 367 (2012) (internal quotation marks and citation omitted) (alterations in original).

In the superior court's 19 July 2012 order, the superior court stated that it "conducted a *de novo* review concerning questions of law, and a 'whole record' review concerning issues of fact." Based on the record, the superior court then "concluded as a matter of law that ZBA's decision concerning the three (3) issues in dispute (*i.e.*, upholding the City's interpretations thereof) was correct, and should be affirmed."

It is evident from the record that the superior court applied the correct standard of review. On appeal, however, petitioners challenge the interpretation of the zoning ordinance. Because issues concerning the interpretation of zoning ordinances are questions of law, we likewise review the issues *de novo*. *See MNC Holdings, LLC*, ___ N.C. App. at ___, 735 S.E.2d at 367.

Classification of Wellesley Avenue

[1] The first issue raised on appeal is whether the superior court erred in failing to reverse the decision of ZBA that affirmed the prior

determination that Wellesley Avenue is a Class V street under the zoning ordinance. The classification of Wellesley Avenue is significant because Wellesley Avenue serves as the primary vehicular access to Queens. Pursuant to Section 9.203(22)(c) of the zoning ordinance, in order for a university to be located within an R-3 district, primary vehicular access must not be by way of a Class VI street.

On appeal, petitioners reexamine the evidence presented to ZBA and argue the only conclusion that can be reached from a proper interpretation of the zoning ordinance is that Wellesley Avenue is a Class VI street. Upon *de novo* review of the zoning ordinance, we disagree and affirm the interpretation of the zoning administrator, ZBA, and superior court — Wellesley Avenue is not a Class VI street and its use as the primary vehicular access to Queens is proper.

Section 2.201 of the zoning ordinance establishes a hierarchy of street classifications based on function and design. For public streets, the classifications range from Class I to Class VI. Pertinent to this appeal, the zoning ordinance differentiates between collector streets, classified as Class V, and local streets, classified as Class VI. A Class V collector street is defined as "[a] roadway which assembles traffic from local streets and distributes it to the nearest arterial street, providing direct primary access to low/medium density land uses and designed to carry low to moderate traffic volumes at low to moderate speeds." A Class VI local street is defined as "[a] two-lane roadway which provides access directly to adjoining low/medium density land uses and conducts traffic to local limited and Class V streets which serve the area. The Class VI road is designed to accommodate low volumes of traffic at low speeds."

When comparing the definitions of Class V and Class VI streets, there are three primary distinctions: (1) function, (2) traffic volume, and (3) speed. It is evident from the record that ZBA considered each of these distinctions during its deliberations. ZBA then voted 4 to 1 to uphold the determination that Wellesley Avenue is not a Class VI street.

Although petitioners raise the issue concerning the classification of Wellesley Avenue as a challenge to ZBA's interpretation of the zoning ordinance, their argument on appeal focuses on the sufficiency of the evidence. Although we review the interpretation of a zoning ordinance *de novo*, we review the sufficiency of the evidence under the whole record test. *See Hopkins*, 149 N.C. App. at 448, 560 S.E.2d at 594; *Mann Media, Inc.*, 356 N.C. at 13-14, 565 S.E.2d at 17-18.

> When the Court of Appeals applies the whole record test and reasonable but conflicting views emerge from the

> evidence, the Court cannot substitute its judgment for the administrative body's decision. The Court, however, must take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. The Court must ultimately decide whether the decision has a rational basis in the evidence.

CG&T Corp. v. Bd. of Adjustment of Wilmington, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992) (internal quotation marks and citations omitted).

At the 28 February 2012 ZBA hearing, testimony was offered from various individuals concerning the classification of Wellesley Avenue. This testimony included presentations from two individuals tendered as experts, Mr. Michael Davis, a Charlotte Department of Transportation employee, and Mr. Walter Fields, a former city planner for the Charlotte-Mecklenburg Planning Commission.

At the hearing, Mr. Davis was tendered as a transportation expert and testified concerning each of the distinctions between Class VI and Class V streets. Regarding function, Mr. Davis opined that Wellesley Avenue met the functional components of a Class V street. Pursuant to definitions in the zoning ordinance, a Class V street "assembles traffic from local streets and distributes it to the nearest arterial street" whereas a Class VI street "conducts traffic to local limited and Class V streets[.]" Mr. Davis testified that Wellesley Avenue connects two major arterial streets, Queens Road West and Selwyn Avenue, and not local limited or Class V streets. Therefore, in terms of function, Mr. Davis concluded that Wellesley Avenue more closely fit the definition of a Class V street than a Class VI street. Mr. Davis then testified concerning the distinctions in traffic volume and speed on Class V and Class VI streets. Pursuant to the definitions in the zoning ordinance, a Class V street is "designed to carry low to moderate traffic volumes at low to moderate speeds[]" whereas a Class VI street "is designed to accommodate low volumes of traffic at low speeds." Because the zoning ordinance does not spell out what constitutes low to moderate traffic volumes and speed, Mr. Davis compared Wellesley Avenue to other Class V streets. Regarding traffic volume, Mr. Davis testified that the average traffic volume on minor collector streets is 1,300 vehicles per day and on all collector streets, including minor and major collector streets, is 2,100 vehicles per day. When compared, Wellesley Avenue exceeds the average traffic volume with an average of 2,700 vehicles per day. Regarding speed, Mr. Davis testified that Wellesley Avenue has a posted speed limit of 25 miles per hour. While 25 miles per hour is low, Mr. Davis indicated "that's a typical speed limit posting on a collector street[,]" as "54 percent of the collector miles in Charlotte are

posted 25 miles per hour." Thus, while acknowledging that the design component is subjective and it is arguable that Wellesley Avenue is a Class VI street, Mr. Davis testified that the traffic volume and speed on Wellesley Avenue were consistent with other Class V streets. As a result, Mr. Davis concluded that Wellesley Avenue was properly classified as a Class V street under the definition in the zoning ordinance.

Mr. Fields was then tendered as an expert in planning and regulatory development and offered testimony tending to show that Wellesley Avenue was a Class VI street. Mr. Fields testified that the definition of a collector street contemplates a road that can physically handle the traffic. Moreover, Mr. Fields indicated that a street cannot be classified without considering the larger network of streets in the area. Considering the physical components of Wellesley Avenue, including width and speed bumps, and considering the role of Wellesley Avenue in the larger network of streets in Myers Park, Mr. Fields opined that Wellesley Avenue was better suited as a Class VI street.

It is evident from ZBA's deliberations that ZBA afforded greater weight to the testimony of Michael Davis and ultimately consolidated his testimony into a single finding of fact, "Charlotte Department of Transportation (CDOT) has determined that Wellesley Avenue is not a Class VI street." We hold this finding of fact sufficient to support ZBA's decision to uphold the zoning administrator's interpretation that Wellesley Avenue is not a Class VI street and to inform the parties and this Court of what induced its decision. *See Humble Oil & Refining Co. v. Bd. of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974) (providing that the facts must be sufficient to inform the parties and the court of the basis for the board's decision); *see also* N.C. Gen. Stat. § 160A-393(l)(2) (2011) ("[F]indings of fact are not necessary when the record sufficiently reveals the basis for the decision below . . . . "). It is neither the superior court's nor this Court's duty to second guess the decision of ZBA where there is a rational basis in the evidence. *CG&T Corp.*, 105 N.C. App. at 40, 411 S.E.2d at 660. Consequently, we affirm.

Floor Area Ratio

[2] The second issue raised on appeal is whether the superior court erred in failing to reverse the decision of ZBA that bound petitioners to the zoning administrator's prior determination that dormitories are residential buildings and excluded from FAR calculations for R-3 zoning districts. Petitioners argue dormitories should have been included.

At the outset of our analysis, we note that petitioners did not specifically raise the issue of whether dormitories are included or excluded from FAR calculations in their appeal application to ZBA. Instead, the issue arose during ZBA's consideration of the third issue on appeal, whether Queens exceeded the maximum FAR when considering the Levine Center and other recently approved construction projects. At the hearing, ZBA refused to allow petitioners to argue that dormitories should be included in FAR calculations because the zoning administrator had already issued an interpretation on 28 January 2010, concluding that dormitories were properly excluded. ZBA reasoned that petitioners were bound by the zoning administrator's prior interpretation because they failed to appeal it within thirty days as required by Section 5.103 of the zoning ordinance.

In their petition for review to superior court, petitioners asserted that it was a violation of due process to bind them to an interpretation to which they had no actual or constructive notice. As noted above, the superior court conducted a *de novo* review of issues of law and a whole record review of the evidence and affirmed ZBA's decision.

Now on appeal to this Court, petitioners continue to argue their due process rights were violated. Queens and the City of Charlotte dispute petitioners' claim, yet neither expends any effort to counter petitioners' assertions that they did not have notice of the zoning administrator's 28 January 2010 interpretation prior to the ZBA hearing and the thirty-day appeal period does not begin to run under Section 5.103 of the zoning ordinance until they receive notice of the interpretive decision. *See Meier v. City of Charlotte*, 206 N.C. App. 471, 481, 698 S.E.2d 704, 711 (2010) ("The appeal period begins to run as soon as the aggrieved party receives actual or constructive notice of the interpretative decision."). Instead, both Queens and the City of Charlotte argue the merits of the zoning administrator's interpretation that dormitories are excluded from FAR calculations.

Where the interpretation of a zoning ordinance is subject to *de novo* review and a *de novo* review of the zoning ordinance by this Court will remedy the alleged due process violations, we accept petitioners' due process argument for purposes of this appeal and interpret the zoning ordinance *de novo*. *See Welter v. Rowan Cty. Bd. of Comm'rs*, 160 N.C. App. 358, 363, 585 S.E.2d 472, 476 (2005) (quoting *Eastern Outdoor, Inc. v. Board of Adjust. of Johnston Cty.*, 150 N.C. App. 516, 519, 564 S.E.2d 78, 80-81 (2002)) ("[I]nstead of remanding such a case to the superior court for exercise of the proper *de novo* review of the zoning ordinance's interpretation, 'an appellate court's obligation to review

a superior court order for errors of law . . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court . . . .") (emphasis omitted).

When interpreting a zoning ordinance, "we attempt to ascertain and effectuate the intent of the legislative body. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, we avoid interpretations that create absurd or illogical results." *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citations omitted). Upon review, we hold that the provisions of the zoning ordinance governing FAR calculations are relatively straightforward.

Section 2.201 of the zoning ordinance defines FAR as "[t]he total floor area of a building or buildings divided by the gross area of the lot or parcel." Pursuant to Section 9.205(1)(b) of the zoning ordinance, the maximum FAR for non-residential buildings in an R-3 district is .50. Residential buildings are not considered in FAR calculations.

The issue addressed by the zoning administrator and now challenged on appeal is whether dormitories on Queens' campus are residential buildings excluded from FAR calculations. If dormitories are residential buildings and excluded from FAR calculations, Queens satisfies the FAR requirement. If dormitories are non-residential buildings, additional FAR calculations will be required to determine whether Queens meets the FAR requirement.

Upon review of the zoning ordinance, we hold that dormitories are residential buildings and properly excluded from FAR calculations. Our interpretation is guided by Section 2.201 of the zoning ordinance. First, Section 2.201 of the zoning ordinance defines a dormitory as:

> A building containing bathroom facilities available for common use by the *residents* of the building, which is *occupied or intended to be occupied as the dwelling* for more than six persons who are not related by blood, marriage, or adoption but who are enrolled in, affiliated with or employed by the same educational, religious, or health institution.

(Emphasis added.) Second, the definition of "residential use" in Section 2.201 of the zoning ordinance includes dormitory.

Although petitioners concede that dormitories are classified as a residential use under the zoning ordinance, petitioners contend that

a dormitory cannot maintain the classification as a residential use when Section 9.204(4) of the zoning ordinance permits dormitories in R-3 districts solely "as an accessory use to a university, college or junior college located on the same lot." Petitioners instead argue that, where dormitories at Queens are permitted in Myers Park only as accessories to Queens, the dormitories must take on the same classification as Queens, an institutional use. We disagree. There is nothing in the zoning ordinance that necessitates the interpretation petitioners now urge this Court to adopt. The fact that a dormitory is allowed in an R-3 district as an accessory to an institutional use but not as a principal use does not require that the dormitory also be classified as an institutional use.

Where dormitory is defined as a dwelling for residents and residential use is defined to include dormitories, we hold the definitions provided in the zoning ordinance control. Thus, we affirm the zoning administrator's interpretation that dormitories are excluded from FAR calculations.

Rules 52 and 59 Motions

[3] The final issue raised on appeal is whether the superior court erred in denying petitioners' motions for amendment and/or alteration pursuant to Rules 52 and 59 of the North Carolina Rules of Civil Procedure. In the motion for amendment and/or alteration, petitioners' sought to have the superior court issue findings of fact and conclusions of law. We, however, find Rules 52 and 59 inapplicable in the present case. Therefore, we hold the superior court did not err.

As we previously noted, "[w]hen the Superior Court grants certiorari to review a decision of [ZBA], it functions as an appellate court rather than a trier of fact." *Hopkins*, 149 N.C. App. at 447, 560 S.E.2d at 593–94. Sitting as an appellate court, the superior court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160A-393(*1*). As we held in *Markham v. Swails*, we are of the opinion that Rule 52(b) has no application where the superior court sits in the posture of an appellate court. 29 N.C. App. 205, 208, 223 S.E.2d 920, 922 (1976). Similarly, we hold that a motion pursuant to Rule 59, concerning new trials and amendment of judgments, is inapplicable in the present case.[1]

1. To the extent petitioners argue the superior court failed to consider their due process argument, the superior court conducted a *de novo* review of issues of law and affirmed. Furthermore, we addressed the issue in this opinion.

III. Conclusion

For the reasons discussed above, we affirm the orders of the superior court.

Affirmed.

Judges CALABRIA and STEELMAN concur.

LINDA M. ROBINSON AND FRANK ROBINSON, PLAINTIFFS
v.
DUKE UNIVERSITY HEALTH SYSTEMS, INC. D/B/A DUKE UNIVERSITY MEDICAL CENTER; DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC.; CHRISTOPHER MANTYH, MD; ERICH S. HUANG, MD; MAYUR B. PATEL, MD; LEWIS HODGINS, MD; JANE AND JOHN DOE, DEFENDANTS

No. COA12-1239

Filed 20 August 2013

1. Civil Procedure—motion to dismiss—improperly overruling previous order

The trial court's summary judgment order in a medical malpractice case improperly overruled a previous order denying defendants' motion to dismiss on the issue of plaintiffs' compliance with N.C.G.S. § 1A-1, Rule 9(j). One judge may not reconsider the legal conclusions of another judge. Thus, Judge Hudson's order granting summary judgment in favor of defendants on the legal question of plaintiffs' compliance with the pertinent provisions of Rule 9(j) was vacated.

2. Medical Malpractice—Rule 9(j) certification—res ipsa loquitur doctrine

The trial court did not err in a medical malpractice case by concluding that plaintiffs' complaint complied with the pertinent provisions of N.C.G.S. § 1A-1, Rule 9(j). No bar existed to plaintiffs' assertion of the *res ipsa loquitur* doctrine, and plaintiffs' complaint and forecast of evidence both satisfied the requirements of Rule 9(j)(3) and survived defendants' motion for summary judgment on that issue.

3. Medical Malpractice—elements—applicable standard of care—summary judgment improper

The trial court erred in granting summary judgment in favor of defendants as to plaintiffs' claim for medical negligence against Dr. Mantyh and Dr. Huang. Plaintiffs presented sufficient evidence to satisfy all elements of a medical malpractice claim against Dr. Mantyh. Further, plaintiffs presented sufficient evidence that Dr. Huang breached the applicable standard of care.

4. Medical Malpractice—vicarious liability of hospital—doctor employee—apparent agent

The trial court erred in granting summary judgment in favor of defendants as to plaintiffs' claim for medical negligence against defendant Duke University Health Systems (DUHS). Dr. Huang was admittedly employed by DUHS at the time of the alleged medical negligence, and plaintiffs' evidence sufficiently demonstrated that Dr. Mantyh was an apparent agent of DUHS.

5. Damages and Remedies—punitive damages—summary judgment proper

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendants as to plaintiffs' claim for punitive damages. Plaintiffs' complaint and forecast of evidence failed to provide any facts that defendants' conduct in causing the patient's injurious condition was willful, wanton, malicious, or fraudulent.

Judge CALABRIA concurring in result only.

Judge STEELMAN concurring in result in separate opinion.

Appeal by plaintiffs from judgment entered 15 June 2012 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 8 May 2013.

Willcox, Buyck & Williams, P.A., by Reynolds Williams, pro hac vice; and Thomas & Farris, by Albert S. Thomas and Allen G. Thomas, for plaintiff appellants.

McGuireWoods LLP, by Mark E. Anderson, Heather R. Wilson, and Monica E. Webb, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs Linda M. Robinson ("Robinson") and her husband, Frank Robinson (collectively, "plaintiffs") appeal from an order of the trial court granting summary judgment in favor of defendants Duke University Health Systems, Inc. d/b/a Duke University Medical Center ("DUHS"); Duke University Affiliated Physicians, Inc. ("DUAP"); Christopher Mantyh, M.D. ("Dr. Mantyh"); Erich S. Huang, M.D. ("Dr. Huang"); Mayur B. Patel, M.D. ("Dr. Patel," collectively with the aforementioned defendants, "defendants"); and Lewis Hodgins, M.D. ("Dr. Hodgins), and dismissing their medical malpractice action with prejudice. On appeal, plaintiffs contend the trial court erred in granting summary judgment in favor of defendants because (1) their complaint stated a cause of action for medical negligence under the common law theory of *res ipsa loquitur*, and therefore their complaint complied with Rule 9(j)(3) of the North Carolina Rules of Civil Procedure for medical malpractice actions; and (2) they presented evidence establishing each and every element of a medical negligence claim, thereby creating a genuine issue of fact for trial. After careful review, we (1) affirm the trial court's order dismissing plaintiffs' action against defendants DUAP, Dr. Patel, and Dr. Hodgins and dismissing plaintiffs' punitive damages claim; (2) vacate the trial court's order granting summary judgment in favor of defendants on the basis of plaintiffs' compliance with Rule 9(j); and (3) reverse the trial court's award of summary judgment in favor of defendants Dr. Mantyh, Dr. Huang, and DUHS. We remand the matter to the trial court for further proceedings consistent with this opinion.

I. Background

On 12 March 2008, Robinson was admitted to Duke University Medical Center with a diagnosis of severe constipation predominant irritable bowel syndrome and colonic inertia. After considering her treatment options, Robinson elected to undergo a subtotal/abdominal colectomy, a surgical procedure to remove a portion of the small intestine and reattach the intestine to the rectum using a surgical stapler. Dr. Mantyh, Chief of Gastrointestinal and Colorectal Surgery at the hospital, assisted by Dr. Huang, a general surgery resident at the hospital, performed Robinson's surgery.

On the day following her surgery, Robinson reported loose stool in her bed, and overnight, she reported bloody fluid passing from her vagina. Upon evaluation, it was discovered that Robinson's small intestine had been connected to her vagina, rather than to her rectum, during her surgical procedure. As a result, on 14 March 2008, Dr. Mantyh and Dr. Huang performed a second surgery on Robinson to correct the misconnection. The second surgery was successful in repairing the communication

between Robinson's small intestine and her vagina. Robinson was subsequently discharged from the hospital on 27 March 2008.

On 29 April 2008, Robinson presented to Dr. Mantyh for follow-up outpatient care, at which time she had new complaints including difficulty speaking, left-sided weakness, erratic hand movements, and blurry vision. Robinson reported that her symptoms began following her second surgery and continued to worsen with time. Dr. Mantyh ordered that Robinson be admitted to the hospital, where she was diagnosed with conversion disorder, a psychiatric disorder related to recent conflict or stress. Robinson was subsequently discharged from the hospital on 2 May 2008.

On 10 March 2011, plaintiffs filed a complaint for medical negligence against all defendants. Plaintiffs' complaint relies on the common law theory of *res ipsa loquitur*. Plaintiffs' complaint also sought punitive damages. On 19 April 2011, all defendants moved to dismiss plaintiffs' action pursuant to Rules 9(j), 12(b)(2), 12(b)(5), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure. On 1 July 2011, the trial court denied defendants' motion to dismiss as to all defendants except Dr. Hodgins, as to whom plaintiffs' action was dismissed with prejudice. Defendants then filed an answer to plaintiffs' complaint on 26 July 2011.

The parties proceeded to conduct discovery, during which plaintiffs identified Joshua Braveman, M.D. ("Dr. Braveman"), an experienced colorectal surgeon, as an expert to testify regarding the care Robinson received from defendants during her surgeries. On 27 April 2012, defendants filed a motion for summary judgment, asserting that (1) plaintiffs had failed to comply with Rule 9(j)(1) of the North Carolina Rules of Civil Procedure for medical malpractice claims, (2) the doctrine of *res ipsa loquitur* did not apply to plaintiffs' action, and (3) plaintiffs could not forecast evidence to satisfy each and every element of their medical negligence claim. The trial court held a hearing on defendants' motion on 12 June 2012, and a written order granting summary judgment in favor of defendants and dismissing plaintiffs' action with prejudice was entered by the trial court on 15 June 2012. On 16 July 2012, plaintiffs entered timely written notice of appeal from the trial court's 15 June 2012 order.[1]

On 12 September 2012, defendants filed a motion with the trial court pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure seeking an advisory opinion and/or a supplemental order with findings

1. Plaintiffs expressly do not appeal the grant of summary judgment in favor of DUAP or Dr. Patel, and therefore, plaintiffs' action stands dismissed as against those defendants.

of fact and conclusions of law to aid our review of plaintiffs' present appeal. Defendants then moved this Court for a stay of appellate proceedings until the trial court could consider their Rule 60(b) motion. This Court granted defendants' motion on 5 November 2012, ordering the case remanded to the trial court for an evidentiary hearing and the entry of findings of fact and conclusions of law thereon. Thereafter, on 14 November 2012, the trial court held a hearing and entered a "Supplemental Order and/or Advisory Opinion," including findings of fact and conclusions of law supporting the grant of summary judgment in favor of defendants.

II. Standard of Review

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "The trial court must consider the evidence in the light most favorable to the non-moving party." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385. We review a trial court's order granting summary judgment *de novo*. *Id.* "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

III. Compliance with Rule 9(j)

A. Trial Court's Inconsistent Rulings on Rule 9(j) Compliance

[1] We first address plaintiffs' contention that the trial court's summary judgment order overruled its previous order denying defendants' motion to dismiss on the issue of plaintiffs' compliance with Rule 9(j).

On 19 April 2011, defendants moved to dismiss plaintiffs' action pursuant to Rules 9(j), 12(b)(2), 12(b)(5), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure. Defendants argued that plaintiffs' complaint failed to comply with Rule 9(j)(1) and did not meet "the well[-]established pleading requirements under North Carolina law so as to establish negligence under the existing common law doctrine of *res ipsa* and therefore fails to fall within the exception set forth in Rule 9(j)(3)." In their memorandum supporting their motion to dismiss, defendants presented extensive argument contending that the doctrine of *res*

ipsa loquitur does not apply to plaintiffs' action because (1) plaintiffs failed to allege either that a surgical instrument or foreign object was left in Robinson's body following surgery or that her injury was to an area far away from and completely unrelated to the zone of surgery; (2) plaintiffs alleged the proximate cause of Robinson's injury in their complaint, rather than alleging that no proof of the cause of Robinson's injury is available; (3) laypersons lack the specialized medical knowledge necessary to infer that the injury Robinson sustained during or as a result of her colectomy procedure is a type that does not ordinarily occur in the absence of negligence; and (4) plaintiffs failed to allege that the instrumentality causing the alleged injury was under defendants' exclusive control.

On 1 July 2011, Judge Robert Hobgood ("Judge Hobgood") denied defendants' motion to dismiss. In his written order, Judge Hobgood noted the parties' arguments as follows:

> The argument of all Defendants is that the Plaintiffs have failed to abide by Rule 9(j) of the North Carolina Rules of Civil Procedure because the Complaint contains no allegation that an expert witness has been appropriately consulted or identified and described as required by Rule 9(j)(1). Plaintiffs urge that the Complaint sets forth facts which establish negligence under the common law doctrine of *res ipsa loquitur*.

Judge Hobgood found as fact that plaintiffs' complaint

> alleges that the Defendants connected Linda Robinson's small intestine to her vagina rather than to her anus during a surgery, thereby injuring her, and that such acts, by their very nature, raise a presumption of negligence on the part of the Defendants. The Complaint alleges that all adult persons know the elementary anatomy of the body and that it requires neither sophistication, training, nor expertise to understand the factual issues raised by the Complaint. The Defendants argue that the factual circumstances described above did not fall within certain parameters which, the Defendants contend, narrowly prescribe the application of the doctrine of *res ipsa loquitur*.

Judge Hobgood then made the following conclusion of law:

> Applying the applicable law to the allegations in the Complaint, the Complaint alleges facts giving notice of

> negligence under the existing common law doctrine of *res ipsa loquitur*. As a result[,] the Defendants' Motion to Dismiss on the basis of Rules 9(j), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure must be denied.

Following discovery, on 27 April 2012, defendants filed a motion for summary judgment, which was granted by Judge Orlando Hudson ("Judge Hudson") on 15 June 2012. In his supplemental order/advisory opinion supporting the grant of summary judgment in favor of defendants, Judge Hudson made certain findings of fact that improperly resolved contested issues of fact, including a finding of fact that (1) Robinson "was diagnosed with a fistula on March 14, 2008, and a reoperation was performed[;]" (2) "[i]n their Complaint, Plaintiffs identify the alleged cause of Mrs. Robinson's injury: 'the botched colectomy is a proximate cause of the Plaintiffs' injury[;]' " and (3) "Dr. Braveman concedes that the injury at issue can occur in the absence of negligence . . . and confirms that a layperson does not have the skill or knowledge to judge the conduct at issue in this case." Judge Hudson then made the following conclusions of law:

> 31. The doctrine of *res ipsa loquitur* is not applicable to this case, where the evidence shows: a) this is a medical malpractice case; b) this case does not involve retained surgical instruments or foreign bodies; c) the alleged injury did not occur in an area that was far away from and completely unrelated to the zone of surgery; d) Plaintiffs offered proof of the cause of the injuries complained of; e) Plaintiff's injury is the type that can and does occur in the absence of negligence.
>
> . . . .
>
> 33. Plaintiffs' Complaint should be dismissed as to all Defendants pursuant to Rule 9(j) because: a) this is a medical malpractice case which requires a pre-filing expert review; b) the Complaint lacks the required Rule 9(j) certification; c) Plaintiffs did not obtain the required Rule 9(j) expert review prior to filing the Complaint; d) the applicable statute of [limitations] expired on March 12, 2011; and e) Plaintiffs did not file a Complaint that complied with Rule 9(j) prior to the expiration of the statute of limitations.

Our case law is clear that "one judge may not reconsider the legal conclusions of another judge." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 646, 692 S.E.2d 470, 473 (2010). The only limited exception to this rule is for "interlocutory orders addressed to the discretion of the trial court[.]" *Id.* Here, however, Judge Hobgood's order determining that plaintiffs' complaint properly complied with Rule 9(j)(3) was not a ruling addressed to his discretion. Rather, it was a ruling as a matter of law:

> In considering whether a plaintiff's Rule 9(j) statement is supported by the facts, a court must consider the facts relevant to Rule 9(j) and apply the law to them. In such a case, this Court does not inquire as to whether there was any question of material fact, nor do we view the evidence in the light most favorable to the plaintiff. Rather, our review of Rule 9(j) compliance is *de novo*, *because such compliance clearly presents a question of law*.

Barringer v. Wake Forest Univ. Baptist Med. Ctr., 197 N.C. App. 238, 255-56, 677 S.E.2d 465, 477 (2009) (emphasis added) (internal quotation marks and citations omitted).

In granting summary judgment in favor of defendants in the present case, Judge Hudson ruled contrary to Judge Hobgood's prior ruling on the same legal issue to dismiss: whether plaintiffs' complaint properly complied with the pertinent provisions of Rule 9(j). Judge Hudson was without authority to reconsider Judge Hobgood's determination on that issue. Although Judge Hudson stated in his supplemental order/advisory opinion that he was "not reviewing or attempting to overrule the findings and/or order entered by Judge [Hobgood] on July 1, 2011[,]" citing the different standards for consideration of a Rule 12(b)(6) motion and a Rule 56 motion, Judge Hudson did precisely the opposite. While we recognize that "[t]he trial court's standards for a Rule 12(b)(6) motion to dismiss and a motion for summary judgment are different and present separate legal questions[,]" *Adkins*, 203 N.C. App. at 647, 692 S.E.2d at 473, one trial court judge is nonetheless powerless to make a contrary ruling on an issue of law already resolved by a prior trial court judge's ruling, despite the denomination of the order as one denying a motion to dismiss or granting summary judgment. *See id.* at 647-52, 692 S.E.2d at 473-76 (vacating order granting summary judgment in favor of defendants on legal issue of whether plaintiff's complaint touched on a matter of public concern where previous ruling by another trial court judge denied defendants' motion to dismiss after considering same legal question and reaching contradictory conclusion).

In comparing the two orders side by side in the present case, as well as defendants' arguments on the issue in both instances, it is clear that Judge Hudson granted summary judgment in favor of defendants in light of his conclusion that the doctrine of *res ipsa loquitur* was not applicable to the facts alleged and evidence presented by plaintiffs and therefore plaintiffs' complaint failed to comply with the pertinent provisions of Rule 9(j) – the opposite conclusion reached by Judge Hobgood in his prior order denying defendants' motion to dismiss on the same legal issue. Accordingly, we must vacate Judge Hudson's order granting summary judgment in favor of defendants on the legal question of plaintiffs' compliance with the pertinent provisions of Rule 9(j). *See id.*

B. Plaintiffs' Compliance with Rule 9(j); Application of Res Ipsa Loquitur

[2] We next address the propriety of Judge Hobgood's conclusion that the doctrine of *res ipsa loquitur* is applicable to the facts alleged in this case, and therefore, plaintiffs' complaint complied with the pertinent provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure for medical malpractice actions.

Rule 9(j) provides in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts 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;
>
> (2) . . . or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2011). "Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations

do not facially comply with the rule's heightened pleading requirements." *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477. "Additionally, this Court has determined 'that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.' " *Id.* (quoting *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008)).

In the present case, plaintiffs' complaint is void of any specific assertion that Robinson's medical care was reviewed by an expert who would testify that the medical care failed to comply with the applicable standard of care; thus, the pleading does not meet the heightened pleading requirements of Rule 9(j)(1), as defendants contend. However, plaintiffs assert that their medical negligence complaint complied with Rule 9(j)(3) by stating a cause of action for negligence under the doctrine of *res ipsa loquitur*. "Accordingly, we consider de novo whether [plaintiffs'] complaint alleges facts establishing negligence under the doctrine of *res ipsa loquit[u]r* pursuant to Rule 9(j)(3)." *Rowell v. Bowling*, 197 N.C. App. 691, 696, 678 S.E.2d 748, 751 (2009).

"*Res ipsa loquitur* is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of [the] defendant." *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992). The doctrine of *res ipsa loquitur*, " 'in its distinctive sense, permits negligence to be inferred from the physical cause of an [injury], without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the [injury] is sufficient to carry the case to the jury on the bare question of negligence.' " *Diehl v. Koffer*, 140 N.C. App. 375, 377-78, 536 S.E.2d 359, 362 (2000) (quoting *Harris v. Mangum*, 183 N.C. 235, 237, 111 S.E. 177, 178 (1922)).

"The doctrine of *res ipsa loquitur* applies when '(1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident [was] under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.' " *Alston v. Granville Health System*, ___ N.C. App. ___, ___, 727 S.E.2d 877, 879 (quoting *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657–58 (1991)), *disc. review dismissed*, ___ N.C. ___, 731 S.E.2d 421 (2012). "For the doctrine to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, ___ N.C. App. ___, ___, 730 S.E.2d 840, 843 (2012); *see also Diehl*, 140 N.C.

App. at 378, 536 S.E.2d at 362 ("[A]pplicability of the *res ipsa loquitur* doctrine depends on whether[,] as a matter of common experience[,] it can be said the [injury] could have happened without dereliction of duty on the part of the person charged with culpability." (internal quotation marks, citation, and emphasis omitted)). " 'Therefore, in order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show — without the assistance of expert testimony — that the injury was of a type not typically occurring in absence of some negligence by defendant.' " *Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 252 (2005) (alterations in original) (quoting *Diehl*, 140 N.C. App. at 378, 536 S.E.2d at 362); *see also Hayes v. Peters*, 184 N.C. App. 285, 287-88, 645 S.E.2d 846, 848 (2007) ("In order for the doctrine to apply, an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred.").

Our Courts have consistently found that "*res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Bowlin*, 108 N.C. App. at 149-50, 423 S.E.2d at 323; *see also Rowell*, 197 N.C. App. at 696, 678 S.E.2d at 751 ("Normally, in [medical malpractice] actions, both the standard of care and its breach must be established by expert testimony." (internal quotation marks and citation omitted)). However,

> [t]he common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field.

Grigg, 102 N.C. App. at 335, 401 S.E.2d at 659.

> Application of *res ipsa* in medical malpractice actions has received special attention, resulting in what our Supreme Court has characterized as a somewhat restrictive application of the doctrine. The precautions in applying *res ipsa* to a medical malpractice action stem from an awareness that the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. This, coupled with the scientific and technical nature of medical treatment,

> renders the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence. Unless the jury is able to make such a determination[, a] plaintiff clearly is not entitled to the inference of negligence *res ipsa* affords.

Schaffner v. Cumberland County Hosp. System, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985) (internal quotation marks and citations omitted). "The reason given for the doctrine's limited availability is the principle that a health care provider is not an insurer of results[.]" *Parks v. Perry*, 68 N.C. App. 202, 206, 314 S.E.2d 287, 289 (1984).

Nonetheless, our Supreme Court has long recognized that

> where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, where proper care is exercised.

Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941); *see also Parks*, 68 N.C. App. at 206, 314 S.E.2d at 289. "Once plaintiff's proof has addressed these concerns, . . . no bar to application of *res ipsa* in medical malpractice actions exists." *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118.

Because "the *res ipsa loquitur* doctrine is only applicable where 'there is no direct proof of the cause of the injury available to the plaintiff[,]' " *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 352, 666 S.E.2d 127, 135 (2008) (quoting *Parks*, 68 N.C. App. at 207, 314 S.E.2d at 290), "where evidence constituting direct proof of the cause of injury is presented, 'the doctrine of *res ipsa loquitur* [is] not applicable.' " *Alston*, ___ N.C. App. at ___, 727 S.E.2d at 880 (alteration in original) (quoting *Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136). In addition, when evaluating whether the injury is of a type that does not ordinarily occur in the absence of negligence, our Court has applied a twofold test in medical malpractice cases: "(1) the injurious result must rarely occur standing alone and (2) the result must not be an inherent risk of the operation." *Parks*, 68 N.C. App. at 206, 314 S.E.2d at 290.

In the present case, defendants argue *res ipsa loquitur* is not applicable in Robinson's case because (1) the injury that Robinson sustained

does not involve either of the two circumstances for which the application of *res ipsa* has been expressly approved by this Court; (2) Robinson's colectomy procedure is outside the knowledge and experience of laymen, thereby requiring expert testimony to show that her injury could not have occurred in the absence of negligence; and (3) plaintiffs offered direct proof of the cause of Robinson's injury. We address these arguments in turn.

1. Limitation of Circumstances in Which Doctrine Applies

Relying on this Court's opinion in both *Grigg*, 102 N.C. App. 332, 401 S.E.2d 657, and *Hayes*, 184 N.C. App. 285, 645 S.E.2d 846, defendants contend that "our courts have applied *res ipsa loquitur* to medical malpractice cases in only two types of cases: 1) where injuries result from surgical instruments or other foreign objects left in the body following surgery; and 2) where there is an injury to an area far away from and completely unrelated to the zone of surgery." Defendants assert that "[i]mportantly, these are the only two scenarios in which North Carolina courts determined that a layperson's common knowledge would permit an inference of negligence." Defendants urge that because the present case does not involve either of these two circumstances, *res ipsa loquitur* is inapplicable.

In *Hayes*, we noted that "[t]his Court has encouraged 'trial courts to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved.' " *Id.* at 288, 645 S.E.2d at 848 (quoting *Howie*, 168 N.C. App. at 699, 609 S.E.2d at 252). In support of this statement, we cited this Court's opinion in *Grigg* as "noting that the doctrine of *res ipsa loquitur* is approved in two limited circumstances: (1) injuries resulting from surgical instruments or other foreign objects left in the body following surgery; and (2) injuries to a part of the patient's anatomy outside of the surgical field." *Hayes*, 184 N.C. App. at 288, 645 S.E.2d at 848 (citing *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659).

However, any limitation of the application of *res ipsa loquitur* to only these two types of medical malpractice cases is not supported by the plain language of our case law. Although *Hayes* cautions trial courts in applying *res ipsa loquitur* in medical malpractice actions involving injuries other than those two categories, *Hayes* does not hold that these two types of cases are the only ones in which *res ipsa loquitur* can apply. To the contrary, the plain language of *Grigg*, cited by *Hayes*, states:

> The common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field.

Grigg, 102 N.C. App. at 335, 401 S.E.2d at 659 (emphasis added). Indeed, our Supreme Court has long held that "where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* . . . , there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence[.]" *Mitchell*, 219 N.C. at 182, 13 S.E.2d at 245. Thus, defendants' argument that *res ipsa* is inapplicable in the present case because it does not involve either a foreign object left in the body following surgery or an injury to an area far away from and completely unrelated to the zone of surgery is without merit.

2. Requirement of Expert Testimony

Defendants further argue that Robinson's medical treatment at issue in the present case involved a colectomy, "a complex surgical procedure." Defendants contend that "[a]verage jurors do not have knowledge to enable them to identify and distinguish internal anatomy such as the vaginal cuff, colon, small intestines, adhesions and rectum as it would appear through a laparoscope." In addition, defendants argue that "[l]aymen have no experience in dissecting adhesions, removal of the colon, or creating an anastomosis (connection) between the small bowel and rectum[,]" and that "[a]verage jurors are not familiar with using a surgical stapler (EEA), including knowledge of how to properly insert, align, and/or use it to create a connection between body tissues." Accordingly, defendants urge that expert testimony is necessary to determine whether negligence occurred in the present case, thereby precluding the application of *res ipsa loquitur*. We disagree.

As plaintiffs' complaint asserts, it is common knowledge and experience that intestines are meant to connect with the anus, not the vagina, even following a surgical procedure to correct a bowel problem. Likewise, as plaintiffs' complaint asserts, it requires no expert testimony to understand that feces are not meant to be excreted from the vagina and that such an injury does not ordinarily occur in the absence of a negligent act or omission during a surgical procedure. Despite defendants' attempts to employ medical terminology to the issue, the simple fact is

that following her surgical procedure, Robinson's intestine was left connected to her vagina, causing her to excrete feces through her vagina. *Cf. Hayes*, 184 N.C. App. at 288, 645 S.E.2d at 848 (expert testimony necessary for the average juror to determine whether a stroke from air emboli during an esophagastroduodenoscopy surgical procedure was an injury that would not normally occur in the absence of negligence); *Howie*, 168 N.C. App. at 698-99, 609 S.E.2d at 252 (expert testimony necessary for a layperson to determine whether the defendant dentist used excessive or improper force in employing a "Cryers elevator" instrument during a wisdom tooth extraction resulting in nerve damage and a fractured jaw); *Bowlin*, 108 N.C. App. at 149, 423 S.E.2d at 322-23 (layman would have no basis for concluding that defendant was negligent in causing injury to plaintiff's sciatic nerve while extracting marrow during a bone marrow harvest procedure); *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659 (expert testimony necessary for a layman to determine whether the force exerted by the defendant obstetrician during cesarean section child delivery was either improper or excessive so as to cause a uterine tear). Contrary to defendants' assertion, we find the circumstances presented in *Hayes*, *Howie*, *Bowlin*, and *Grigg* distinguishable from those presented in the present case. In each of those four cases, an understanding of the procedures involved and the proper techniques to be employed during those procedures was necessary for a determination by the jury as to whether the injury at issue in each case could have occurred in the absence of some negligence by the defendant health care provider. Here, however, although Robinson underwent a colectomy procedure, an understanding of the requisite techniques employed during the procedure is not required for a layman to determine that Robinson's small intestine should not have been connected to her vagina during the procedure and that such an anatomical result following surgery does not normally occur in the absence of negligence.

In further support of their contention that expert testimony is required for an understanding of the procedure and the injury involved in this case, defendants point to Dr. Braveman's testimony that he reviewed Robinson's medical records and relied on his own expertise in the field of colorectal surgery to confirm that negligence occurred during Robinson's colectomy. Defendants also highlight that Dr. Braveman acknowledged that a "rectovaginal fistula" can occur in the absence of negligence following a colectomy procedure. Nonetheless, Dr. Braveman also testified that an injury such as the one Robinson sustained from her original surgical procedure does not occur in the absence of some negligence by the surgeon ninety-five percent of the time. In addition, Dr. Braveman testified that passing stool through the vagina immediately following surgery

is rare, although it can occur, and raises a strong suspicion that the surgery was done improperly. Dr. Braveman further testified that Robinson's injurious condition, in having her intestine directly connected to her vagina, is never a risk of a colectomy procedure. Thus, plaintiffs' forecast of evidence sufficiently demonstrates (1) that Robinson's injury — that her small intestine was attached to her vagina rather than to her rectum causing feces to pass through her vagina, rarely, if ever, occurs standing alone, outside of negligence during the operation which was being performed, and (2) that such a result is not an inherent risk of the operation. *See Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118.

The fact that plaintiffs' proffer of expert testimony describes Robinson's procedure, the anatomy involved, and the injurious result does not detract from the fact that a layperson can understand, without the assistance of such expert testimony, that following a procedure to remove a portion of the intestine or colon, a patient's intestine should not be reattached to her vagina, resulting in the passing of feces through the vagina, if the procedure was done properly. Indeed, Dr. Braveman agreed that a layperson needs no special expertise to understand that the small intestine being connected to the vagina is not anatomically correct. "When, as here, the facts can be evaluated based on common experience and knowledge, expert testimony is not required." *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118.

3. Direct Proof of Cause of Injury

Finally, defendants argue that because plaintiffs offered direct proof of Robinson's injury, the doctrine of *res ipsa loquitur* is inapplicable in the present case. Defendants state that plaintiffs' complaint contends that " 'the botched colectomy is a proximate cause of the Plaintiffs' injury,' and that Defendants were negligent by attaching 'Linda Robinson's colon to her vagina in such a way that feces came through her vagina.' " Defendants also point to Dr. Braveman's testimony opining that the surgical error occurred by inserting a stapler through the vagina instead of the rectum.

However, defendants' argument conflates proffered evidence of the "cause" of Robinson's injury with the injurious condition itself. Robinson's injurious condition involved the direct attachment of her small intestine to her vagina, resulting in the passing of feces through her vagina. Plaintiffs allege that the colectomy procedure was "botched," resulting in this injurious condition. Although plaintiffs' proffered evidence from Dr. Braveman indicates that Dr. Mantyh and/or Dr. Huang improperly inserted the surgical stapler into her vagina, rather than her

rectum, thereby causing the injurious result, Dr. Mantyh's testimony directly contradicts Dr. Braveman's testimony. Dr. Mantyh testified as to his opinion that because Robinson had undergone prior gynecological surgeries, her vaginal cuff had "fused" with a portion of her rectum and was then caught within the surgical stapler during the colectomy procedure, thereby creating a three-way communication between the small intestine, rectum, and vagina. Dr. Braveman's testimony, however, directly contradicts this testimony, opining that Robinson's small intestine was directly connected to her vagina and that her rectum was left unattached to anything. Such conflicting testimony, at a minimum, creates a question of material fact for a jury as to the precise cause of Robinson's injurious condition. "The inference created by *res ipsa* will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence." *Schaffner*, 77 N.C. App. at 691-92, 336 S.E.2d at 118.

Plaintiffs' proffer of Dr. Braveman's testimony in no way establishes direct proof of the precise cause of Robinson's injury. Rather, such testimony constitutes plaintiffs' proffer of evidence as to how the injury might have occurred. Notably, in *res ipsa* cases, "[t]he fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that is necessary to offer." *Pendergraft v. Royster*, 203 N.C. 384, 394, 166 S.E.2d 285, 290 (1932) (internal quotation marks and citation omitted). Allegations addressing plaintiffs' evidence as to the attendant circumstances of Robinson's injury is not equivalent to direct proof of the cause of the injury. *Cf. Rowell*, 197 N.C. App. at 697, 678 S.E.2d at 752 (holding that the doctrine of *res ipsa loquitur* was not applicable where the plaintiff specifically alleged that a particular incision made by the defendant doctor to the plaintiff's left knee was the exact cause of her injury). Here, unlike the circumstances presented in *Rowell*, plaintiffs allege that Robinson's "botched" colectomy was the cause of her injurious condition, and plaintiffs' proffer of expert testimony provides only a theory of the attendant circumstances that resulted in Robinson's injury during her surgical procedure. Plaintiffs have neither alleged nor presented direct evidence of the precise human cause of Robinson's injury.

Moreover, Robinson was unconscious during her surgical procedure and would have no way of presenting direct evidence as to the precise human cause of her injurious condition. *Cf. Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136 (distinguishing the factual circumstances presented in *Parks*, 68 N.C App. 202, 314 S.E.2d 287, "where the plaintiff was under general anesthesia at the time her injury occurred and therefore

could not offer direct proof of its cause," with the factual circumstances therein presented, in which the patient "was fully aware of the cause of his alleged injury. In fact, [the patient] identified his blood pressure cuff as the source of his injury numerous times to medical personnel over the four days that his injury allegedly occurred. When a plaintiff offers direct evidence of the negligence that led to his injury, the doctrine of *res ipsa loquitur* is inapplicable"). Here, unlike the circumstances presented in *Yorke*, Robinson is unable to offer direct evidence of the negligence that led to her injury, hence plaintiffs' reliance on the doctrine of *res ipsa loquitur* and the proffer of Dr. Braveman's testimony.

As this Court has previously noted: "[*Res ipsa*] must not be supposed to require that plaintiff . . . must rely altogether upon this prima facie showing . . . of negligence, for [s]he may resort to other proof for the purpose of particularizing the negligent act and informing the jury as to the special cause of [her] injury." *Schaffner*, 77 N.C. App. at 694, 336 S.E.2d at 119 (alterations and ellipsis in original) (internal quotation marks and citation omitted). Here, plaintiffs' proffer of Dr. Braveman's testimony opining as to the particular human cause of Robinson's injurious condition does not preclude the application of the *res ipsa* doctrine in this case, where the negligence may be inferred from the physical cause of Robinson's injury — the direct attachment of her small intestine to her vagina. *Diehl*, 140 N.C. App. at 377-78, 536 S.E.2d at 362.

We hold plaintiffs' complaint sufficiently alleges, and plaintiffs' forecast of evidence sufficiently demonstrates, that (1) Robinson's injury is not an inherent risk of a colectomy procedure and occurs rarely, if ever, in the absence of negligence; (2) the surgical procedure resulting in Robinson's injury was exclusively within defendants' control; (3) because Robinson was unconscious, she has no direct proof as to the precise cause of her injurious condition; and (4) no expert testimony is required in order to understand that Robinson's injurious condition is likely the result of defendants' negligent act or omission during the course of her surgical procedure. This is certainly not a case in which the mere result of Robinson's treatment "was not satisfactory or less than could be desired, or different from what might be expected." *Mitchell*, 219 N.C. at 182, 13 S.E.2d at 245. Accordingly, no bar exists to plaintiffs' assertion of the *res ipsa loquitur* doctrine in this case, and plaintiffs' complaint and forecast of evidence both satisfy the requirements of Rule 9(j)(3) and survive defendants' motion for summary judgment on that issue. "Issues of negligence should ordinarily be resolved by a jury and are rarely appropriate for summary judgment." *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 117; *see also Parks*, 68 N.C. App. at 205,

314 S.E.2d at 289 (noting that in *Easter v. Hospital*, 303 N.C. 303, 305, 278 S.E.2d 253, 255 (1981), a medical negligence case, "[our] Supreme Court recognized the general rule that only in exceptional negligence cases is summary judgment appropriate").

IV. Forecast of Evidence Satisfying Elements of Medical Negligence Claim Against Dr. Mantyh and Dr. Huang

[3] We next address whether plaintiffs presented sufficient evidence of their medical negligence claim to survive defendants' motion for summary judgment.

In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care; (2) breach of that standard; (3) proximate causation; and (4) damages. *Atkins v. Mortenson*, 183 N.C. App. 625, 630, 644 S.E.2d 625, 629, *appeal dismissed*, 361 N.C. 690, 652 S.E.2d 255 (2007). In the present case, defendants contend that plaintiffs failed to present competent evidence on the applicable standard of care and breach of that standard, thereby rendering summary judgment in defendants' favor proper. In Judge Hudson's supplemental order/advisory opinion, he likewise concluded that summary judgment in favor of defendants was proper, in the alternative, because plaintiffs failed to establish evidence of the applicable standard of care in that Dr. Braveman, plaintiffs' sole standard of care expert, "is not qualified to offer standard of care opinions pursuant to N.C.G.S. § 90-21.12 and Rule 702(b) of the North Carolina Rules of Evidence on grounds that he impermissibly applied a national standard of care" and that Dr. Braveman "offered no evidence of his familiarity with either the training and experience of the Defendant, Dr. Mantyh, or the community standard of care in Durham, North Carolina, or a similar community." Judge Hudson likewise concluded that plaintiffs failed to offer any evidence "of any breach of the standard of care by Dr. Huang."

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C. Gen. Stat. § 90-21.12 (2011), which provides:

> [I]n any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the

> care of such health care provider *was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action*[.]

Id. § 90-21.12(a) (emphasis added).

> Plaintiffs must establish the relevant standard of care through expert testimony. When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not meet the accepted medical standard, [t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries. This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant.

Crocker, 363 N.C. at 142-43, 675 S.E.2d at 628 (alteration in original) (internal quotation marks and citations omitted).

In the present case, Dr. Braveman testified during his deposition that he knew nothing about Dr. Mantyh's education, training, or experience at that time. Dr. Braveman testified that he had never visited Duke University Health System or any of its facilities and knew nothing about their surgical facilities. Dr. Braveman stated that he had not reviewed the website or read any materials about Duke. Dr. Braveman stated that all he knew about Duke was that it had "a great reputation." Dr. Braveman stated that he knew Duke was "a tertiary care facility and takes care of all aspects of medical problems." Dr. Braveman stated that the only information he had about Duke was that "it's a university health system and it's got a national reputation[.]" Dr. Braveman further testified that he believed there existed a national standard of care with respect to colorectal surgeons and that the standard of care prevalent at Duke University "should not be different" from the standard of care prevalent at the three medical centers with which he was familiar.

Subsequent to his deposition, Dr. Braveman submitted an affidavit stating that he was "familiar with the standard of care for physicians such as Dr. Mantyh practicing in Durham, North Carolina, the Research Triangle area, and similar communities such as Worcester, Massachusetts[;] Cleveland, Ohio[;] and Columbus, Ohio in 2008 with

respect to the type of procedure Dr. Mantyh performed on Linda Robinson on or about March 12, 2008." Dr. Braveman further stated in his affidavit that "[a]t the time of [his] testimony, [he] had specific familiarity with the standard of care in the three communities in which [he had] practiced and was of the opinion then that the standard of care was similar across those communities and Durham, North Carolina." Dr. Braveman's affidavit explained that since giving his deposition testimony, "[he had] confirmed [his] opinion with Internet research regarding Duke University Hospital and [had] confirmed that it is a sophisticated training hospital such as the other ones with which [he had] personal familiarity."

Where summary judgment is granted on the basis that a doctor's testimony was to a national rather than a community standard of care,

> the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12. In making such a determination, a court should consider whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.

Pitts v. Nash Day Hosp., Inc., 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005). In our recent opinion in *Higginbotham v. D'Amico*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA12-1099 (N.C. Ct. App. Apr. 16, 2013), we explained:

> The mere use of the phrase "national standard of care" is not fatal to an expert's testimony if the expert's testimony otherwise meets the demands of section 90-21.12.
>
> In the alternative, [w]here the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community.

Id. at ___, ___ S.E.2d at ___, No. COA12-1099, slip op. at 6 (alteration in original) (internal quotation marks and citations omitted). We conclude Dr. Braveman's testimony meets this standard.

Defendants argue that Dr. Braveman's affidavit is impermissible because it contradicts his former deposition testimony. *See Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002) ("[A] party opposing a motion for summary judgment cannot create a

genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony."); *Barringer*, 197 N.C. App. at 257-58, 677 S.E.2d at 478. However, we conclude that rather than contradicting his testimony, Dr. Braveman's affidavit actually supplements it. In his affidavit, Dr. Braveman reaffirms his belief that the applicable standard of care is similar to that of the medical facilities with which he was familiar and that he had confirmed his beliefs through Internet research. "[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community." *Grantham v. Crawford*, 204 N.C. App. 115, 119, 693 S.E.2d 245, 248-49 (2010) (alteration in original) (internal quotation marks and citations omitted). Although Dr. Braveman testified as to his opinion regarding a national standard of care for colorectal surgeons, Dr. Braveman reinforced his opinion through his affidavit, pointing to particular research he had conducted on Duke University and Dr. Mantyh. We fail to see how Dr. Braveman's affidavit contradicted his testimony. Considered as a whole, Dr. Braveman's testimony satisfied the requirements of N.C. Gen. Stat. § 90-21.12.

Having sufficiently presented expert testimony to satisfy their burden of establishing the standard of care for colorectal surgeons performing a colectomy procedure at Duke University on 12 March 2008, plaintiffs likewise presented sufficient evidence that both Dr. Mantyh and Dr. Huang breached that standard. Specifically, Dr. Braveman testified as to his opinion that Dr. Mantyh directly breached the standard of care by not ensuring that the surgical stapler was placed correctly anatomically. Thus, because plaintiffs presented expert testimony establishing a standard of care and breach of that standard by Dr. Mantyh, the trial court erred in granting summary judgment in favor of that defendant on that basis. *Crocker*, 363 N.C. at 142-43, 675 S.E.2d at 628.

In addition, plaintiffs presented sufficient evidence that Dr. Huang incorrectly placed the surgical stapler into Robinson's vagina, thereby causing the injurious result.

> Expert testimony is not required . . . to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues. The application of this "common knowledge" exception to the requirement of expert testimony in medical malpractice cases has been reserved for those

> situations in which a physician's conduct is so grossly negligent *or the treatment 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) (emphasis added) (citations omitted). Here, plaintiffs' proffer of evidence tends to show that Dr. Huang breached the applicable standard of care in incorrectly placing the surgical stapler into Robinson's vagina and failing to ensure its proper anatomical placement. A jury, based on its common knowledge, could decide from this evidence that Dr. Huang breached the standard of care owed to Robinson. Accordingly, the trial court erred in granting summary judgment in favor of defendants as to plaintiffs' claim for medical negligence against Dr. Mantyh and Dr. Huang.

V. Summary Judgment in Favor of DUHS

[4] In his supplemental order/advisory opinion, Judge Hudson concluded that summary judgment in favor of DUHS was proper because "Dr. Mantyh is not an agent or apparent agent of Defendant DUHS." Judge Hudson found as a fact that "DUHS did not have any relationship with Dr. Mantyh on March 12, 2008." Despite that finding, however, in his affidavit, Dr. Huang stated that at all times relevant to the events alleged in plaintiffs' complaint, he was employed by DUHS. Because plaintiffs presented sufficient evidence establishing a medical negligence claim against Dr. Huang, plaintiffs' claim of vicarious liability as to DUHS on behalf of Dr. Huang, at a minimum, should proceed.

In addition, our Courts have noted that "apparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing [the] services and care." *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 305, 628 S.E.2d 851, 861 (2006).

> Under this approach, 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. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.

Id. at 307, 628 S.E.2d at 862.

Here, plaintiffs presented evidence that Dr. Mantyh was the Chief of Gastrointestinal and Colorectal Surgery at the hospital and was an assistant professor with tenure in surgery at Duke University, from which he receives a paycheck. In addition, plaintiffs presented evidence showing that DUHS lists Dr. Mantyh as one of its physicians on its website. "[A] jury could reasonably find [that these facts] indicated to the public that [DUHS] was providing [surgical] services to its patients." *Id.* at 307-08, 628 S.E.2d at 862. Plaintiffs also proffered evidence tending to show that Robinson was referred by another physician to DUHS and/or Dr. Mantyh for evaluation of her colonic inertia problems. Thus, there is no evidence in the record tending to show that Robinson specifically sought out Dr. Mantyh to perform her surgical treatment. Indeed, throughout the present litigation, plaintiffs have continually asserted that Dr. Mantyh is an agent and/or employee of DUHS. The trial court erred in granting summary judgment in favor of DUHS.

VI. Punitive Damages Claim

[5] Plaintiffs have failed to present any argument that the trial court's grant of summary judgment in favor of defendants on their punitive damages claim was improper. Indeed, plaintiffs' complaint and forecast of evidence fails to provide any facts that defendants' conduct in causing Robinson's injurious condition was willful, wanton, malicious, or fraudulent. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants as to plaintiffs' claim for punitive damages.

VII. Conclusion

In summary, we hold Judge Hudson's order granting summary judgment in favor of defendants on the basis of plaintiffs' compliance with Rule 9(j) must be vacated, as it impermissibly overruled Judge Hobgood's order denying defendants' motion to dismiss on the same legal issue. We hold that plaintiffs' complaint sufficiently alleges, and plaintiffs' forecast of evidence sufficiently demonstrates, that no bar exists to plaintiffs' assertion of the doctrine of *res ipsa loquitur* in this case. Thus, plaintiffs' complaint satisfies the requirements of Rule 9(j)(3) for medical malpractice actions and plaintiffs' forecast of evidence is sufficient to survive defendants' motion for summary judgment on that issue.

Judge Hudson's order granting summary judgment in favor of defendant Dr. Mantyh is reversed, as plaintiffs presented sufficient evidence to satisfy all elements of a medical malpractice claim against him. Accordingly, plaintiffs' claim for medical negligence against Dr. Mantyh

may proceed. Judge Hudson's order granting summary judgment in favor of defendant Dr. Huang is likewise reversed, as plaintiffs presented sufficient evidence that Dr. Huang breached the applicable standard of care in improperly placing the surgical stapler into Robinson's vagina. Judge Hudson's order granting summary judgment in favor of DUHS is also reversed, as Dr. Huang was admittedly employed by DUHS at the time of the alleged medical negligence, and plaintiffs' evidence sufficiently demonstrates that Dr. Mantyh was an apparent agent of DUHS.

We further hold that Judge Hudson's order granting summary judgment in favor of defendants DUAP and Dr. Patel is affirmed, as plaintiffs expressly did not present any argument as to why summary judgment is not appropriate as to those defendants. Plaintiffs' action therefore remains dismissed as against defendants DUAP and Dr. Patel. Judge Hudson's order granting summary judgment in favor of defendants on plaintiffs' claim for punitive damages is likewise affirmed, as plaintiffs presented no argument as to why summary judgment is not appropriate on that issue, and plaintiffs failed to allege and/or present any evidence that defendants' conduct in this case was willful, wanton, malicious, or fraudulent. Therefore, plaintiffs' claim for punitive damages remains dismissed. Finally, Judge Hobgood's order granting defendants' motion to dismiss plaintiffs' action as to defendant Dr. Hodgins is likewise affirmed, as plaintiffs did not appeal from that order dismissing the action against that defendant. Plaintiffs' action remains dismissed as against Dr. Hodgins.

We remand the present case to the trial court for further proceedings against defendants Dr. Mantyh, Dr. Huang, and DUHS, consistent with this opinion.

Affirmed in part, vacated in part, reversed in part, and remanded.

Judge CALABRIA concurs in result only.

STEELMAN, Judge, concurring in the result.

I concur with the result reached in parts IIIA, IV, V, and VI of the majority opinion. Given the holding in part IIIA of the opinion, the analysis and holdings in part IIIB of the opinion are unnecessary. *See O'Neill v. S. Nat'l Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233 (1979) ("An Order denying a Rule 12(b)(6) motion is interlocutory and clearly not appealable.").

STATE OF NORTH CAROLINA
v.
ARNULFO AGUSTIN

No. COA12-1065

Filed 20 August 2013

1. Rape—of child—date of offense—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of rape of a child. There was substantial evidence presented that the offense of rape was committed by defendant on or after 1 December 2008, the effective date of N.C.G.S. § 14-27.2A(a).

2. Indecent Liberties—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of indecent liberties with a child. The State presented substantial evidence of each element of the crime. Further, the amendments to Article 81B of Chapter 15A that were noted by defendant did not affect his sentencing for the offense of indecent liberties.

3. Rape—of child—failure to submit lesser-included offense—first-degree statutory rape—age of defendant

The trial court did not commit plain error by failing to submit first-degree statutory rape as a lesser-included offense of rape of a child. The only different element was the age of the defendant, and at trial, there was no dispute that defendant was over eighteen. Rather, defendant's contention was that he did not commit the crime.

4. Sentencing—indecent liberties with child—improper version of statute—no prejudice

Defendant could not demonstrate any prejudice from any alleged error with respect to his sentencing for the crime of indecent liberties with a child. By applying the post 1 December 2009 version of Article 81B of Chapter 15A of the General Statutes, the trial court sentenced defendant at a lower prior record level than he would have been under the prior statute.

5. Sentencing—rape of child—minimum sentence of 300 months

The trial court did not err by sentencing defendant to 300-369 months imprisonment for the rape of a child charge. N.C.G.S. § 15A-1340.17 mandates a minimum sentence of 300 months.

STATE v. AGUSTIN

[229 N.C. App. 240 (2013)]

Appeal by defendant from judgment entered 4 April 2012 by Judge Richard D. Boner in Burke County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.

Kevin P. Bradley for defendant-appellant.

STEELMAN, Judge.

Where there was substantial evidence that defendant committed the offense charged after 1 December 2008, the trial court did not err in submitting the offense of rape of a child to the jury. Where the evidence as to the age of the defendant was uncontroverted, the trial court did not commit plain error in declining to instruct the jury on the lesser included offense of first-degree rape. Where the statute was unambiguous, the trial court did not err in sentencing the defendant.

I. Factual and Procedural History

From about January 2010 through about April 2010, Arnulfo Agustin (defendant) allegedly raped M.A. She testified that he "put his private into my private" at least twice. She further testified that:

> So he came in and he closed the door. And then I was just there sitting on the floor and then he told me to get up. And I got up so he wouldn't hurt me, because I thought he would hurt me.
>
> Then he told me to pull down my pants, so I pulled it down, because I, I didn't -- I thought he would hurt me. So then I -- then he told me to spread my legs and I spreaded my legs.
>
> And my, my little cousin [J.] and my brother were in the room. They were playing cars and watching TV at the same time. And he put his private into my private, and then he made me kiss him.
>
> And then my little brother, [D.], he came up to me and tugged on my shirt and said, "[M.A.], what are you doing?"
>
> And he immediately stopped. Then I, I pulled up my pants and then I, I ran out of the room and stayed near my grandma, because I knew he wouldn't do it in front of her.

On 12 September 2011, defendant was indicted for the felonies of rape of a child under N.C. Gen. Stat. § 14-27.2A(a), and taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1. The jury found defendant guilty of both charges. The trial court determined that the offenses occurred on 1 January 2010, and imposed an active sentence of 300-369 months imprisonment for the rape charge, and a concurrent sentence of 16-20 months imprisonment for the indecent liberties charge.

Defendant appeals.

II. Denial of Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying defendant's motion to dismiss. 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*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990) (citations omitted). Since defendant presented evidence in this case, we review this argument as of the close of all of the evidence. *See State v. Britt*, 87 N.C. App. 152, 154, 360 S.E.2d 291, 292 (1987).

B. Analysis

[1] Defendant was indicted for the crime of rape of a child pursuant to N.C. Gen. Stat. § 14-27.2A(a). This was a new crime enacted by the General Assembly in Session Law 2008-117, section 1. "A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.2A(a) (2011). This offense was classified as a B1 felony, with the proviso that "in no case shall the person receive an active punishment of less than 300 months." N.C. Gen. Stat. § 14-27.2A(b). Subsection (e) provided that the offense under N.C. Gen. Stat. § 14-27.2(a)(1) is a lesser included offense. These provisions became effective 1 December 2008, and apply to offenses committed on or after that date.

On appeal, defendant contends that the State's evidence was that the alleged offenses were committed between 2006 and 2009, and that "there is no substantial evidence to support conclusion Defendant-Appellant raped M.A. after the 1 December 2008 effective date of N.C.G.S. § 14-27.2A." Defendant further contends that although N.C. Gen. Stat. § 15-155 states that no judgment shall be reversed "for omitting to state the time at which the offense was committed *in any case where time is not of the essence of the offense*[,]" that since N.C. Gen. Stat. § 14-27.2A only applies to offenses committed after 1 December 2008, that in this case, time is of the essence.

We first of all note that in his brief, defendant acknowledged that there was evidence that the crime of rape occurred between 2006 and 2009. Second, we note that evidence was presented that the rape occurred when M.A.'s younger brother was 3 years old. Since the brother was 5 years old on 19 August 2011, when M.A.'s interview was videotaped, and almost 6 at the time of trial in April 2012, this places the rape as occurring in the latter half of 2009 or early 2010.

We hold that there was substantial evidence presented that the offense of rape was committed by defendant on or after 1 December 2008, and that the trial court did not err in denying defendant's motion to dismiss that charge at the close of all of the evidence.

[2] Defendant then makes an argument concerning his conviction for indecent liberties with a child. He does not challenge the sufficiency of the evidence as to any of the elements of that crime. Rather, he notes that there were changes to the provisions of Article 81B of Chapter 15A contained in Session Laws 2009-555 and 2009-556, which applied to offenses committed after 1 December 2009. None of these amendments

affected the substantive elements of the crime of indecent liberties, but only dealt with the lengths of sentences.

We hold that the State presented substantial evidence of each element of the crime of indecent liberties with a child and that the trial court correctly denied defendant's motion to dismiss at the close of the evidence. We further note that the amendments noted by defendant did not affect his sentencing for the offense of indecent liberties.

This argument is without merit.

III. Failure to Submit the Lesser Included Offense

In his second argument, defendant contends that the trial court committed plain error in failing to submit the lesser included offense of first-degree rape to the jury. We disagree.

A. 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).

> [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, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

[3] At trial, defendant did not request that the trial court instruct the

jury on the lesser offense of first-degree rape. Defendant lodged no objection to the court's instructions to the jury, as given. Defendant's arguments on this issue are only reviewed for plain error.

As noted above, N.C. Gen. Stat. § 14-27.2A provides that first-degree statutory rape (N.C. Gen. Stat. § 14-27.2(a)(1)) is a lesser included offense of rape of a child. The elements of the offense of rape of a child are that: (1) the defendant is at least 18 years of age; (2) defendant engages in vaginal intercourse with the victim; and (3) the victim is a child under the age of 13 years. N.C. Gen. Stat. § 14-27.2A(a). The elements of first-degree rape are that: (1) the defendant is at least 12 years old and at least four years older than the victim; (2) defendant engages in vaginal intercourse with the victim; and (3) the victim is a child under the age of 13 years. N.C. Gen. Stat. § 14-27.2(a)(1). Two of the elements of the two offenses are identical (the age of the victim and the requirement of vaginal intercourse). The only different element is the age of the defendant. Under N.C. Gen. Stat. § 14-27.2A, the defendant must be at least 18 years of age, while under N.C. Gen. Stat. § 14-27.2(a)(1), the defendant can be under 18 years of age, a minimum of 12 years of age, but must be at least four years older than the victim.

In the instant case, there was no dispute at trial that defendant was over 18 years of age at the time of the alleged rape. The evidence presented was that M.A. was born 29 August 2001, and thus was 9 years old, or younger, at the time of the alleged rape.

On appeal, defendant argues that since there was no evidence that the offenses took place after 1 December 2008, that "the jury very likely would have opted for the lesser included offense of N.C.G.S. § 14-27.2(a)(1) if given the option." However, the decision on whether to submit a lesser offense rests upon the evidence as to the elements of the principal and lesser offense, not the date of commission of the offense. At trial, there was no dispute as to the age of defendant. Rather, defendant's contention was that he did not commit the crime.

We hold that under plain error review, the trial court did not err in failing to instruct the jury upon the lesser offense of first-degree rape.

This argument is without merit.

C. Sentencing on Indecent Liberties Charge

[4] Defendant further argues that he was improperly sentenced on the indecent liberties charge because the trial court used the version of Article 81B of Chapter 15A of the General Statutes as amended by

Session Laws 2009-555 and 2009-556 in sentencing defendant. Each of these amendments applied to offenses committed after 1 December 2009. Session Law 2009-555 amended N.C. Gen. Stat. § 15A-1340.14(c), changing the number of prior sentencing points required for each level of felony sentencing. In the instant case, defendant stipulated that he had one prior sentencing point. Under the law for offenses prior to 1 December 2009, defendant would have been a prior record level II. However, under the post 1 December 2009 law, defendant would have been a prior record level I.

Session Law 2009-556 amended the sentencing grid found in N.C. Gen. Stat. § 15A-1340.17(c). However, none of these changes altered the sentences imposed for a Class F felony, in the presumptive range for prior record levels I and II.

By applying the post 1 December 2009 version of Article 81B of Chapter 15A of the General Statutes, the trial court sentenced defendant at a lower prior record than he would have been under the prior statute. Defendant can demonstrate no prejudice from any alleged error with respect to his sentencing for the crime of indecent liberties with a child. We further note that the sentence imposed, 16-20 months, was a proper, presumptive range sentence regardless of whether the pre- or post-1 December 2009 statute was applied.

IV. Duration of Sentence

[5] In his third argument, defendant contends that the trial court erred in sentencing defendant to 300-369 months imprisonment for the rape of a child charge. We disagree.

N.C. Gen. Stat. § 14-27.2A(b) states that a person convicted is guilty of a Class B1 felony, "except that in no case shall the person receive an active punishment of less than 300 months." Defendant contends, however, that the statute is silent as to whether this refers to the minimum or maximum term to be imposed at the time of sentencing, and that therefore the court had discretion to sentence defendant to less 300 months as a minimum sentence.

The statute on its face is clear. "[I]n no case shall the person receive an active punishment of less than 300 months." This language is unambiguous. It mandates a minimum sentence of 300 months, with the corresponding maximum sentence as found in N.C. Gen. Stat. § 15A-1340.17. The sentence of 300-369 imposed by the trial court was in accordance with the statute.

This argument is without merit.

NO ERROR.

Judges GEER and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ELDER G. CORTEZ, Defendant, and INTERNATIONAL FIDELITY INSURANCE COMPANY, Surety, and RICHARD L. LOWRY, Surety, and LARRY D. ATKINSON, Surety, and TONY L. BARNES, Surety

INTERNATIONAL FIDELITY INSURANCE COMPANY, Plaintiff
v.
ELDER GIOVANI CORTEZ; JOHNSTON COUNTY BOARD OF EDUCATION; STATE OF NORTH CAROLINA; and WILL R. CROCKER in his Official Capacity as the Clerk of Superior Court for Johnston County, Defendants

No. COA12 1399

TONY L. BARNES; LARRY D. ATKINSON; RICHARD L. LOWRY; and LR&M LR&M BAILBONDS, INC., Plaintiffs
v.
ELDER GIOVANI CORTEZ; STATE OF NORTH CAROLINA; JOHNSTON COUNTY BOARD OF EDUCATION; WILL R. CROCKER in his Official Capacity as the Clerk of Superior Court for Johnston County; and STEVE BIZZELL in his Official Capacity as Sheriff of Johnston County, Defendants

No. COA12 1427

Filed 20 August 2013

1. Sureties—appearance bond—name on bond form

International Fidelity Insurance Company (International) was the surety on an appearance bond for a defendant who did not appear even though International's name did not appear on the first page of the appearance bond form. International's subsequent actions, admissions, and seemingly uninterrupted participation in the litigation was inconsistent with its position disclaiming its intent to be bound by the contract entered into by its agent.

2. Sureties—bail bond—forfeiture—relief from final judgment

The trial court did not err in an action concerning forfeiture of a bail bond by concluding that International Fidelity Insurance

Company's (International's) exclusive remedy for relief from a final judgment of forfeiture was to appeal from that judgment pursuant to N.C.G.S. § 15A-544.8. After defendant failed to appear, International received timely and proper notice of the entry of forfeiture; although an order was entered that set aside the forfeiture, that order was subsequently rendered a nullity and vacated, and the forfeiture was made a final judgment.

3. Judgments—collateral attack—bail bond forfeiture

The trial court did not err in an action concerning a bail bond forfeiture when it concluded that a complaint by International Fidelity Insurance Company was a collateral attack on a judgment decreeing forfeitures to be final judgments.

4. Appeal and Error—unnecessary issue—determination on another question

The question of whether certain complaints in an action concerning a bail bond forfeiture were barred by collateral estoppel and *res judicata* was rendered unnecessary by the trial court's determination that the complaints were impermissible collateral attacks.

5. Sureties—bond forfeiture—sanctions—motion timely

In light of the procedural complexities and anomalies of a bail bond forfeiture case, a school board's motion for sanctions against the bondsmen and the insurance company was timely. The plain language of N.C.G.S. § 15A-544.5(d) provides no express instruction as to when a party must move for sanctions against a surety in order to be timely.

6. Bail and Pretrial Release—bond forfeiture—sanctions—no abuse of discretion

The trial court did not abuse its discretion by imposing monetary sanctions on an insurance company (International) in an action concerning the forfeiture of a bail bond. International did not attach the documentation required to support its motion seeking to set aside the forfeiture and such a failure is one of the grounds upon which the court is authorized to impose sanctions under N.C.G.S. § 15A-544.5(d)(8).

7. Appeal and Error—preservation of issues—constitutional issues not raised at trial—not considered

Constitutional issues not raised in the record on appeal, not presented to the trial court, and not ruled on by the trial court were not considered.

8. Sureties—bond forfeiture—sanctions—amount

The trial court did not err in the amount of sanctions imposed against the insurance company in an action concerning a bail bond forfeiture where the statute in effect at the time the insurance company filed its motion for remission did not provide any applicable guidance or factors for determining the amount of sanctions and the statute was amended one week later to provide such guidance. The trial court's conclusion that the version of the statute in effect when the motion was filed governed was not challenged on appeal, and, in light of the record, the trial court's sanction cannot be said to have been manifestly unsupported by reason.

9. Appeal and Error—preservations of issues—issues not addressed

Issues in the appeal concerning a bail bond forfeiture were not addressed where they were not determinative in light of other issues, were not supported by relevant legal authority, were not challenged at trial, or were meritless in light of plain statutory language.

Appeal by Richard L. Lowry and L R & M Bailbonds, Inc.[1] from order entered 11 April 2012 by Judge William R. Pittman in Johnston County Superior Court. Appeal by International Fidelity Insurance Company from order entered 11 April 2012[2] by Judge William R. Pittman in Johnston County Superior Court, and from order entered 24 August 2012 by Judge Richard L. Doughton in Johnston County Superior Court. Heard in the Court of Appeals 4 June 2013.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for plaintiffs–appellants Richard L. Lowry and L R & M Bailbonds, Inc.

Ragsdale Liggett PLLC, by Mary Hulett, Amie C. Sivon, and John B. Walker, for appellant International Fidelity Insurance Company.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for defendants–appellees the State of North Carolina and Will R. Crocker in his Official Capacity as the Clerk of Superior Court for Johnston County.

1. Although the record indicates that L R & M Bailbonds, Inc. is a named party in File No. 12 CVS 30, the appellation representing this party in our caption matches that of the trial court's 11 April 2012 order, which identifies this party as "LR&M LR&M Bailbonds, Inc."

2. Although the record indicates that Steve Bizzell, in his Official Capacity as the Sheriff of Johnston County, is a named party in File No. 12 CVS 201, our caption matches that of the trial court's 11 April 2012 order, which does not include this party.

Tharrington Smith, L.L.P., by Rod Malone, and Daughtry, Woodard, Lawrence, & Starling, by James R. Lawrence, Jr., for defendant–appellee Johnston County Board of Education.

MARTIN, Chief Judge.

Because these cases involve common issues, they have been joined for the purposes of appeal pursuant to our authority under Rule 40 of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 40 ("Two or more actions that involve common issues of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court.").

As a preliminary matter, we note that this Court has considered issues arising out of the proceedings for File No. 07 CRS 56935 in two prior appeals. *See State v. Cortez* (*Cortez II*), __ N.C. App. __, 715 S.E.2d 881 (2011); *State v. Cortez* (*Cortez I*), 211 N.C. App. 198, 711 S.E.2d 876 (unpublished), *supersedeas*, *disc. review*, *and cert. denied*, 365 N.C. 336, 731 S.E.2d 834 (2011), *cert. denied*, __ U.S. __, 182 L. Ed. 2d 165 (2012). In order to fully address the issues properly before us, we recount the relevant procedural history for the proceedings that both preceded and followed *Cortez I* and *Cortez II*.

Twenty-nine-year-old Elder Giovani Cortez[3] ("defendant") was arrested and indicted for the offenses of first-degree kidnapping, first-degree rape of a child under the age of thirteen, and taking indecent liberties with a child, which offenses were alleged to have occurred on 23 August 2007. Defendant was authorized to be released upon the execution of a secured bond in the amount of $2,000,000.00, which was later reduced to $600,000.00. On 16 September 2008, four months after defendant's secured bond was reduced, defendant was released on bail subject to the conditions of appearance bonds executed by Tony L. Barnes, Larry D. Atkinson, and Richard L. Lowry in the amounts of $20,000.00, $10,000.00, and $570,000.00, respectively.

Mr. Barnes executed the $20,000.00 bond as an "accommodation bondsman," and Mr. Atkinson executed the $10,000.00 bond as a "professional bondsman," which rendered each a surety on their respective

3. Defendant's middle name appears in the record as "Geovani," "Deovani," and "Giovani." Because the captions of the court's orders for File Nos. 12 CVS 30 and 12 CVS 201, from which the parties appeal, indicate that defendant's middle name is "Giovani," we use the same appellation here.

bonds. *See* N.C. Gen. Stat. § 15A-531(8)(b)–(c) (2011) (defining "[s]urety" as "[t]he professional [or accommodation] bondsman, when a bail bond is executed by a professional [or accommodation] bondsman"). Because Mr. Lowry executed the $570,000.00 bond as a "bail agent," the surety for that bond was the insurance company on behalf of which Mr. Lowry executed the bond. *See* N.C. Gen. Stat. § 15A-531(8)(a) (defining "[s]urety" as "[t]he insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company"); *see also* N.C. Gen. Stat. § 15A-531(3) (defining "[b]ail agent" as a person licensed "as a surety bondsman under Article 71 of Chapter 58 of the General Statutes, [and] is appointed by an insurance company by power of attorney to execute or countersign bail bonds for the insurance company in connection with judicial proceedings"); N.C. Gen. Stat. § 58-71-1(11) (2011) (defining "[s]urety bondsman" as a person licensed by the North Carolina Commissioner of Insurance who "is appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings"). The record shows that, at the time the bond was executed, Mr. Lowry was authorized to execute bail bonds both for International Fidelity Insurance Company ("International") and for Accredited Insurance Company ("Accredited"). The insurance company named on the face of the appearance bond executed by Mr. Lowry was Accredited, while International was the insurance company named on the attached power of attorney that evidenced Mr. Lowry's authority to execute criminal bail bonds of up to $1 million. According to an affidavit from International's Senior Vice President Jerry W. Watson, International "is not an affiliate, subsidiary, or parent of Accredited," and Accredited "is, in fact, a competitor of [International]." Only International received and accepted the $3,990.00 premium paid for the execution of the $570,000.00 bond.

In order to secure the $570,000.00 appearance bond executed by Mr. Lowry, defendant and his wife Raquel H. Cortez executed a promissory note in the amount of $600,000.00, made payable to "L R & M Corp, Richard Lowry," upon the condition that, "if [defendant] fails to appear for any scheduled or unscheduled court date in . . . 07 CRS 56935 in the County of Johnston, State of North Carolina and a forfeiture issued[,] this note shall be due on demand." Two deeds of trust, each representing a total indebtedness of $300,000.00 and naming "L R & M Corp" and Mr. Lowry as beneficiaries, were provided as collateral to secure the $600,000.00 promissory note.

On 18 February 2009, defendant failed to appear in court, and the Johnston County Clerk of Superior Court's Office ("Clerk's Office")

issued bond forfeiture notices to Mr. Barnes, Mr. Atkinson, and International, as the sureties of record, and to Mr. Lowry, as the bail agent for named surety International. Each notice, which was sent using the Administrative Office of the Courts' Form AOC-CR-213, indicated that the forfeiture of the bond for each surety named on the notice would become a final judgment on 23 July 2009, unless that forfeiture was set aside upon a party's motion prior to that date, or unless such motion was still pending on that date. The notices further provided that a forfeiture "will not be set aside for any . . . reason" other than those enumerated on the form.

On 22 July 2009, one day before the forfeitures were set to become final judgments, Mr. Atkinson and Mr. Barnes as sureties, and Mr. Lowry as the bail agent for named surety International, each indicated their intent to move to set aside the forfeitures by signing and dating the "Motion To Set Aside Forfeiture" section on the second page of the bond forfeiture notice forms they had received from the Clerk's Office almost five months earlier. Although Form AOC-CR-213 allows the movant to mark the checkbox next to the enumerated reason that supports their request to set aside a forfeiture, Mr. Atkinson, Mr. Barnes, and Mr. Lowry (collectively "the Bondsmen") did not indicate by checkmark which of the reasons supported their motions to set aside, and instead wrote "See attached Petition" at the top of their respective notice forms. Then, the Bondsmen and International filed a "Motion for Remission of Forfeiture" ("the Remission/Set Aside Motion") with the Clerk's Office, in which they collectively sought to "set[] forth the contended ground for relief from the order of forfeiture."

In this Remission/Set Aside Motion, the movants alleged that they each "signed as surety for the appearance of the defendant" in this matter. They further alleged that, although defendant had been located in Mexico and a federal arrest warrant had been issued for service by the FBI and by the Mexican Federal Police, defendant had not yet been served with any arrest warrant but would be "shortly." In support of their allegations, the movants then attached to the motion approximately 160 pages of e mails chronicling Mr. Lowry's efforts to locate defendant between February 2009 and July 2009. In addition to attaching a copy of the motion to the Form AOC-CR-213 they each filed with the Clerk's Office, copies of the Remission/Set Aside Motion were also served on the Johnston County District Attorney's Office ("the DA's Office") and on the attorney for the Johnston County School Board ("the Board").

Neither the DA's Office nor the Board filed objections to the 22 July 2009 motions seeking to set aside the forfeitures. Consequently, on

3 August 2009, the Johnston County Clerk of Superior Court ("the Clerk") granted the movants' requests to set aside the forfeitures. On 7 August 2009, Mr. Lowry then executed a satisfaction of the deeds of trust that had been provided by defendant and his wife as collateral to secure the promissory note that secured the appearance bonds. On 25 August 2009, the Board filed a motion against defendant and the Bondsmen pursuant to N.C.G.S. § 1A-1, Rule 60 ("the Rule 60 Motion"), in which the Board requested that the court strike the 3 August 2009 order that set aside the forfeitures. Although International was not named in the motion's caption, International was served with a copy of the Board's Rule 60 Motion, which specifically alleged that International posted a bond in the amount of $570,000.00 for the release of defendant.

In its Rule 60 Motion, the Board challenged whether the form of the movants' requests to set aside the forfeitures sufficiently complied with the procedures set forth in N.C.G.S. § 15A-544.5. Specifically, the Board asserted that the 3 August 2009 order setting aside the forfeitures should be stricken because: the movants did not indicate by checkmark on the second side of Form AOC-CR-213 which of the enumerated reasons supported their motions to set aside, and such a failure, the Board argued, was in dereliction of the requirements set forth in N.C.G.S. § 15A-544.5(b); the movants' Remission/Set Aside Motion was filed in contravention to the direction of a 12 January 2009 Administrative Order by the chief district and senior resident superior court judges for Judicial District 11 B that all motions to set aside a forfeiture made pursuant to N.C.G.S. § 15A-544.5 must be filed on Form AOC-CR-213; the documents accompanying the movants' Remission/Set Aside Motion were not sufficient evidence to support any of the grounds for which a forfeiture "shall be set aside" pursuant to N.C.G.S. § 15A-544.5(b); and the movants' Remission/Set Aside Motion was "not captioned as a Motion to Set Aside Forfeiture," but rather as a "Motion for Remission of Forfeiture," which the Board alleged caused it to believe that no objection was required to contest said motion pursuant to N.C.G.S. § 15A-544.5(d). In response to this motion, the Bondsmen urged the court to conclude that the Board's failure to object to the Remission/Set Aside Motion pursuant to N.C.G.S. § 15A-544.5(d) caused the forfeitures to be set aside "by operation of law."

On 12 October 2009, the trial court entered an order denying the Board's motion "to vacate or strike" the 3 August 2009 order that set aside the forfeitures. The trial court concluded that, "[n]otwithstanding the misleading caption on sureties' motion, the tenuous claim of the sureties under [N.C.G.S. §] 15A-544.5(b)(4)"—which provides that a forfeiture "shall be set aside" when "[t]he defendant has been served with an

Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidence by a copy of an official court record," N.C. Gen. Stat. § 15A-544.5(b)(4) (2011)—"and the sureties' loose compliance with this court's administrative order governing bond forfeitures," the Board and the DA's Office "had actual notice of the nature of the relief sought by the sureties," failed to object within the then-ten-day period[4] for doing so, and the Board "made no showing" that it was entitled to relief under Rule 60(b)(1), (b)(4), or (b)(6). The Board appealed to this Court from the trial court's 12 October 2009 denial of its Rule 60 Motion; the Board did not appeal from the 3 August 2009 order setting aside the bond forfeitures.

On 19 April 2011, this Court reversed and remanded the trial court's denial of the Board's Rule 60 Motion seeking to strike the 3 August 2009 order. *See Cortez I*, 211 N.C. App. 198, 711 S.E.2d 876, slip op. at 14. In *Cortez I*, this Court determined that the Clerk was "without authority to grant the motion" because the movants' "claimed" reasons for relief from forfeiture "[did] not come within the purview of the statute [and] the requisite documentation [wa]s entirely absent." *See id.* at 14. Consequently, this Court concluded that the 3 August 2009 order, which set aside the forfeitures, "was void," and remanded the matter "with instructions for the trial court to either dismiss Sureties' [Remission/Set Aside Motion] or deny the same for the reasons set forth herein." *Id.* at 4, 14.

However, before this Court filed its decision in *Cortez I*, defendant's case was placed on another court calendar and, again, defendant failed to appear. Then, on 17 November 2009, two weeks after defendant failed to appear for the second time, and one week after the Board gave its notice of appeal to this Court from the denial of its Rule 60 Motion that was at issue in *Cortez I*, the Clerk's Office issued another round of bond forfeiture notices to Mr. Barnes, Mr. Atkinson, and International, as sureties, and to Mr. Lowry as bail agent for named surety International. However, "the [s]ureties had not re bonded [d]efendant following his initial 18 February 2009 failure to appear"; instead, this second round of forfeiture notices were issued only "for the original bonds executed by the [s]ureties." *See Cortez II*, __ N.C. App. at __, 715 S.E.2d at 882.

4. At the time that the Bondsmen and International filed their motions to set aside the bond forfeiture notices in July 2009, N.C.G.S. § 15A-544.5(d)(4) provided that "the clerk shall enter an order setting aside the forfeiture" "[i]f neither the district attorney nor the board of education has filed a written objection to the motion by the *tenth* day after the motion is served." N.C. Gen. Stat. § 15A-544.5(d)(4) (2007) (emphasis added). However, this provision has since been amended to provide that a forfeiture shall be set aside if neither the district attorney nor the board of education has filed a written objection "by the twentieth day" after the motion is served. *See* 2009 N.C. Sess. Laws 847, 847, ch. 437, § 1.

Thus, in response to these second forfeiture notices, in April 2010, the Bondsmen filed their "Motion to Dismiss and Motion to Set Aside Forfeiture," in which they asserted that the 17 November 2009 notices of forfeiture "should be stricken, vacated and set aside, and dismissed," because the trial court was divested of its jurisdiction to issue notices of forfeiture once the Board gave notice of appeal from the trial court's denial of the Board's Rule 60 Motion. After hearing the matter, on 17 May 2010, the trial court entered an order denying the Bondsmen's April 2010 motions. The Bondsmen appealed to this Court from this order.

On 20 September 2011, in *Cortez II*, this Court concluded, "[w]ere we to hold that the Clerk and the . . . court had jurisdiction to enter and affirm the second orders of forfeiture, the [s]ureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in [d]efendant's case." *Cortez II*, __ N.C. App. at __, 715 S.E.2d at 884. Thus, after determining that "the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review," this Court vacated the trial court's second orders of forfeiture. *Id.* at __, 715 S.E.2d at 884.

The Board then filed a motion in the trial court requesting that the court comply with this Court's decision in *Cortez I*—which held that the 3 August 2009 order setting aside the forfeitures was void—by either dismissing or denying the movants' 22 July 2009 Remission/Set Aside Motion. After hearing the matter, on 5 January 2012, the trial court entered an order ("the 5 January 2012 Order") in which it did the following: vacated its own 12 October 2009 order that denied the Board's Rule 60 Motion to strike the 3 August 2009 order setting aside the forfeitures; dismissed the movants' 22 July 2009 Remission/Set Aside Motion "for the reasons set forth in the [*Cortez I*] decision"; and ordered that the forfeitures "shall become" final judgments. The Clerk's Office then entered an electronic bond forfeiture judgment pursuant to the trial court's order, and issued a writ of execution to the Sheriff of Johnston County ("the Sheriff") giving notice that International must pay $570,000.00 plus interest and fees.

On 4 January 2012, one day before the trial court entered its order declaring that the forfeitures were final judgments, the Bondsmen and International together filed a complaint ("the Bondsmen Complaint") designated as File No. 12 CVS 30 against defendant, the State of North Carolina ("the State"), the Board, the Clerk, and the Sheriff. In the Bondsmen Complaint, plaintiffs requested that the trial court "should

declare that [the Clerk] did in fact terminate the Plaintiffs' contractual obligation [on the bonds]" when it entered its 3 August 2009 order setting aside the forfeitures, and that, as a consequence, plaintiffs "may not be held liable on the [b]onds," or, in the alternative, that, "even if [the Clerk's 3 August 2009] Orders did not terminate the contractual obligation, the State and the Board are estopped from seeking to impose any kind of contractual liability upon the Plaintiffs relating to the [b]onds" "to the extent that the [b]onds were formerly secured by the [d]eeds of [t]rust (which [d]eeds of [t]rust were required to be cancelled)." The Bondsmen also sought injunctive relief pursuant to 42 U.S.C. § 1983.

The day after the trial court entered its 5 January 2012 Order declaring that the forfeitures were final judgments, International returned the premium it received for defendant's bond. Then, one week later, International voluntarily dismissed its claims in the Bondsmen Complaint without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a), and filed a separate complaint ("the International Complaint") designated as File No. 12 CVS 201 against the same defendants. In the International Complaint, International requested that the trial court declare that "no forfeiture or judgment can be held against International in the matter of the bonds executed to secure the appearance of [defendant]," because Accredited had been the insurance company named on the face of the appearance bond, and because Mr. Lowry "had no authority to attach International's Power of Attorney to an [Accredited] bond." International further requested that the court declare that it was not a party to the 5 January 2012 Order, because neither the Board's Rule 60 Motion nor the 5 January 2012 Order named International as a party in the caption.

The Board then filed motions to dismiss the Bondsmen and International Complaints pursuant to Rule 12(b)(1) and (b)(6), and on the grounds that the complaints are impermissible collateral attacks on the trial court's 5 January 2012 Order and are further barred by the doctrines of res judicata, collateral estoppel, and equitable estoppel. The State, with the Clerk, filed motions to dismiss both complaints on similar grounds. The trial court conducted hearings on the motions to dismiss in both actions. On 11 April 2012, the trial court entered an order in File No. 12 CVS 30 allowing the Board's motion to dismiss the claims alleged in the Bondsmen Complaint "as they relate to a declaratory judgment and to the substantive law of contracts involving the original contract [or appearance bond] between the plaintiffs and [the State]," on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments—from which the parties had not appealed—and on the grounds that such claims were

barred by the doctrines of res judicata and collateral estoppel. However, the motion to dismiss the claim in the Bondsmen Complaint that sought injunctive relief for alleged violations of 42 U.S.C. § 1983 by the State was denied without prejudice. On the same day, the trial court also entered an order in File No. 12 CVS 201, in which it dismissed the claims that had been alleged in the International Complaint against the Board, the State, and the Clerk, on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments, and on the grounds that such claims were barred by the doctrines of res judicata and collateral estoppel. International appealed to this Court from the trial court's order allowing the motions to dismiss the International Complaint, and the Bondsmen and L R & M Bailbonds, Inc. appealed from the order allowing the Board's motion to dismiss the first cause of action in the Bondmen Complaint. The trial court certified the appealability of its order regarding the Bondsmen Complaint pursuant to N.C.G.S. § 1A-1, Rule 54(b).

Then, on 17 July 2012, the Board moved for monetary sanctions pursuant to N.C.G.S. § 15A-544.5(d)(8) against defendant, International, and the Bondsmen in File No. 07 CRS 56935—the underlying criminal case for which the original appearance bonds had been made—on the grounds that the 22 July 2009 Remission/Set Aside Motion was "plainly frivolous and filed for the sole purpose of preventing the forfeitures from going into judgment." The Board requested that the court impose monetary sanctions in the amount of fifty percent of each bond against Mr. Barnes and Mr. Atkinson individually, and against Mr. Lowry and International together. On 24 August 2012, the court ordered that, because Mr. Atkinson and Mr. Barnes "promptly" paid their respective bonds after the 5 January 2012 Order, and because Mr. Lowry "is not a surety" for the $570,000.00 bond, only International "shall pay a sanction in the amount of $285,000 pursuant to [N.C.G.S.] § 15A-544.5(d)(8)." International gave timely notice of appeal from this order. The court then stayed the "execution on the civil judgment" for monetary sanctions pursuant to the pending appeal; the stay was secured by a bond.

A party "is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011) ("When more than one claim for relief is presented in an action, . . . or

when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment."). Here, on 11 April 2012, the trial court dismissed all claims against the Board arising out of the Bondsmen Complaint, but denied without prejudice the motion to dismiss the Bondsmen's prayers for injunctive relief for alleged violations of 42 U.S.C. § 1983 by the State. Accordingly, we limit our review of the 11 April 2012 order regarding File No. 12 CVS 30 to the issues certified for appeal as finally determined by the court pursuant to N.C.G.S. § 1A-1, Rule 54(b), which are those issues that "relate[] to declaratory judgment and the substantive law of contracts on the original contract between [the State] and [the Bondsmen]."

The parties bring forward the following issues on appeal: (I) whether the trial court erred by determining that International was the surety on the $570,000.00 bond executed by Mr. Lowry; (II) whether the trial court erred when it determined that International's "exclusive remedy for relief from a final judgment of forfeiture" is to appeal from that judgment pursuant to N.C.G.S. § 15A-544.8; (III) whether the trial court erred when it concluded that the International Complaint was a collateral attack on the court's 5 January 2012 Order; (IV) whether the trial court erred when it concluded that the International and Bondsmen Complaints were barred by the doctrines of res judicata and collateral estoppel; (V) whether the trial court erred when it concluded that the Board's motion for sanctions was timely; (VI) whether the trial court considered the relevant statutory factors before it imposed monetary sanctions against International; and (VII) whether the amount of the monetary sanctions imposed on International was unconstitutionally excessive, and whether the sanctions imposed violated the Ex Post Facto Clauses of the United States and North Carolina Constitutions.

I.

[1] International first contends the trial court erred by determining that it was the surety on the $570,000.00 bond executed by Mr. Lowry, because International's name does not appear on the first page of the appearance bond form.

"An appearance bond is a contract of the defendant and the surety with the State." *State v. Corl*, 58 N.C. App. 107, 111, 293 S.E.2d 264, 267 (1982). The form provided to bondsmen, insurance companies, and bail agents to evidence this contract is the Administrative Office of the Courts' Form AOC-CR-201, entitled "Appearance Bond for Pretrial Release." According to the General Statutes, "[t]he name of any

insurance company executing the bond as surety, and the name, license number, and power of appointment number of the bail agent executing the bail bond on behalf of the insurance company" "shall be entered on each bail bond executed under Part 1 of [Article 26]," N.C. Gen. Stat. § 15A-544.2(a)(4) (2011), including on "an appearance bond in a specified amount secured by . . . at least one solvent surety." N.C. Gen. Stat. § 15A-534(a)(4) (2011). Accordingly, Side One of Form AOC-CR-201 includes empty boxes under the heading "Insurance Company," in which a bail agent can indicate his or her own name and license number, as well as the name of the insurance company and the bail agent's power of appointment number for the named company. Additionally, bail agents and others who execute the form as a "Surety Appearance Bond" are directed to complete the affidavit on the reverse side of the form, which specifically directs the affiant to "Affix Stamp or Power of Attorney Here." In other words, according to the directions on the "Appearance Bond for Pretrial Release" form, in order to execute an appearance bond on behalf of an insurance company, in addition to completing Form AOC-CR-201 itself, a bail agent must also attach or affix the power of attorney that evidences his or her authority to execute a bond for the named surety.

In the present case, the insurance company named on the face of the appearance bond executed by Mr. Lowry for $570,000.00 was Accredited, while the insurance company named on the attached power of attorney evidencing Mr. Lowry's authority to execute the bond was International. We can only surmise that this inconsistency may have been borne out of Mr. Lowry's inattentive selection of two pre populated documents, since the names of the insurance companies on the appearance bond form and on the power of attorney documentation are both typewritten, while the bond-specific information for defendant's case—e.g., defendant's name, the description of the charged offenses, the file numbers for the charged offenses, the amount of the bond, the date of execution of the bond, and the name of the county and the division of the court in which defendant's case is calendared—is handwritten on these same forms. Nevertheless, regardless of the cause of this inconsistency, International argues that "basic contract and agency law in North Carolina compels a conclusion that International cannot be required to pay a bond it did not sign," and that "International was never a party to the contractual obligations of the [b]ond." We disagree.

"No contract is formed without an agreement to which at least two parties manifest an intent to be bound." *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007). "If certain acts have been performed or contracts made on behalf of another without his authority, he has,

when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts." *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965) (internal quotation marks omitted). "If he accepts them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place." *Id.* (internal quotation marks omitted). Thus, "intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Am. Travel Corp. v. Cent. Carolina Bank & Tr. Co.*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (omission in original) (internal quotation marks omitted), *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

Here, International does not dispute that Mr. Lowry intended to enter into a contract with the State by executing an appearance bond for defendant. International also does not dispute that Mr. Lowry had actual authority to execute appearance bonds on its behalf, and does not dispute that it was within Mr. Lowry's authority to execute a bond on International's behalf in the amount of the bond at issue. Additionally, the record before us shows that International both received and accepted a $3,990.00 premium in exchange for executing the $570,000.00 bond for defendant, which International only sought to return or refund about three years later, *after* the trial court entered its 5 January 2012 Order making the $570,000.00 bond forfeiture a final judgment. Moreover, after receiving notice from the Clerk's Office pursuant to N.C.G.S. § 15A-544.4 that the $570,000.00 bond would be subject to forfeiture, on 22 July 2009, International, with the Bondsmen, filed the Remission/Set Aside Motion, in which International admitted to the court that it "*signed as surety* for the appearance of the defendant in the Superior Court of Johnston County, as appears of record." (Emphasis added.) Furthermore, the record shows that: International was served with copies of the Board's Rule 60 Motion, which sought to strike the 3 August 2009 order setting aside the forfeitures, as well as with copies of the Board's notice of appeal from the trial court's 12 October 2009 order denying the Board's Rule 60 Motion, the proposed record on appeal for *Cortez I*, and the second bond forfeiture notices sent in November 2009 that were the subject of the appeal brought before this Court in *Cortez II*; International was also represented by the same attorney as the Bondsmen with respect to this matter from at least July 2009 through 4 January 2012, when the Bondsmen Complaint—in which International was also originally a named party—was filed; and International first disclaimed its status as a surety on the $570,000.00 bond, sought to refund or return the premium

on the bond, retained separate legal counsel from the Bondsmen in this matter, voluntarily dismissed its claims in the Bondsmen Complaint, and filed its own separate declaratory judgment complaint *only after* the court entered its 5 January 2012 Order, in which the court ordered that the bond forfeitures were final. We agree that it would have been a better practice for the Clerk's Office to only have processed the appearance bond and the accompanying power of attorney if the power of attorney attached to the bond evidenced Mr. Lowry's authority to execute the bond for the company indicated on the face of the bond form. However, based on the record before us, we conclude that International's subsequent actions, admissions, and seemingly uninterrupted participation in this litigation are inconsistent with its present position disclaiming its intent to be bound by the contract entered into by its agent, Mr. Lowry, when he executed the $570,000.00 bond for defendant. *See*, *e.g.*, *Carolina Equip. & Parts Co.*, 265 N.C. at 401, 144 S.E.2d at 258 ("It is what a party does, and not what he may actually intend, that fixes or ascertains his rights under the law. He cannot do one thing and intend another and very different and inconsistent thing. The law will presume that he intended the legal consequences of what he does, or, in other words, that his intention accords in all respects with the nature of his act." (internal quotation marks omitted)). Accordingly, despite the inconsistencies in the named insurance companies on the face of the appearance bond and on the accompanying power of attorney, as a result of International's later conduct which demonstrated its intent to be bound to the contract entered into by its agent, Mr. Lowry, we hold that International is the surety on the $570,000.00 bond executed by Mr. Lowry for defendant and, as such, is liable for the same.

International also asserts, in the alternative and without supporting legal authority, that "even if International were a party to the [b]ond," the bond "ceased to be a binding contract as to International" when the trial court entered its 3 August 2009 order that set aside the forfeitures. However, in *Cortez I*, this Court concluded that the 3 August 2009 order "was void" because the Clerk "lacked the authority to grant Sureties' [Remission/Set Aside Motion]." *See Cortez I*, 211 N.C. App. 198, 711 S.E.2d 876, slip op. at 4, 13. Because International fails to direct us to any authority upon which we could conclude that the court's order that was deemed void in its entirety and vacated can still be said to be "final as to International," we decline to address this assertion further.[5]

5. We note that, in June 2011, in an apparent response to *Cortez I*, the General Assembly amended several bail bond statutes, including those that pertain to written motions to set aside bail bond forfeitures. The amendments were preceded by the following preamble:

II.

[2] International next contends the trial court erred by concluding in the 11 April 2012 order dismissing the International Complaint that International's "exclusive remedy for relief from a final judgment of forfeiture" is to appeal from that judgment pursuant to N.C.G.S. § 15A-544.8. We disagree.

"If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2011). Unless a forfeiture is set aside in accordance with the procedures set forth in N.C.G.S. § 15A-544.5, "[w]hen a forfeiture has become a final judgment[,] . . . the clerk of superior court . . . shall docket the judgment as a civil judgment against the defendant and against each surety named in the judgment." N.C. Gen. Stat. § 15A-544.7(a) (2011). "There is no relief from a final judgment of forfeiture except as provided in [N.C.G.S. § 15A-544.8]," which provides that, "[a]t any time before the expiration of three years after the date on which a judgment of forfeiture became final," any surety named in the judgment may make a written motion for relief if "[t]he person seeking relief was not given notice [of the forfeiture] as provided in G.S. 15A- 544.4," or for "[o]ther extraordinary circumstances" that the court, "in its discretion," "determines should entitle [the movant] to relief" from the forfeiture. N.C. Gen. Stat. § 15A-544.8(a), (b), (c)(1) (2011).

> Whereas, the North Carolina Court of Appeals held recently in its unpublished opinion in [*Cortez I*], COA10 474, that G.S. 15A-544.5(d)(1) constitutes a jurisdictional limitation on the clerk's authority to grant motions to set aside bond forfeitures under G.S. 15A-544.5(d)(4); and
>
> Whereas, contrary to the Court's reasoned interpretation of G.S. 15A-544.5(d), it was not the intent of the General Assembly in S.L. 2000 133 that the description of the content of motions to set aside in G.S. 15A-544.5(d)(1) would constitute a jurisdictional limitation on the clerk's authority to grant such motions . . . .

2011 N.C. Sess. Laws 1530, 1530–31, ch. 377. Thus, it appears that the General Assembly rejected the reasoning upon which this Court relied when it determined that the 3 August 2009 order setting aside the forfeitures was void. However, since the parties did not appeal from the trial court's 5 January 2012 Order, which vacated the order that set aside the bond forfeitures "for the reasons set forth in the [*Cortez I*] decision," since we are bound by the prior panel's decision, *see In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989), and since "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), we decline to address this issue further.

In the present case, International asserts only that it cannot seek relief from the forfeiture on the $570,000.00 bond pursuant to N.C.G.S. § 15A-544.8 because "International is not a surety subject to the statute." However, because we have already determined that International is the surety on the $570,000.00 bond executed by Mr. Lowry, International is subject to the bail bond forfeiture statutes, *see* N.C. Gen. Stat. § 15A-544.1 (2011) ("By executing a bail bond the defendant and each surety submit to the jurisdiction of the court and irrevocably consent to be bound by any notice given in compliance with [the 'Bail Bond Forfeiture' Part of the 'Bail' Article in the General Statutes.]"), and we find this assertion is without merit. Here, the record reflects that, after defendant failed to appear in court, International received timely and proper notice of the entry of forfeiture of the $570,000.00 bond executed by Mr. Lowry in accordance with N.C.G.S. §§ 15A-544.3 and 15A-544.4. Although an order had been entered that set aside the forfeitures, such order has since been rendered a nullity and vacated, and the forfeitures have been made final judgments. Thus, according to the applicable statutes, as the surety on the $570,000.00 bond, International may only seek relief from the now final judgment of forfeiture on this bond pursuant to N.C.G.S. § 15A-544.8. Because we have determined that International is the surety on the bond at issue, we decline to address International's concern regarding what, if any, mechanism it could have employed within the existing statutory scheme of the "Bail Bond Forfeiture" Part of Article 26 in Chapter 15A of the General Statutes to challenge any enforcement proceedings levied against it pursuant to N.C.G.S. § 15A-544.7 if it had *not* been the surety on the bond.

III.

[3] International next contends the trial court erred by concluding that the International Complaint was a collateral attack on the court's 5 January 2012 Order, which decreed the forfeitures to be final judgments.

"A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (internal quotation marks omitted). "[A] collateral attack upon a judicial proceeding [is] an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *Hearon v. Hearon*, 44 N.C. App. 361, 362, 261 S.E.2d 9, 10 (1979) (internal quotation marks omitted). "North Carolina does not allow collateral attacks on judgments." *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003).

International asserts, without support, that the International Complaint is not a collateral attack on the 5 January 2012 Order because its claims "do not seek an adjudication that the [Order] is invalid," but instead "merely seek[] a declaration" that the forfeiture on the $570,000.00 bond cannot be enforced against it. However, the International Complaint specifically claims: "The [$570,000.00] Bond is null and void. At minimum, the Bond is null and void as to International." The complaint then specifically requests "[t]hat the [trial court] enjoin and restrain the Defendants from entering and/or executing any judgment against the International [sic] relative to any liability upon the Bond," and that the court declare "that the Bond is not an enforceable obligation against International." In other words, International would only be entitled to the relief demanded in its complaint if the trial court declared that International—the erstwhile self-identified surety on the $570,000.00 bond now subject to enforcement proceedings under N.C.G.S. § 15A-544.7—has no liability on the $570,000.00 bond forfeiture made final by the court's 5 January 2012 Order. Because such an outcome would allow International to "avoid, defeat, [and] evade" the enforcement of the judgment made final by the court's 5 January 2012 Order, thus "deny[ing] [the order's] force and effect," *see Hearon*, 44 N.C. App. at 362, 261 S.E.2d at 10 (internal quotation marks omitted), we must conclude that the trial court did not err when it concluded that the International Complaint was a collateral attack on the court's 5 January 2012 Order.[6]

IV.

[4] International and Mr. Lowry each next contend the trial court erred when it concluded that their respective complaints, both filed in January 2012, were barred by the doctrines of res judicata and collateral estoppel, because they assert that the claims and issues raised in their complaints "could not have been litigated in an earlier proceeding due to the limitations of the Bond Forfeiture Statutes, particularly [N.C.G.S.] § 15A-544.5(b)." We conclude that the trial court's determination that the complaints were each impermissible collateral attacks on the court's 5 January 2012 Order renders unnecessary our review of whether the complaints were additionally barred by the affirmative defenses of res judicata and collateral estoppel.

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6. Mr. Lowry does not challenge the trial court's conclusion that the first cause of action in the Bondsmen Complaint was a collateral attack on the court's 5 January 2012 Order. Thus, this determination remains undisturbed on appeal.

V.

[5] In July 2012, the Board moved for monetary sanctions against International and the Bondsmen pursuant to N.C.G.S. § 15A-544.5(d)(8). In August 2012, the trial court entered an order imposing monetary sanctions against International, in which it concluded:

> In light of the Sureties' "misleadingly captioned" Motion, the time required for the Court of Appeals to review the matter and issue its decision, and the Board's defense of the two lawsuits filed by the Sureties in January 2012, . . . the Board's motion for sanctions was filed in a timely fashion as there is no timing requirement for a motion for sanctions under the applicable statutes.

International argues that this conclusion was erroneous because the Board's motion for sanctions was not timely filed. We disagree.

At the time International and the Bondsmen filed the Remission/Set Aside Motion on 22 July 2009, N.C.G.S. § 15A-544.5(d) provided, in relevant part, as follows:

> If a forfeiture is not set aside . . . [pursuant to a court's order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear], the only procedure for setting it aside is as follows:
>
> (1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (b) of this section.
>
> . . . .
>
> (3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.
>
> (4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

> (5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.
>
> . . . .
>
> (8) If at the hearing the court determines that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, *the court may order monetary sanctions against the surety filing the motion*, unless the court also finds that the failure to attach the required documentation was unintentional. This subdivision shall not limit the criminal prosecution of any individual involved in the creation or filing of any fraudulent documentation.

N.C. Gen. Stat. § 15A-544.5(d) (2007) (emphasis added).

Here, International suggests, without support, that, to have been deemed timely filed, the Board's motion for sanctions must have been filed according to the same time constraints as those set out for filing written objections to a motion to set aside pursuant to N.C.G.S. § 15A-544.5(d)(3)–(5). However, we find no support for International's assertion in the plain language of the statute, which provides no express instruction as to when a party must move for sanctions against a surety pursuant to this subsection in order to be considered timely.[7] Moreover, when the General Assembly amended several bail bond statutes in 2011, including the provision at issue, the General Assembly expressly stated in the preamble of the enabling legislation that this Court's narrow interpretation of another subdivision of N.C.G.S. § 15A-544.5(d) in *Cortez I*—in which a panel of this Court determined that subdivision (d)(1) imposed a jurisdictional limitation on the clerk's authority to grant a motion to set aside under subdivision (d)(4)—"was not the intent of the General Assembly." *See* 2011 N.C. Sess. Laws 1530, 1530–31, ch. 377. Accordingly,

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7. Although this statute was amended—just over a week after International and the Bondsmen filed the Remission/Set Aside Motion—to provide that "[a] motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing," 2009 N.C. Sess. Laws 847, 847, ch. 437, § 1, the statute still lacks direction as to when a party must move for monetary sanctions pursuant to this subsection in order for such motion to be considered timely.

in the absence of express language from the bail bond forfeiture statutes directing us to impose the narrowly-construed time limitations urged upon us by International's reading of subsection (d), and in light of the General Assembly's recent rejection of this Court's narrow interpretation of another subdivision of this same statutory subsection, we are disinclined to adopt as rule International's unsupported assertion that the Board's motion for sanctions was *per se* untimely.

Instead, the record shows that, although the Remission/Set Aside Motion was filed on 22 July 2009, it was only finally decided by the trial court on 5 January 2012. One week later, International initiated other litigation proceedings against the Board and other parties by filing its declaratory judgment action, which action was dismissed pursuant to the trial court's 11 April 2012 order. Then, three months after that final disposition, the Board filed its motion for sanctions pursuant to N.C.G.S. § 15A-544.5(d)(8). Thus, because the record shows that the Board's motion for sanctions was brought within three months of the trial court's dismissal of International's Remission/Set Aside Motion—after almost three years of litigation initiated by and with the participation of the Bondsmen and International that included two appeals to this Court—and because International was given timely notice of the hearing on the Board's motion for sanctions, which motion was heard three weeks after International received notice of such motion, we overrule International's contention that the trial court erred when it concluded, in light of the procedural complexities and anomalies of this case, that the Board's motion for sanctions was timely.

VI.

[6] International next contends the trial court abused its discretion because the court did not properly consider the relevant statutory factors before it imposed monetary sanctions against International pursuant to N.C.G.S. § 15A-544.5(d)(8). As we indicated above, at the time that International and the Bondsmen filed the Remission/Set Aside Motion, N.C.G.S. § 15A-544.5(d)(8) provided that, if the court "determines that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion," unless "the court also finds that the failure to attach the required documentation was unintentional." N.C. Gen. Stat. § 15A-544.5(d)(8) (2007). In its August 2012 order imposing monetary sanctions on International, the trial court found and concluded that the Remission/Set Aside Motion "did not include the supporting documentation required by [N.C.G.S.] § 15A-544.5(d)." There

was no evidence in the record to support, and the court did not find, that International's failure to attach this documentation was unintentional. Thus, because International failed to attach the documentation required to support its motion seeking to set aside the forfeiture, and because such a failure is one of the grounds upon which the court is authorized to impose sanctions under N.C.G.S. § 15A-544.5(d)(8), we conclude that it was within the trial court's authority and discretion pursuant to N.C.G.S. § 15A-544.5(d)(8) to impose monetary sanctions on International. In the absence of any legal argument to support the remaining assertions advanced by International with respect to this issue on appeal, we decline to address this issue further.

VII.

[7] Finally, International contends the amount of the monetary sanctions imposed on International by the trial court was unconstitutionally excessive, and that the trial court incorrectly applied the current version of N.C.G.S. § 15A-544.5(d)(8) when it imposed sanctions upon International, thus violating the Ex Post Facto Clauses of the United States and North Carolina Constitutions. However, International's response to the Board's motion, as it appears in the record before us, does not raise these constitutional challenges. Additionally, the extensive findings and conclusions of the trial court's order on the Board's motion for sanctions do not reflect that any constitutional challenges were presented to the court for consideration nor were any such challenges ruled upon by the court. Since "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal," *see State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982), we decline to consider this issue further.[8] Nonetheless, since International also suggests that the trial court abused its discretion by imposing a monetary sanction of $285,000.00 upon International,

8. We note that International appears to presume that the sanctions imposed by the trial court were unconstitutionally excessive and violative of the Ex Post Facto Clauses because International suggests, without legal support, that monetary sanctions imposed under N.C.G.S. § 15A-544.5(d)(8) constitute a criminal punishment. However, because the General Assembly's 2009 amendment to N.C.G.S. § 15A-544.5(d)(8) modified the statute to expressly provide that "[s]anctions awarded under this subdivision *shall be docketed* by the clerk of superior court *as a civil judgment* as provided in G.S. 1 234," 2009 N.C. Sess. Laws 847, 847, ch. 437, § 1 (emphasis added), and because "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one," *see State v. White*, 162 N.C. App. 183, 193, 590 S.E.2d 448, 455 (2004) (alteration in original) (internal quotation marks omitted), International's presumption that monetary sanctions imposed under this provision were intended by the Legislature to be criminal punishments appears to be misplaced.

we must consider whether the court's decision to impose sanctions in this amount was "manifestly unsupported by reason," or "was so arbitrary that it could not have been the result of a reasoned decision." *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

[8] As International concedes, at the time International filed the Remission/Set Aside Motion, N.C.G.S. § 15A-544.5(d)(8) "d[id] not include a provision setting the amount of sanctions," and "d[id] not provide any guidance or factors for the trial court to determine the amount of any sanction other than whether the documentation is fraudulent and whether the failure is intentional." However, when the General Assembly amended this provision one week after International filed the Remission/Set Aside Motion, it added the following instruction for the trial courts:

> If the court concludes that a sanction should be ordered, in addition to ordering the denial of the motion to set aside, sanctions shall be imposed as follows: (i) twenty-five percent (25%) of the bond amount for failure to sign the motion; (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation; and (iii) not less than one hundred percent (100%) of the bond amount for the filing of fraudulent documentation. Sanctions awarded under this subdivision shall be docketed by the clerk of superior court as a civil judgment as provided in G.S. 1-234. The clerk of superior court shall remit the clear proceeds of the sanction to the county finance officer as provided in G.S. 115C-452.

2009 N.C. Sess. Laws 847, 847, ch. 437, § 1. Thus, if a surety fails to attach the required documentation to a motion to set aside a forfeiture filed on or after 1 January 2010, a court is now authorized and required by the General Assembly under subdivision (d)(8) to impose a sanction equal to fifty percent of the bond's amount if the court decides to impose monetary sanctions against a surety for such a failure.

Here, the Board sought $285,000.00 in monetary sanctions against International pursuant to N.C.G.S. § 15A-544.5(d)(8). As we mentioned above, the trial court concluded, and International concedes, that, at the time the Remission/Set Aside Motion was filed, there was no statutory limitation on the amount that a trial court could impose for monetary sanctions under N.C.G.S. § 15A-544.5(d)(8). The trial court also recognized that the General Assembly has since revised this statute, which now directs the trial court that "sanctions shall be imposed" according

to the percentage scheme excerpted above. The trial court then further concluded:

> 6. The version of [N.C.G.S.] § 15A-544.5(d)(8) in effect at the time the Sureties filed their [Remission/Set Aside] Motion should govern the Court's review of the Board's motion for sanctions.
>
> . . . .
>
> 9. The version of [N.C.G.S.] § 15A-544.5(d)(8) in effect at the time the Sureties filed their Motion did not prohibit the Board from filing its motion for sanctions in July 2012.
>
> . . . .
>
> 11. This Court is not bound by the current version of [N.C.G.S.] § 15A-544.5(d)(8), which would require a sanction in the amount of fifty percent of the bond for failure to attach the required documentation. The amount of any sanction(s) is within the Court's discretion.
>
> 12. The Court has authority to order the payment of sanctions by the Sureties in amounts deemed reasonable to the Court due to the Sureties' failure to attach the documentation required by [N.C.G.S.] § 15A-544.5(d)(8) to their Motion.

Since none of these conclusions are challenged by International on appeal, and in light of the record before us and the unrestrictive statutory language applicable at the time the Remission/Set Aside Motion was filed, we conclude that the trial court's decision to impose a monetary sanction in the amount of $285,000.00 against International cannot be said to have been manifestly unsupported by reason. Accordingly, we overrule this issue on appeal.

[9] Lastly, we recognize that Mr. Lowry asserts that the first cause of action in the Bondsmen Complaint stated a claim upon which relief should have been granted. However, because Mr. Lowry does not challenge the trial court's determination that this cause of action was an impermissible collateral attack on the court's 5 January 2012 Order that made the forfeitures final judgments, and because the unsupported assertion in Mr. Lowry's brief on this issue is meritless in light of the plain language of N.C.G.S. §§ 15A-544.6, 15A-544.7, and 15A-544.8, we decline to address this issue further. We further decline to address any

remaining assertions raised in International's brief in support of which it has failed to present any relevant legal authority, *see* N.C.R. App. P. 28(a), (b)(6), or which are not determinative in light of our disposition of other issues on appeal.

Affirmed.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ERIC LARS KNUDSEN

No. COA12-1475

Filed 20 August 2013

1. Motor Vehicles—driving while impaired—findings of fact—sufficiency of evidence

The trial court did not err in a driving while impaired case by making its findings of fact numbers eight, nine, and twelve. There was sufficient evidence to support these findings.

2. Search and Seizure—Fourth Amendment—totality of circumstances

The trial court did not err by concluding that defendant was seized within the meaning of the Fourth Amendment. The totality of the circumstances discernible from the record on appeal showed no error.

3. Search and Seizure—motion to suppress evidence—totality of circumstances—minimal level of objective justification—reasonable articulable suspicion

The trial court did not err in a driving while impaired case by granting defendant's motion to suppress the evidence. The totality of the circumstances did not rise to the minimal level of objective justification required for a reasonable articulable suspicion under the Fourth Amendment.

Appeal by the State from order entered 11 January 2013 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Joseph L. Hyde, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr.; and Ashley Canon, for Defendant-Appellee.

McGEE, Judge.

Eric Lars Knudsen (Defendant) was charged with driving while impaired on 20 July 2011 in violation of N.C. Gen. Stat. § 20-138.1. Defendant pleaded guilty to the charge in Forsyth County District Court on 27 March 2012, and received a sixty-day suspended sentence and twelve months' unsupervised probation.

On that same day, Defendant filed notice of appeal to superior court. Defendant filed a "Motion to Dismiss for Lack of Reasonable Suspicion" on 27 April 2012, and a hearing was held in superior court on 14 June 2012. A written order was filed on 11 January 2013, in which the trial court held that Defendant was illegally stopped and seized in violation of the Fourth Amendment to the United States Constitution. All evidence resulting from that seizure was suppressed as "fruit of the poisonous tree."

At the hearing, Officer B.L. Williams (Officer Williams) and Corporal R.A. Necessary (Corporal Necessary), with the Winston-Salem Police Department, testified for the State. The officers' testimony tended to show the following:

Officer Williams, a bicycle officer with the police department, was on routine patrol in the 500-600 block of North Trade Street in downtown Winston-Salem, on the evening of 28 July 2011. Corporal Necessary was also on patrol in that same area in a marked police department vehicle. At approximately 11:10 p.m., Corporal Necessary observed Defendant get into a 2007 blue Volkswagen Rabbit (the vehicle) while holding a cup that looked similar to cups that were commonly used at downtown bars to serve mixed drinks. The vehicle was parked near Finnegan's, a local restaurant and pub.

Corporal Necessary testified that, as he was driving south on Trade Street, he saw Defendant open the driver's side door and get into the vehicle, which was parked on the west side of Trade Street, facing south. At this point, Corporal Necessary slowed down drastically, and noticed that the headlights of the vehicle had come on. After passing by the

vehicle, Corporal Necessary spotted Officer Williams in the street on his bicycle, facing north. Corporal Necessary stopped, relayed to Officer Williams what he had seen, and asked Officer Williams if he would ride by the vehicle and determine if the cup Corporal Necessary had seen Defendant holding contained alcohol. When Corporal Necessary stopped to talk to Officer Williams, he was very close to the vehicle, roughly a car length and a half away. After speaking with Officer Williams, Corporal Necessary then turned his police cruiser around, passed by the vehicle again, and turned right on Sixth Street.

Officer Williams, riding north on his bicycle in the southbound lane, approached the vehicle and noticed that its lights were on and that the engine was running. Officer Williams was in his police uniform, which included a weapon. According to Officer Williams' testimony, he rode past the vehicle at an arm's length distance, and made it obvious that he was looking inside the vehicle. Officer Williams observed two men sitting in the front seat. Defendant, who was sitting in the driver's seat, was holding a clear, light-colored, Solo-type cup, similar to ones used in downtown bars.

After passing by the vehicle, Officer Williams rode a short distance away and stopped on the sidewalk at an entrance to a parking lot so that he could contact Corporal Necessary and relay what he had just seen. As he was doing so, the two males exited the vehicle, and began walking the short distance down the sidewalk towards Officer Williams. Corporal Necessary, who had been planning on leaving the area, saw Defendant and the other male get out of the vehicle and walk toward Officer Williams. Instead of leaving the area, Corporal Necessary decided to park his police cruiser behind Officer Williams, blocking the entrance of the parking lot in the process. Corporal Necessary testified as follows:

> I was actually going to leave the area at that point. And I was traveling extremely slow. [Defendant] and the other white male get out and start walking down the sidewalk towards Officer Williams. When I seen this, I pulled in.
>
> Q. And how close were you when you saw the defendant walking with the passenger on the sidewalk?
>
> A. I'm still in the car on the road, and I turned. It's kind of hard to explain. I'll show you. This is the entrance to the parking lot. I'm in this lane. I drove down, faced towards the entrance to the parking lot, at an angle, and stopped and got out.

Corporal Necessary further testified that, when he got out of his cruiser, Officer Williams and Defendant were already talking. Corporal Necessary stayed roughly three to four feet behind Officer Williams and Defendant as they spoke. As Defendant walked towards Officer Williams and was approximately an arm's length away, Officer Williams asked Defendant, "what do you have in the cup?"

There is conflicting testimony about whether Defendant had the cup in his hands while on the sidewalk. Officer Williams testified that, although he saw the cup in Defendant's hand while Defendant was in the vehicle, he believed that Defendant did not have the cup with him on the sidewalk. However, Corporal Necessary testified that Defendant did, in fact, have the cup in his hand while he was on the sidewalk. Corporal Necessary further testified that, when Officer Williams asked Defendant what was in the cup, Defendant replied, "water" and handed the cup to Officer Williams, who determined that the cup contained water. Officer Williams stated that Defendant's clothes were not messy, but that his eyes appeared "a little glazy and his face was kind of flush."

Both Officer Williams and Corporal Necessary admitted that, prior to speaking with Defendant, they did not know where Defendant had been, where he was going, or what was in the cup that had first drawn their attention. Defendant never moved the vehicle and Officer Williams, who testified that he was roughly three feet from Defendant, did not notice any odor of alcohol on Defendant.

Following this testimony, the trial court granted Defendant's motion. The State appeals.

I.

The issues presented on appeal by the State are (1) whether the trial court erred in its written findings of fact, (2) whether the trial court erred in concluding as a matter of law that Defendant was seized within the meaning of the Fourth Amendment to the United States Constitution, and (3) even if Defendant was seized, whether the trial court erred in concluding that the seizure was unsupported by a reasonable suspicion.

II.

[1] The State first argues that portions of findings of fact numbers eight, nine, and twelve in the trial court's 14 June 2012 order are erroneous. The scope of review of a suppression order 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).

We accord great deference to a trial court's findings of fact, as it is entrusted with the duty to "hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *Id.* at 134, 291 S.E.2d at 619-20. The findings of fact that are not challenged by the State on appeal are binding and deemed to be supported by competent evidence. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). For the portions that are challenged, this Court looks to discern whether competent evidence exists to support the finding made by the trial court. If there is competent evidence to support the trial court's finding, then it is similarly binding on appeal, "even if the evidence is conflicting." *State v. Blackstock*, 165 N.C. App. 50, 55, 598 S.E.2d 412, 416 (2004) (citing *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996)). It is with this deference in mind that we analyze the State's contentions.

The trial court made the following findings of fact relevant to this appeal:

> 1. On July 28, 2011, at approximately 10:00 p.m. to 10:30 p.m.[,] Officer B.L. Williams was on routine patrol within the city limits of Winston-Salem, N.C. He was working the evening shift in the downtown district of Winston-Salem between the 500 and 600 blocks of North Trade Street. On the date and time in question, Officer Williams was operating a police issued bicycle.
>
> 2. While on patrol, Officer Williams met Corporal Necessary who was also on routine patrol. Corporal Necessary was operating a marked patrol vehicle and was working as a member of the Forsyth County Driving While Impaired Task Force.
>
> 3. Corporal Necessary told Officer Williams that he thought he had seen an individual walking downtown with a clear cup in his hand and get into his car. Corporal Necessary gave a description of the car and its location and asked Officer Williams to check on this individual. Corporal Necessary did not tell Officer Williams that he believed the Defendant to be impaired. There was nothing about the manner in which the Defendant was walking that gave Corporal Necessary reason to believe that Defendant was impaired.

There was nothing about the Defendant's physical appearance or his dress that gave Corporal Necessary reason to believe that the Defendant was impaired.

4. There are a number of bars and eating establishments that serve alcohol in the area where Corporal Necessary observed the Defendant, but Corporal Necessary did not see the Defendant leaving any such establishment.

5. Based on the information supplied by Corporal Necessary, Officer Williams turned his bicycle around and drove against traffic so he could check on the individual and the vehicle described by Corporal Necessary. Officer Williams drove slowly by the vehicle and peered into the inside of the targeted vehicle. The vehicle was occupied by the Defendant who was seated on the driver's side behind the wheel. . . . . There was conflicting testimony as to whether Officer Williams saw anything in the Defendant's hand as he drove by. Officer Williams testified he saw a cup in the Defendant's hand as he was sitting in the car. However, Corporal Necessary testified that Officer Williams told him he did not see anything in the Defendant's hand as he passed by the vehicle. As Officer Williams looked inside the vehicle, he noted that the Defendant had a cup in his hand. The lights of the vehicle were on and the engine was running.

6. After Officer Williams passed by the Defendant on his police bicycle, the Defendant and the passenger exited the vehicle and began walking down the sidewalk. According to Officer Williams, the Defendant did not have a cup in his hand as he was walking down the street. According to Corporal Necessary, the Defendant did have a cup in his hand as he was walking down the street. Although Officer Williams gave conflicting testimony as to whether he observed the Defendant's vehicle parked illegally, the Defendant never moved his vehicle and there were no readily observable motor vehicle law violations that occurred in the presence of either Officer.

7. On the question of whether the Defendant has a cup in his hand as he was walking down the street after exiting the vehicle, the Court is of the view that the defendant did have a cup in his hand after he exited the vehicle.

8. After observing the Defendant walk down the sidewalk, Officer Williams moved his police bicycle from the roadway to the pedestrian sidewalk in an effort to initiate contact with the Defendant. The Officer positioned his bicycle in such a way as to block the Defendant's normal path of travel as a pedestrian on the sidewalk. At the time Officer Williams initiated contact with the Defendant, he was wearing a police uniform with the word, "Police" in reflective tape on the back. On the front of the uniform is a badge with Officer Williams['] name and the words "Bike Patrol". The Officer was wearing a helmet with the word "Police" in white decals. The officer was carrying a velcro bag with all the equipment, citations, accident book and other paperwork that an officer would need. The velcro bag also had the word "Police" on it. The officer was dressed for court just as he was dressed on the date and time in question and part of the officer's dress included a police issued firearm. . . .

9. At the same time that Officer Williams initiated contact with the Defendant, Corporal Necessary pulled his patrol car directly behind Officer Williams. Officer Williams purpose in initiating contact with the Defendant was to make a determination as to whether there was any alcohol in the cup that the Defendant was holding. As the Defendant and his companion were approaching a parking lot, which would have been their normal path of travel, the entrance to the parking lot was blocked by Officer Williams who had dismounted his bicycle. Likewise, Corporal Necessary positioned his marked patrol vehicle at an angle so as to block the entrance to the parking lot.

10. As the Defendant and the passenger approached the parking lot, Officer Williams dismounted his bicycle and initiated contact with Defendant. The contact consisted of asking the Defendant "what is in the cup?" At the time Officer Williams asked the Defendant what is in the cup, he was within arms' length of the Defendant. At the time Officer Williams asked the Defendant what was in the cup, he did not detect any odor of alcohol coming from the cup, nor did he notice an order of alcohol coming from the Defendant. The Defendant handed the cup to Officer Williams and told

> him it was water. Officer Williams smelled the liquid, and discovered the cup, in fact, contained water.
>
> 11. Corporal Necessary pulled in behind the Defendant's car and did not detect any signs of impairment as the Defendant was walking towards Officer Williams. Corporal Necessary has investigated over 1400 driving while impaired cases since 1989.
>
> 12. The Defendant was stopped only because he was walking on the sidewalk with a cup in his hand with clear liquid in it and the officers wanted to know what was in the cup.[1] (original footnotes omitted).

The first challenged finding of fact is a portion of finding of fact number eight, which states in relevant part: "[Officer Williams] positioned his bicycle in such a way as to block . . . Defendant's normal path of travel as a pedestrian on the sidewalk." The testimony presented at the motion hearing regarding the position of Officer Williams and his bicycle on the sidewalk consisted of the following:

Officer Williams testified that, after riding past the Defendant's vehicle and looking inside, "I turned around and straddled my bicycle, right at the entrance to the parking lot." Officer Williams testified that he stopped at the entrance to the parking lot to "be able to contact Officer Necessary to let him know I did see the vehicle he had in question and I could see the two individuals in it." Officer Williams then testified: "While all that was transpiring, [Defendant and his companion] exited the vehicle and started walking north on Trade Street towards my direction. I dismounted my bicycle, had my bicycle on the sidewalk." As Officer Williams was clarifying his testimony, he stated further:

> When I got down to the parking lot . . . and stopped my bicycle, they got out of the [vehicle] then, when I stopped down at the parking lot. They got out of the vehicle, got on the sidewalk, and walked towards me, down towards my location. And when they got to my location, I asked [Defendant], "What do you have in your cup?" And he said, "Water."

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1. We have omitted some portions of the findings of fact in the trial court's 11 January 2013 order, including some specifically challenged by the State. The omitted portions are irrelevant to our analysis of the issues on appeal and, due to their irrelevancy, we express no opinion as to their validity.

Officer Williams also stated: "I was astraddle of my bicycle when they walked down the street towards me."

Regarding the positioning of the bicycle on the sidewalk, Corporal Necessary testified that "Officer Williams . . . was straddling his bicycle at some distance behind . . . [Defendant's vehicle], probably two or three car lengths behind the [vehicle], next to the sidewalk at an entrance to the parking lot."

This testimony serves as competent evidence to support finding of fact number eight. Both officers testified that Officer Williams and his bicycle were on the sidewalk and at the entrance to the parking lot. Both officers testified that Defendant and the other male walked on the sidewalk, toward Officer Williams, until they reached Officer Williams, who then questioned Defendant. While there is conflicting evidence concerning whether Officer Williams and his bicycle were next to the sidewalk, or on the sidewalk, at a suppression hearing the trial court is tasked with weighing the testimony and deciding the facts. The trial court enjoys the benefit of live testimony, and we hold that its characterization of the incident, embodied in its findings of fact, represents a fair weighing of the testimony. The State's contention that there exists no competent evidence to support finding of fact number eight is without merit; thus, we hold that finding of fact number eight is binding on appeal.

The State next challenges finding of fact number nine, which reads in relevant part:

> As the Defendant and his companion were approaching a parking lot, which would have been their normal path of travel, the entrance to the parking lot was blocked by Officer Williams who had dismounted his bicycle. Likewise, Corporal Necessary positioned his marked patrol vehicle at an angle so as to block the entrance to the parking lot.

We hold that the wording of the first portion of finding of fact number nine is unclear. It is uncertain whether the trial court meant to find that Defendant's normal path of travel was on the sidewalk and in the direction of the parking lot, or whether the trial court meant to find that the parking lot itself was Defendant's normal path of travel. To the extent that finding of fact number nine states that Defendant was walking on the sidewalk in the direction of the parking lot, this finding is clearly supported by the evidence and testimony. To the extent, if at all, the trial court intended to find that Defendant's normal path of travel was the parking lot itself, it is unsupported by competent evidence and is not binding on appeal.

However, we hold that the remaining challenged portions of finding of fact number nine are both clear and supported by competent evidence. Officer Williams testified that he stopped his bicycle at the entrance to the parking lot to be able to contact Corporal Necessary. Corporal Necessary, in stating that he observed Officer Williams straddling his bicycle next to the sidewalk and at the entrance to the parking lot, corroborated this testimony. This testimony is competent evidence that supports the finding that the entrance to the parking lot was blocked by Officer Williams. Likewise, Corporal Necessary testified that, when he saw Defendant get out of the vehicle and begin to walk towards Officer Williams, Corporal Necessary "drove down, faced towards the entrance to the parking lot, at an angle, and stopped and got out." Corporal Necessary stated that he parked his cruiser "[n]ot in the parking lot," but rather that his cruiser "was turned at an angle, facing southwest at an angle, with the front of [the cruiser] at the entrance to the parking lot." This is competent evidence that Corporal Necessary parked his patrol vehicle at an angle and blocked access to the parking lot.

The State next contends that finding of fact number twelve is unsupported by competent evidence. Finding of fact number twelve states that Defendant was only stopped "because he was walking on the sidewalk with a cup in his hand with clear liquid in it and the officers wanted to know what was in the cup." We hold that, while there was conflicting testimony suggesting that the officers may have taken other factors into account, there was competent evidence to support finding of fact number twelve.

On cross-examination by Defendant's counsel, Officer Williams answered in the affirmative when asked if "[t]he only thing" he knew about Defendant was "that he had a cup in his hand that [Defendant] said contained water." Although Officer Williams testified that Defendant's face appeared flushed, Officer Williams admitted that he did not know why Defendant's face appeared flushed, did not know where Defendant had been, and did not know where Defendant was going. Similarly, Corporal Necessary admitted that, before Officer Williams asked Defendant what was in the cup, Corporal Necessary did not know where Defendant had come from, where he was going, what he was doing downtown, whether he worked downtown, what was in the cup, or why he had gotten into the vehicle. This testimony was competent evidence upon which the trial court made finding of fact number twelve. This finding is therefore binding on appeal.

III.

[2] The State next argues that the trial court erred by concluding that Defendant was seized within the meaning of the Fourth Amendment. Based on the findings of fact, the following conclusions of law relevant to this appeal were entered by the trial court:

> 3. On July 28, 2011, . . . Defendant was unlawfully seized and detained under the 4th Amendment to the United States Constitution because Officer Williams and Corporal Necessary lacked reasonable suspicion to block . . . Defendant's normal path of travel as a pedestrian.
>
> 6. Based upon the totality of the circumstances faced by . . . Defendant on the date and time in question, a reasonable person would not have felt free to go about his business and ignore two officers who had every intention of stopping . . . Defendant and making an inquiry as to whether the clear plastic cup containing clear liquid was something other than water.
>
> 7. There was no reasonable suspicion to stop . . . Defendant from traveling down the road as a pedestrian to make inquiry about what may or may not have been in . . . Defendant's cup. For purposes of fourth amendment analysis, the action of Officer Williams and Corporal Necessary constituted a show of force and a restraint on . . . Defendant's movement such that that [sic] a reasonable person would not feel free to ignore Officer Williams['] question. The encounter between the two officers and . . . Defendant was not a voluntary consensual encounter between the police and a citizen. Instead, the encounter in question constitutes a violation of . . . Defendant's 4th Amendment right to be free from an unreasonable seizure and subsequent interrogation.

A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Royster*, ___ N.C. App. ___, ___, 737 S.E.2d 400, 403 (2012) (citing *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011)). The conclusions of law "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citing

State v. Payne, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990)). We hold that the relevant binding findings of fact support the trial court's relevant conclusions of law.

The United States Supreme Court has held that a law enforcement officer does not offend the Fourth Amendment merely by approaching an individual in a public place and by putting questions to him. *Florida v. Royer*, 460 U.S. 491, 497, 75 L. Ed. 2d 229, 236 (1983). However, a person is seized under the Fourth Amendment when, "by means of physical force or a show of authority," the defendant's freedom of movement is restrained. *State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 553, 64 L. Ed. 2d 497, 509 (1980)).

As there was no physical force employed by Officer Williams or Corporal Necessary to restrain Defendant in this case, a seizure occurred if, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Williams*, 201 N.C. App. 566, 569, 686 S.E.2d 905, 907 (2009) (quoting *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991)) (internal quotation marks omitted).

When there has been no physical force or attempt to leave, examples of circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Kaupp v. Texas*, 538 U.S. 626, 630, 155 L. Ed. 2d 814, 820 (2003) (citing *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509). Several North Carolina Supreme Court opinions have also found the fact that an officer was in uniform to be a significant factor to consider when determining whether a seizure has occurred. *See, e.g.*, *State v. Icard*, 363 N.C. 303, 310, 677 S.E.2d 822, 827 (2009) (noting that an officer was in uniform while conducting a seizure analysis).

We are mindful of the United States Supreme Court's holding that an encounter between police and a defendant "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. In the present case, the encounter began with Corporal Necessary slowly passing by Defendant's vehicle, stopping just over a car length beyond, and talking with another officer. Both officers were wearing police uniforms and wore weapons as part of those uniforms. After Corporal Necessary passed by Defendant for

a second time, Officer Williams, at Corporal Necessary's request, rode past Defendant's vehicle against traffic and "made it obvious" that he was looking into Defendant's vehicle. After observing Defendant walk down the sidewalk towards him and, in an effort to initiate contact with Defendant, Officer Williams rode his bicycle a short distance away, and then moved his bicycle from the street onto the sidewalk. When Officer Williams took this action, he was a short "two or three car lengths away" from Defendant's vehicle. Upon noticing Defendant get out of the vehicle and start walking towards Officer Williams, Corporal Necessary pulled his police cruiser onto the sidewalk and at an angle to the entrance to the parking lot and, by doing so, blocked the entrance to the parking lot.

Officer Williams was on the sidewalk, with his bicycle, impeding Defendant's continued movement along the sidewalk. Corporal Necessary, by parking his cruiser behind Officer Williams, with the front of the cruiser at the entrance of the parking lot, he necessarily blocked the sidewalk with his cruiser. Corporal Necessary exited the cruiser and joined Officer Williams on the sidewalk, directly in Defendant's path of travel. Officer Williams then demanded of Defendant, "what do you have in the cup," which in the context of the entire encounter constituted "police conduct [which] would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Williams*, 201 N.C. App. at 569, 686 S.E.2d at 907 (citation omitted).

We also note that, along with the great deference we give to the trial court to hear testimony and find facts, in the present case, the trial court was in a better position to review evidence that is not accessible and reviewable by this Court on appeal; namely, whatever demonstration was given by Corporal Necessary as to the positioning of himself and his police cruiser on the sidewalk.[2] "[I]t is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal." *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994) (emphasis in original); *see also State v. Milby and State v. Boyd*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981) (holding that the appellant must "make the irregularity manifest" before it can be considered a basis for prejudicial error). It is the State, as appellant, who has the burden to make any alleged errors by the trial court part of the record on appeal and thus

2. As noted *supra*, when Corporal Necessary testified at the motion hearing concerning is movements, he stated: "It's kind of hard to explain. *I'll show you.* This is the entrance to the parking lot. I'm in this lane. I drove down, faced towards the entrance to the parking lot, at an angle, and stopped and got out" (emphasis added). Whatever demonstration Corporal Necessary did as part of his testimony is not part of the record on appeal.

reviewable by this Court. In absence of such evidence, an appeal will fail "to overcome the presumption of correctness at trial." *State v. Ali*, 329 N.C. 394, 412, 407 S.E.2d 183, 194 (1991).

We hold that the totality of the circumstances, discernible from the record on appeal, shows no error by the trial court in concluding that Defendant was seized within the meaning of the Fourth Amendment to the United States Constitution.

IV.

[3] In its final contention, the State asserts that the trial court erred in granting Defendant's motion to suppress because even if a seizure of Defendant occurred, the seizure was supported by a reasonable articulable suspicion that criminal activity was being committed, and Defendant's Fourth Amendment rights were therefore not violated. We disagree.

A reasonable suspicion has been defined by the United States Supreme Court as "some minimal level of objective justification." *INS v. Delgado*, 466 U.S. 210, 217, 80 L. Ed. 2d 247, 255 (1984). In order to meet the reasonable suspicion threshold, "[t]he officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 889, 909 (1968)) (internal quotation marks omitted). "The concept of reasonable suspicion . . . is not 'readily, or even usefully, reduced to a neat set of legal rules.' " *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10 (citation omitted). Rather, in determining if reasonable suspicion existed, the Court must account for "the totality of the circumstances –the whole picture." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981).

We hold that the totality of the circumstances of this case does not rise to the minimal level of objective justification required for a reasonable articulable suspicion under the Fourth Amendment. Officer Williams and Corporal Necessary observed Defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. Defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle, and began walking down the sidewalk, where he was stopped by the officers. Finding of fact twelve, which we deemed to be supported by competent evidence and therefore binding on appeal, states that Officer Williams and Corporal Necessary stopped and questioned Defendant "only because he was walking on the sidewalk with a

cup in his hand with clear liquid in it" and the officers wanted to know what was in the cup.

We hold that the officers had, at most, an inchoate and unparticularized hunch that Defendant was involved in some form of criminal activity. Defendant's actions did not give rise to the minimal level of objective justification required by the Fourth Amendment; therefore, the trial court did not err in granting Defendant's suppression motion.

Affirmed.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA
v.
DONNELL EDWIN MURRAY

No. COA12-1066

Filed 20 August 2013

1. Evidence—exhibits—photographs—authentication

The trial court did not err in a possession with intent to sell and deliver cocaine and sale of cocaine case by admitting as substantive evidence the State's exhibits 7 and 8 based on alleged improper authentication in violation of N.C.G.S. § 8C-1, Rule 901. The photos were properly authenticated as people from whom the police informant had purchased drugs in the past.

2. Evidence—exhibits—photographs—relevancy

The trial court erred in a possession with intent to sell and deliver cocaine and sale of cocaine case by admitting as substantive evidence the State's exhibits 7 and 8. The photographs did not have any tendency to make the existence of any fact of consequence more probable or less probable.

3. Evidence—exhibits—photographs—admission prejudicial

Defendant was prejudiced in a possession with intent to sell and deliver cocaine and sale of cocaine case by the trial court's admission of exhibits 7 and 8 into evidence. There was a reasonable possibility that had exhibits 7 and 8 not been admitted as substantive evidence, a different result would have been reached at trial.

Appeal by Defendant from judgments entered 15 May 2012 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 28 February 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Julie Ramseur Lewis, for Defendant.

DILLON, Judge.

Donnell Murray (Defendant) appeals from judgments entered upon convictions of possession with intent to sell and deliver cocaine and sale of cocaine in violation of N.C. Gen. Stat. § 90-95 (2011), challenging the authentication and relevancy of photographs admitted into evidence, the trial court's failure to exercise its discretion in responding to a jury request, and the alleged ineffective assistance of Defendant's trial counsel.[1] We conclude that Defendant is entitled to a new trial.

I. Background

The evidence of record tends to show the following: On 18 January 2011, Phillip West, a police informant, was wired with a camera by officers of the Shelby Police Department and provided a vehicle and two $20 bills. Detective James Burgess and Detective Chad Burnette provided Mr. West with two $20 bills and instructed him to go to a particular residence and attempt to buy controlled substances from a man named Donnell Murray.

Mr. West went to the residence and knocked on the door. A man opened the door, and Mr. West asked if "it was Donnell," to which the man replied, "Yes." Mr. West said he needed "a forty," which meant $40 worth of crack cocaine. The man handed Mr. West two rocks that appeared to be crack cocaine in exchange for the two $20 bills. The substances were subsequently determined to have a total weight of .1 grams and to contain cocaine base. On 13 June 2011, Defendant was indicted on charges of possession with intent to sell and deliver cocaine and sale of cocaine.

Defendant denied being the person who sold Mr. West the drugs, claiming that it was probably one of his two sons, named Donnell, Jr.,

1. Because we find there was prejudicial error in the the admission of irrelevant evidence, we do not address Defendant's second and third arguments pertaining to the trial court's failure to exercise discretion and to the trial counsel's alleged ineffective assistance of counsel.

and Aikeem. Detective Mark Boris of the Shelby Police Department prepared three photo lineups which were shown to Mr. West. The third lineup contained a picture of Defendant. Purportedly, each of the first two lineups contained a picture of either Donnell, Jr., or Aikeem. Mr. West identified an individual from each lineup, including Defendant in the third lineup, as people from whom he had purchased drugs in the past, but he did not identify the photos he chose from the first two lineups as Defendant's sons by name or familial association with Defendant.

Defendant's case came on for trial at the 12 March 2012 session of Cleveland County Superior Court. At trial, the three photos from the lineups were introduced into evidence as State's Exhibits 7, 8 and 9. The video of the drug transaction was also admitted into evidence, but only a portion of the face of the man who sold Mr. West the cocaine was visible on the video. During deliberations the jury requested to review the photographs, the videotape and the testimonial evidence. The trial court allowed the jury to review the photographs and the videotape. Ultimately, the jury returned guilty verdicts on both charges. The trial court entered judgments consistent with the jury's verdicts, sentencing Defendant to consecutive terms of 15 to 18 months incarceration on the possession with intent to sell and deliver conviction, and 21 to 26 months incarceration on the sale of cocaine conviction. From these judgments, Defendant appeals.

II. Analysis

Defendant argues on appeal that the trial court erred by admitting, as substantive evidence, the State's Exhibits 7 and 8, which were photographs picked out by Mr. West from the first two lineups. Defendant specifically challenges the admission of the photographs as substantive evidence on two grounds: (1) Defendant contends the photographs were not properly authenticated in violation of N.C. Gen. Stat. § 8C-1, Rule 901 (2011); and (2) Defendant contends the photographs were irrelevant and prejudicial in violation of N.C. Gen. Stat. § 8C-1, Rules 401 and 403 (2011). We address each argument in turn.

"We [generally] review the trial court's decision to admit evidence for abuse of discretion, looking to whether 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. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009), *cert. denied*, __ U.S. __, 178 L. Ed. 2d 90 (2010). However, with regard to a determination on the relevancy of evidence, "a trial court's rulings . . . technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to

Rule 403[;] [nonetheless][,] such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

A. Authentication

[1] N.C. Gen. Stat. § 8-97 provides that "[a]ny party may introduce a photograph . . . as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." *Id.* Rule 901 of our Rules of Evidence requires authentication or identification "by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901 (2011). "In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994) (citation omitted).

In this case, the testimony concerning authentication of the photographs consisted of testimony from Mr. West and from Detective Boris. Mr. West testified that he knew the individuals depicted in Exhibits 7 and 8 to be people from whom he had bought drugs in the past, though not on 18 January 2011, and that he had picked each of them out of a photo lineup the night before. Mr. West did not further testify as to the identities of the men depicted in Exhibits 7 and 8. Mr. West, however, testified that the individual depicted in Exhibit 9 was the person from whom he bought drugs on 18 January 2011 and that the person was Defendant. Over Defendant's objection, all three photos were admitted as substantive evidence.

We believe this testimony was sufficient to authenticate Exhibits 7 and 8 as photographs of people from whom Mr. West purchased drugs in the past. *See Lee*, 335 N.C. at 270, 439 S.E.2d at 560 (stating that, "[i]n order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be"). We further believe this testimony was sufficient to authenticate Exhibit 9 as Defendant, such that it was properly admitted. *See id.*

The State, however, attempted to further authenticate Exhibits 7 and 8 as photos depicting Defendant's sons through the testimony of Detective Boris. Detective Boris' testimony was somewhat confusing on the issue. On direct examination, he testified that he put together three lineups with photos of Defendant and his two sons; that Exhibit 7 was a picture of Defendant's son Aikeem; that he could not remember the name of the individual depicted in Exhibit 8; and that Exhibit 9 was a

picture of Defendant. However, on cross-examination, he gave the following testimony:

> A. I believe number 7 is going to be Aikeem.
>
> Q. But you're not sure?
>
> A. I'm sure number nine is definitely Donnell, Senior. Number eight, I'm really not sure what his name is. When I put together a photo lineup, it often involves –
>
> Q. My question is are you sure or not that seven is Aikeem; a hundred percent are you sure?
>
> A. The idea of a lineup is to get them all to look exactly the same so from what I remember, yes, these two.
>
> Q. Are you saying yes, it is or –
>
> A. I'm saying I'm one hundred percent that this gentleman is Donnell, Senior. I remember putting his lineup together, and that's my suspect. I couldn't be a hundred percent sure on these two.
>
> Q. So you can't be a hundred percent on the people you say are Aikeem or the other person?
>
> A. No, I can't, no sir.

We do not believe the foregoing testimony from Detective Boris was sufficient to authenticate Exhibits 7 and 8 as photographs depicting Defendant's sons. *See Lee*, 335 N.C. at 270, 439 S.E.2d at 560.

B. Relevancy

[2] Defendant next argues that the photographs – even if properly authenticated as photographs of people from whom Mr. West had purchased drugs in the past – were nonetheless irrelevant and prejudicial to Defendant's trial.

N.C. Gen. Stat. § 8-97 provides that "[a]ny party may introduce a photograph . . . as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." *Id.* Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rules 402 and 403 (2011). Relevant evidence is defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

N.C. Gen. Stat. § 8C-1, Rule 401 (2011). "Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence." *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. "[A] trial court's rulings on relevancy . . . are given great deference on appeal." *Id.* However, "compliance with the facial requirements of Rule 901(a) does not mean . . . that an exhibit automatically qualifies as relevant under Rule 401[.]" *State v. Patterson*, 103 N.C. App. 195, 405 S.E.2d 200, *aff'd*, 332 N.C. 409, 420 S.E.2d 98 (1992).

In this case, the transcript does not shed any light on how the photographs – if they were not authenticated as Defendant's sons, but rather, only as men Mr. West had purchased drugs from in the past – had any tendency to make the existence of any fact of consequence more probable or less probable than it would be without the photographs. Therefore, we conclude that Exhibits 7 and 8 were irrelevant. *See generally Patterson*, 103 N.C. App. at 203, 405 S.E.2d at 205 (holding that a sketch was irrelevant because no testifying witness had "personal knowledge of the suspects' appearances and could not, therefore, vouch for the accuracy of the sketched representations"). Accordingly, the trial court erred by admitting Exhibits 7 and 8 as substantive evidence in this case.

C. Prejudice

[3] Defendant has the burden of showing that the error was prejudicial by establishing a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443(a) (2011). Defendant argues he was prejudiced by the trial court's admission of Exhibits 7 and 8 into evidence for the following reason:

> [The jury was left with] the impression that the issue had already been resolved and that the men [depicted in Exhibits 7 and 8] were, in fact, Defendant's sons. The jury's full understanding of the lineup testimony was material – indeed, critical – to the determination of Defendant's guilt or innocence. If one of Defendant's sons was the seller, and if neither of the two men depicted in the photographs were, in actuality, Defendant's sons, then their features clearly would not match the small portion of the seller's lower face visible on the paused video.

In other words, Defendant argues, the jury quite possibly made its determination that it was Defendant - and not one of his sons - who appears in the video based on a conclusion that Defendant as portrayed in Exhibit 9 looked more like the man in the video than the individuals depicted in Exhibits 7 and 8, who the jury may have believed were Defendant's sons. This argument is substantiated by evidence heard at trial and by inquiries made by the jury during deliberation. During the trial, the jury heard testimony that Defendant had a son named Donnell, Jr., who also sometimes went by "Donnell," who was the "spitting image" of his father, Defendant, and who frequented the residence where Mr. West purchased the cocaine. The jury also heard testimony that Aikeem looked a lot like Donnell, Jr., that Mr. West had indicated prior to trial that on the relevant day in question he had "bought [the drugs] from a young black male maybe mid-twenties[,]" and that Defendant's appearance at trial was different from his appearance on the date Mr. West purchased the cocaine:

> Q. Mr. West, you did make a description of the individual from whom you bought that cocaine that day; correct?
>
> A. Yes.
>
> Q. I believe your words were you bought it from a young black male maybe mid-twenties; is that correct?
>
> A. Yes.
>
> Q. [Defendant] is not in his mid-twenties; is he?
>
> A. No.
>
> Q. Does he appear the same way today that he appeared on January 18, 2011?
>
> A. No. He didn't have facial hair or a beard or nothing.
>
> Q. Facial hair that's kind of gray underneath his chin, he didn't have that?
>
> A. No.
>
> Q. Was he wearing glasses if you remember?
>
> A. No, no glasses.
>
> Q. Did he appear younger to you than he appears today?
>
> A. Yes. I mean, you know.

Moreover, the jury heard Detective Boris' conflicting testimony at trial regarding the identity of the men shown in Exhibits 7 and 8.

During deliberations the jury sent a note asking the trial court to allow them to review Exhibits 7, 8 and 9, the videotape showing the drug transaction and testimonies. The transcript shows that the jury wanted to view Exhibits 7 and 8 – which had been authenticated only as photos of *unidentified* men from whom Mr. West had purchased drugs in the past – and the videotape of the drug buy *to compare* the photos and the videotape. The jury asked the judge specifically to "pause [the video] at one point . . . where we could see a . . . portion of somebody's face[.]" Moreover, the jury asked whether they could hear the portion of the tape when Mr. West "says Donnell[?]" because "we think we heard [the man] say yes." While the trial court allowed the jury to review the photographs and the videotape, the trial court never responded to the jury's request to review the testimonies concerning the photographs, which presumably would have included Detective Boris' testimony on cross-examination. Had the jurors been able to review the testimonies, they may have determined that Exhibits 7 and 8 had not been conclusively identified as Defendant's sons, and, resultantly, they may not have made their decision based on a comparison of the photos with the video. We believe Defendant's argument has merit.

It is clear from the transcript that the jury wanted to compare the three photographs with the person depicted in the videotape of the drug sale. The jury wanted to review Exhibits 7 and 8 in conjunction with the videotape because they had some doubt as to whether Defendant or one of his sons made the sale. If the individuals depicted in Exhibits 7 and 8 were, in fact, not Defendant's sons, then the jury may have resolved the doubt in favor of finding Defendant guilty because, in their minds, Defendant resembled the individual depicted in the videotape more than the individuals depicted in Exhibits 7 and 8. Therefore, we believe there is a reasonable possibility that, had Exhibits 7 and 8 not been admitted as substantial evidence, a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443(a).

NEW TRIAL.

Judge STEPHENS and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
LESTER GERARD PACKINGHAM

No. COA12-1287

Filed 20 August 2013

Sexual Offenders—statute prohibiting accessing commercial social networking website—First Amendment violation—overbroad—vague

Defendant registered sex offender's conviction for accessing a commercial social networking website pursuant to N.C.G.S. § 14-202.5 was vacated. The statute violates federal and state constitutional rights to free speech, expression, association, assembly, and the press under the First and Fourteenth Amendments. Additionally, the statute is overbroad, vague, and is not narrowly tailored to achieve a legitimate government interest.

Appeal by defendant from judgment entered 30 May 2012 by Judge William Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

Lester Gerard Packingham (defendant), a registered sex offender, appeals from a judgment entered upon a jury conviction for accessing a commercial social networking Web site, pursuant to N.C. Gen. Stat. § 14-202.5 (2011). Defendant challenges the statute as unconstitutional. For the reasons stated herein, we agree. Accordingly, we vacate the judgment of the trial court.

I. Background

Chapter 14, Article 27A of our general statutes governs the Sex Offender and Public Protection Registration Programs (the Registry). "The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders

is of paramount governmental interest." N.C. Gen. Stat § 14-208.5 (2011). Accordingly, the stated purpose of the Registry is to protect the public and children from the risk of recidivism by sex offenders and to aid "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders" because sex offenders "pose significant and unacceptable threats to the public safety and welfare of children." *Id.*

As part of the Registry, persons convicted on or after 1 January 1996 of sexually violent offenses or certain offenses against minors must register as a sex offender. In doing so, they must provide the sheriff's office in the county in which they reside with all pertinent personal information set forth in N.C. Gen. Stat. § 14-208.7(b) (2011). "Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14.208.12A." N.C. Gen. Stat. § 14-208.7(a)(2) (2011). Alternatively, "[a]ny person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator" is required to register under the Sexually Violent Predator Registration Program. N.C. Gen. Stat. § 14-208.6A (2011). A violation of the registration requirements is a Class F felony. N.C. Gen. Stat. § 14-208.11 (2011).

On 1 December 2008, the General Assembly enacted N.C. Gen. Stat. § 14-202.5 as part of the Protect Children from Sexual Predators Act. NC B. Summ., 2008 Reg. Sess. S.B. 132. The statute bans the use of commercial social networking Web sites by any registered sex offender:

> (a) Offense. -- It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.
>
> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. -- The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. -- A violation of this section is a Class I felony.

N.C. Gen. Stat. § 14-202.5 (2011).

In the case *sub judice*, defendant was convicted of taking indecent liberties with a child in 2002. Accordingly, he became a registered sex offender. In 2010, in an effort to enforce N.C. Gen. Stat. § 14-202.5, the Durham Police Department began investigating profiles on the Web sites Myspace.com and Facebook.com for evidence of use by registered sex offenders. An officer recognized defendant in a profile picture belonging to Facebook user "J.R. Gerard," then confirmed that defendant was the

person who created the profile page. Thereafter, defendant was indicted on 20 September 2012 for maintaining at least one personal Web page or profile on Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.

At a pretrial hearing, defendant moved to dismiss the charge on the basis that N.C. Gen. Stat. § 14-202.5 was unconstitutional. The trial court joined defendant's motion with a similar motion made by another defendant. Superior Court Judge Michael R. Morgan denied the joint motion, finding that the statute was constitutional as applied to both defendants. He declined to rule on the statute's facial constitutionality for want of jurisdiction. Defendant in the case *sub judice*, and the other defendant, filed a joint appeal with this Court, which we denied on 22 June 2011.

On 30 May 2012, a jury found defendant guilty of accessing a commercial social networking Web site. Defendant was sentenced to 6 to 8 months imprisonment, suspended, and placed on 12 months of supervised probation. Defendant now appeals.

II. Analysis

On appeal, defendant challenges N.C. Gen. Stat. § 14-202.5 (2011) on the basis that it violates his federal and state constitutional rights to free speech, expression, association, assembly, and the press under the First and Fourteenth Amendments. Additionally, he asserts that the statute is overbroad, vague, and not narrowly tailored to achieve a legitimate government interest. We agree.

This case presents the single legal question of whether N.C. Gen. Stat. § 14-202.5 is unconstitutional. "The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *State v. Daniels*, ___ N.C. App. ___, ___, 741 S.E.2d 354, 363 (2012), *appeal dismissed*, *review denied*, 738 S.E.2d 389 (N.C. 2013) (internal quotations and citations omitted).

A. Level of Scrutiny

The statute plainly involves defendant's First Amendment rights as incorporated through the Fourteenth Amendment because it bans the freedom of speech and association via social media. "[A] statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea." *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993) (quotation marks and citations omitted). N.C. Gen. Stat. § 14-202.5 (2011) is content neutral because it restricts access to commercial social networking

Web sites without any reference to the content or type of speech disseminated or posted thereon. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42, 129 L. Ed. 2d 497 (1994). Content-neutral regulations are subject to intermediate scrutiny: they must be both "narrowly tailored to achieve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675 (1989). In the instant case, we conclude that the statute is not narrowly tailored; accordingly, we decline to address whether the statute leaves open alternative channels for communication. *See Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013).

B. Narrow Tailoring

The U.S. Supreme Court has stated that a narrowly tailored statute "targets and eliminates no more than the exact source of the evil it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 485 (1988) (citation omitted).

> [T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81 (quotation marks and citations omitted). The State must also "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664, 129 L. Ed. 2d at 532.

At the outset, we note that this is the first constitutional challenge to N.C. Gen. Stat. § 14-202.5 heard before this Court. As such, we find several federal court decisions addressing the constitutionality of similar statutes to be persuasive. Most recently, in *Doe v. Prosecutor*, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit declared Indiana Code § 35-42-4-12 (2011) to be unconstitutional: the statute prohibited registered sex offenders convicted of offenses involving a minor (including, *inter alia*, child molesting, possession of child pornography, and sexual conduct in

the presence of a minor) from using social networking websites, instant messaging services, and chat programs. It defined a "social networking web site" as a Web site that:

> (1) facilitates the social introduction between two (2) or more persons;
>
> (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
>
> (3) allows a member to create a web page or a personal profile; and
>
> (4) provides a member with the opportunity to communicate with another person.
>
> The term does not include an electronic mail program or message board program.

Ind. Code Ann. § 35-42-4-12 (2011). Additionally, the statute provided a defense to a prosecution if the registered offender:

> (1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
>
> (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.

Id. Calling the statute "overinclusive" and a complete "social media ban," the Seventh Circuit concluded that, though content neutral, the statute was not narrowly tailored to serve the state's interest because it broadly prohibited substantial protected speech rather than specifically targeting the evil of improper communications to minors:

> [T]here is nothing dangerous about Doe's use of social media as long as he does not improperly communicate with minors. Further, there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress.

Prosecutor, 705 F.3d at 698-99.

Similarly, Nebraska statute Neb. Rev. Stat. § 28-322.05(1) (2012) made it unlawful for certain registered sex offenders "to knowingly and intentionally use[] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use [it]." Neb. Rev. Stat. § 28-322.05(1) (2012). Only those registered offenders convicted of offenses targeting minors were subject to the statutory ban. *See* Neb. Rev. Stat. § 29-4001.01(13) (2012). The statute defined a "social networking web site" as:

> [A] web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile[.]

Neb. Rev. Stat. § 29-4001.01(13) (2012).

Upon review, the U.S. District Court in Nebraska held that Neb. Rev. Stat. § 28-322.05 was not narrowly tailored because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012) (citation omitted) (alteration in original). The District Court reasoned that, even if the ban was applicable only to the most common and notable social networking sites, such as Facebook.com and Myspace.com, it nevertheless prohibited an enormous amount of expressive activity on the internet: "[T]he ban potentially restricts the targeted offenders from communicating with hundreds of millions and perhaps billions of adults and their companies despite the fact that the communication has nothing whatsoever to do with minors." *Id.* at 1111; *see also Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012) (holding that La. Rev. Stat. Ann. § 14:91.5 (2012) was unconstitutional, in part because "[t]he sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued.").

C. Legitimate State Interest

Turning now to the case at hand, it is undisputed that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet. North Carolina requires sex offenders to register in the sex offender database because "the protection of [] children is of great governmental interest." N.C. Gen. Stat. § 14-208.5 (2011). However, while enacted to further a legitimate state interest, N.C. Gen. Stat. § 14-202.5, as it stands, is not narrowly tailored.

i. Substantially Broad Application

First, defendant argues that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, in part

> because it treats all registered sex offenders the same, regardless of the offense committed, the victim's age, whether a computer was used to facilitate or commit the offense, the likelihood of reoffending, and regardless of whether the person has been classified as a sexually violent predator. It burdens more people than needed to achieve the purported goal of the statute.

We agree. We begin by noting that Article 27A demonstrates the legislature's intent to distinguish between sex offenders based on the character of their convictions:

> It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

N.C. Gen. Stat. § 14 208.6A (2011). Accordingly, our general statutes contain various restrictions that are only applicable to specified subsets of sex offenders. *See* N.C. Gen. Stat. § 14-208.18(c) (2011) (governing premises restrictions that apply only to registered sex offenders who commit an offense defined in Article 7A or against a child under the age of 16); N.C. Gen. Stat. § 14-208.22 (2011) (requiring only offenders classified as "sexually violent predators" to provide additional identifying factors, offense history, and documentation of psychiatric treatment); N.C. Gen. Stat. § 14-208.23 (2011) (requiring only "sexually violent predators" to register for life); N.C. Gen. Stat. § 14-208.40A (2011) (allowing courts to implement satellite-based monitoring if (i) the offender has been classified as a sexually violent predator (ii) the offender is a recidivist, (iii)

the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.).

In contrast, N.C. Gen. Stat. § 14-202.5 applies equally to every registered sex offender in the state, regardless of whether the offender committed any sexual offense involving a minor. For example, registered sex offenders convicted of misdemeanor sexual battery of an adult, pursuant to N.C. Gen. Stat. § 14-27.5A (2011), and those convicted of attempted rape of an adult, pursuant to N.C. Gen. Stat. § 14-27.6 (2011), may not access any commercial social networking Web site. Thus, the application of this statute is neither conditional upon showing that the offender previously used a social networking Web site to target children, nor does it require a showing that the offender is a current threat to minors. Accordingly, the statute is not narrowly tailored because it fails to target those offenders who "pose a factually based risk to children through the use or threatened use of the banned sites or services." *Nebraska*, 898 F. Supp. 2d at 1111. In essence, it burdens more people than necessary to achieve its purported goal.

We note that in *Doe v. Prosecutor* and *Doe v. Nebraska*, the challenged statutes were applicable only to those registered sex offenders whose offenses involved a minor. Nevertheless, the courts concluded that the statutes were not narrowly tailored, in part, because they also banned a broad scope of internet activity. As such, tailoring N.C. Gen. Stat. § 14-202.5 to those offenders who "pose a factually based risk to children" does not cure the statute's fatal flaw. *Nebraska*, 898 F. Supp. 2d at 1111. Its overbroad application to all registered sex offenders is merely one example of how, when judged against the First Amendment, N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, and thus unconstitutional.

ii. Substantially Broad Scope

Defendant asserts that an additional First Amendment concern is the fact that N.C. Gen. Stat. § 14-202.5 arbitrarily prohibits a broad scope of internet activity. We agree.

"Expansively written laws designed to protect children are *not* exempt from the constitutional requirement of clarity under both the First Amendment and the Due Process Clause[.]" *Id.* at 1112. Due process requires that laws give people of ordinary intelligence fair notice of what conduct is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222 (1972).

> The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its

> obvious chilling effect on free speech. . . . [G]overnment may regulate in the area of First Amendment freedoms only with narrow specificity[.] These principles apply to laws that regulate expression for the purpose of protecting children.

Brown v. Entm't Merchs. Ass'n, 2011 U.S. 4802, 37-38, 180 L. Ed. 2d 708, 725 (2011) (quotations and citations omitted). Vague criminal statutes are disfavored because they restrict the exercise of First Amendment freedoms. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 138 L. Ed. 2d 874 (1997).

Here, the State fails to make a convincing argument as to why the statute is not unconstitutionally vague. N.C. Gen. Stat. § 14-202.5(b) defines "social networking Web site[s]" as being 1) "commercial" in that they "derive[] revenue," 2) "social" because they promote the introduction of individuals, and 3) facilitative of "networking" by allowing users to create personal profiles or have mechanisms that allow users to communicate with others, "such as message board[s], chat room[s], electronic mail, or instant messenger." N.C. Gen. Stat. § 14-202.5(b) (2011). N.C. Gen. Stat. § 14-202.5(c) provides two exceptions: 1) an offender may access a Web site that provides one discrete service, including photo-sharing, electronic mail, instant messenger, chat room or message board, or 2) he may visit a Web site that is primarily intended to facilitate commercial transactions between members or visitors. N.C. Gen. Stat. §14-202.5(c)(1-2) (2011).

The construction of N.C. Gen. Stat. § 14-202.5(b) lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited. We assume that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as Facebook.com and Myspace.com. However, the ban is much more expansive. For example, while Foodnetwork.com contains recipes and restaurant suggestions, it is also a commercial social networking Web site because it derives revenue from advertising, facilitates the social introduction between two or more persons, allows users to create user profiles, and has message boards and photo sharing features. Additionally, the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com because these sites contain subsidiary social networking pages: they derive revenue from advertising; their functions facilitate the social introduction of two or more people; and they allow users to create personal profiles, e-mail accounts, or post

information on message boards. Thus, registered sex offenders may be prohibited from conducting a "Google" search, purchasing items on Amazon.com, or accessing a plethora of Web sites unrelated to online communication with minors. In its overall application, the statute prohibits a registered sex offender whose conviction is unrelated to sexual activity involving a minor from accessing a multitude of Web sites that, in all likelihood, are not frequented by minors.

Furthermore, while the definition of "commercial social networking Web site" in N.C. Gen. Stat. § 14-202.5(b) is overbroad and vague on its face, N.C. Gen. Stat. § 14-202.5(a) is similarly vague. This portion of the statute makes it unlawful for the offender to "access" a Web site where he "knows" that the site permits minor children to become members. The term "access" is defined as "[t]he act of approaching." *American Heritage Dictionary* 8 (3ed. 1997). Accordingly, the statute is violated by merely pulling up a prohibited Web site, regardless of whether the offender searches the site or immediately leaves it upon recognizing that he is banned from its use. Furthermore, by its plain language, it is assumed that every offender inherently "knows" which Web sites are banned. However, given the vague definition of "commercial social networking Web site" and its broad reach, it is fundamentally impossible to expect an offender, or any other person, to "know" whether he is banned from a particular Web site prior to "accessing" it. Moreover, N.C. Gen. Stat. § 14-202.5 contains no defense to prosecution should a sex offender unintentionally access a banned Web site. Finally, should a registered sex offender have active Facebook, Amazon, or other accounts at the time of his conviction, the plain language of N.C. Gen. Stat. § 14-202.5 makes it unlawful to login to close the accounts. Accordingly, we conclude that N.C. Gen. Stat. § 14-202.5 is unconstitutionally vague on its face and overbroad as applied.

D. Additional Safeguards

Finally, we note that our General Assembly has enacted laws aimed at protecting children on the internet without abridging First Amendment freedoms: N.C. Gen. Stat. § 14-202.3 (2011) prohibits solicitation of a child by a computer or other electronic device to commit an unlawful sex act; N.C. Gen. Stat. § 14-196.3 (2011) prohibits cyber-stalking; and Article 27A requires registered sex offenders to provide the State with "[a]ny online identifier the person uses or intends to use," N.C. Gen. Stat. § 14-208.7(b)(7) (2011). Accordingly, "[w]ith little difficulty, the state could more precisely target illicit communication, as the statutes above demonstrate." Prosecutor, 705 F.3d at 700.

III. Conclusion

In sum, we conclude that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, is vague, and fails to target the "evil" it is intended to rectify. Instead, it arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal. The statute violates the First Amendment's guarantee of free speech, and it is unconstitutional on its face and as applied. Accordingly, we vacate the trial court's judgment.

VACATED.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA
v.
JOHNATHAN BLAKE PERRY

No. COA13-30

Filed 20 August 2013

1. Evidence—expert testimony—cause of injuries—current state of medical research

The trial court did not commit plain error in a first-degree murder case by allowing the admission of testimony from the State's experts regarding the cause of the minor child's injuries. Although defendant contended that "the current state of medical research" in the diagnosis of head injuries in children rendered the testimony of the State's witnesses unreliable, the validity of this claim could not be evaluated based on the absence of record evidence.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—intentional assault of child—hands used as deadly weapons

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The record contained sufficient evidence to allow the jury to find that defendant had intentionally assaulted the minor child while using his hands as deadly weapons and that the child sustained fatal injuries as a result of this assault.

3. Homicide—first-degree murder—felony murder rule—underlying felony—felony child abuse

Although defendant argued that felony child abuse was not a viable underlying felony sufficient to support a conviction for first-degree murder under the felony murder rule, defendant acknowledged that this issue has already been decided adversely to his position by the Court of Appeals.

4. Sentencing—life imprisonment without parole—first-degree murder—not cruel and unusual punishment

The trial court did not violate defendant's right to be free from cruel and unusual punishment by sentencing him to life imprisonment without the possibility of parole for the crime of first-degree murder. The imposed sentence was authorized by the relevant statutory provisions, and thus, could not be classified as cruel and unusual in a constitutional sense.

Appeal by defendant from judgment entered 5 June 2012 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 May 2013.

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

Kathryn L. VandenBerg for Defendant-appellant.

ERVIN, Judge.

Defendant Johnathan Blake Perry appeals from a judgment sentencing him to a term of life imprisonment without the possibility of parole based upon his conviction for first degree murder. On appeal, Defendant argues that the trial court committed plain error by allowing the State's expert witnesses to express opinions to the effect that the injuries sustained by the alleged victim, J.W.,[1] had been intentionally inflicted on the grounds that this testimony was "not sufficiently reliable"; that the trial court erred by denying his motion to dismiss the charge against him for lack of adequate evidentiary support; that his felony murder conviction cannot be properly predicated on his commission of felonious child abuse inflicting serious bodily injury; and that his conviction of first degree murder and resulting sentence of life imprisonment without possibility

1. J.W. will be referred to throughout the remainder of this opinion as Joan, a pseudonym used to protect the child's privacy and for ease of reading.

of parole are disproportionate and constitute cruel and unusual punishment. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

a. Events of 7 December 2010

Joan was born on 29 September 2009 to Sebrina Wright, who had three other children. Although Defendant was Joan's father, he was not the father of any of her siblings. Defendant and Ms. Wright had little contact during the time that Ms. Wright was pregnant with Joan or the first year of Joan's life. However, Defendant moved in with Ms. Wright and her four children in September 2010.

Joan was a healthy baby who developed normally and did not have significant medical problems. Yolanda Manson, Ms. Wright's sister, recalled Joan as a happy, outgoing baby, who drank from a cup and could pick herself up if she fell. Joan did not take any medications, had no problems eating, and was not known to choke on food or milk.

Joan continued to appear happy and healthy during the first week of December 2010. On Monday, 6 December 2010, Joan behaved normally, smiling at family members and eating well. At that time, Joan was starting to use a drinking cup; however, she also used a bottle, which she was able to hold on her own.

Although Joan initially appeared to be comfortable with Defendant, as time went on, Ms. Wright "started to notice [that] she would scream a lot . . . when he would have her" and that "he was the only male that she really didn't favor." According to Ms. Wright, Defendant "always thought [Joan] was real clingy to [Ms. Wright]" and "just didn't like the fact that she was so clingy[.]" When Joan was approximately six months old, Ms. Wright returned to work. At that point, Ms. Wright's mother began watching Joan during the work day. After Defendant moved in, Ms. Wright's mother continued to watch Joan on most days. However, Defendant watched Joan once or twice on a "rare occasion."

At about 5:30 a.m. on Tuesday, 7 December 2010, Ms. Wright got up, changed Joan's diaper, and gave her a bottle of milk, which Joan drank normally. Ms. Wright did not see any bruising on Joan's legs or body at that time. Before she left for work, Ms. Wright woke Defendant,

who was sleeping in the living room. Upon being awakened, Defendant moved into the bedroom where Joan was sleeping. At approximately 6:30 a.m., Ms. Wright departed with the three older children, leaving Defendant and Joan alone in the house.

Ms. Wright spoke briefly with Defendant on the phone at approximately 11:30 a.m. on 7 December 2010. When Defendant held Joan up to the phone, Ms. Wright could hear her "little baby talk" and recalled that she "just sounded normal." When Ms. Wright hung up in order to enter a bank branch, Defendant asked her to call back as soon as she emerged from the bank building. After depositing a check and leaving the bank, Ms. Wright called Defendant twice without receiving any answer. At the time of her third call, Defendant answered and told Ms. Wright that Joan was not breathing and was "gone." Ms. Wright told Defendant to call 911, hung up, and drove home immediately, calling 911 herself as she drove.

About five minutes after speaking with Defendant, Ms. Wright arrived at her home. At that time, she saw emergency medical services personnel carrying Joan, who was not moving and whose eyes were rolled back into her head, to an ambulance for transportation to Wake Medical Center. At the time that they attempted to render assistance to Joan, emergency medical personnel noted that she was unresponsive, not moving or breathing on her own, had no discernible pulse, and felt "very limp" and "like a rag doll." After emergency medical services personnel moved Joan's tongue, she resumed an inadequate labored breathing. However, she did not open her eyes or respond to stimuli. In the ambulance, Joan was unresponsive, was only breathing about four times a minute, vomited a thin white fluid, and never regained consciousness. In the course of treating the child, emergency medical services personnel determined that Joan's blood sugar was normal, that her airway was not obstructed, that she was not on any sort of medication, that she did not have a fever or a history of seizures, and that she had not had any access to cleaning products or illegal drugs.

According to Ms. Wright, Defendant was "running back and forth" "arguing" and "fussing" "with the ambulance people." As a result, Captain Tony Pack of the Wake County Emergency Medical Services called upon police to restrain Defendant. When emergency workers asked Defendant what had happened, he said that he had given Joan a bottle, departed from the room while leaving Joan on the couch, and returned about eight minutes later to find her on the floor "gargling," unresponsive, and not breathing. According to investigating officers, the carpeted floor upon which Defendant claimed that Joan had fallen was 18 inches below the couch seat and 24 inches below the couch arm.

At the hospital, Joan began "posturing," which is "a term for stiffening of the extremities," a development that indicated that the "[s]welling in the brain [had] reached a point that it's actually beginning to force the brain out of . . . the hole at the base of the skull." According to Vernon Hilliard, Jr., of the Eastern Wake County Emergency Medical Services, these symptoms generally occur "almost immediately before death due to head trauma." After receiving initial treatment at Wake Medical Center, Joan was airlifted to the University of North Carolina Medical Center at around 4:00 p.m. on 7 December 2010.

As they travelled between the two medical facilities, Ms. Wright asked Defendant "What did you do?" Defendant did not answer Ms. Wright's question. When investigating officers arrived at the University of North Carolina Medical Center, Defendant walked away. An hour or two later, Ms. Wright reiterated her question to Defendant, who, once again, failed to answer. However, Defendant did tell Melissa Williams of the Wake County Department of Human Services that he had put Joan on a sofa with a bottle; that, when he returned to the living room eight or ten minutes later, she was lying on the floor choking and with her eyes closed; that Ms. Wright had directed him to call 911 when she called and that he had not harmed Joan. Defendant later talked to investigating officers.

At the University of North Carolina Medical Center, attending physicians drilled a small hole in Joan's forehead for the purpose of installing an intracranial pressure monitor and administered medications in an attempt to reduce the pressure resulting from the swelling in her brain. Unfortunately, these medical interventions could not reverse the damage caused by Joan's injuries. As a result, Joan was pronounced dead in the early morning hours of 9 December 2010.

b. State's Expert Testimony

Dr. Molly Berkoff, the medical director of the child protection team at the University of North Carolina Medical Center, came to the hospital on 7 December 2010. According to Dr. Berkoff, the most common injuries seen in children who have experienced abusive head injury, which is a term used to describe injuries to a child's head or brain that appear to have been intentional rather than accidental in origin, were "intracranial hemorrhages" and "subdural hemorrhages, bleeding inside the brain, [] retinal hemorrhages or bleeding inside the eye, [and] subarachnoid edema or swelling inside the brain." Abusive head trauma is "thought to be related to the child's brain being moved in a rotational way, not in one linear kind of direct manner but, instead, potentially as a result of shaking." As a result, the injuries typically associated with abusive head

trauma differ from those that tend to be sustained in a simple linear fall. In Dr. Berkoff's opinion, "having a child die as a result of a simple fall would be an extremely rare occurrence" affecting "less than .5 per million children."

After arriving at the hospital, Dr. Berkoff consulted with the intensive care physicians, examined Joan briefly, and met with Defendant and Ms. Wright, who provided a history of the circumstances surrounding Joan's injury that was consistent with the other evidence presented at trial. During a second, more thorough, physical exam, Dr. Berkoff noted the presence of bruises and scratches on Joan's body, including bruises on Joan's thighs and abdomen which, according to Dr. Berkoff, were "not [in] a typical location for a bruise in a toddler," and "unusual" marks and bruises on Joan's buttocks. In Dr. Berkoff's opinion, the bruising that she observed constituted "further supporting evidence of trauma." CAT scans of Joan's head "showed a subdural hematoma in her brain as well as significant swelling of her brain, cerebral edema." According to Dr. Berkoff:

> [T]he most significant thing on these scans for [Joan] was the amount of cerebral edema that she had, and . . . [the] subdural bleeding there as well. . . . I've come to the conclusion they weren't from accidental means, for example, a simple fall. It was in a different location as well as being more extensive than what I typically see in cases where children have simple falls.

Finally, Dr. Berkoff observed that Joan "had extensive retinal hemorrhages in both eyes," which Dr. Berkoff considered to be "more supporting evidence for her being diagnosed with abusive head trauma."

In Dr. Berkoff's opinion, the "location of where [Joan's] subdural was and the lack of a significant history of trauma for her made me conclude that her subdural [bleeding] was most likely a result of abusive head trauma in addition to the other findings that were identified from her clinical evaluation and her radiologic evaluation." Dr. Berkoff's opinion rested, in part, on the fact that the size and location of the bleeding in Joan's brain, in addition to the extensive swelling of Joan's brain, was not consistent with known cases involving simple falls. In reaching this conclusion, Dr. Berkoff noted that Joan had "not only had this subdural which was concerning, but she also had massive cerebral edema" in which "her whole brain looked swollen." Moreover, the fact that Joan "had extensive retinal hemorrhages in both eyes" provided "more supporting evidence for her being diagnosed with abusive head trauma."

Finally, Dr. Berkoff noted that Joan's injuries "seemed to have developed over a very short period of time[.]" In Dr. Berkoff's opinion, Joan's injuries occurred after Ms. Wright heard her speaking normally at around 11:30 a.m., a conclusion which she reached based upon the "rapid onset" of symptoms resulting from abusive head trauma, and might have been caused by "potentially either shaking or having a child's head strike an object or an object strike a child's head[.]" As a result, after "[r]eviewing [Joan's] lab results, the different blood tests that [Joan] had done, looking at her radiologic results, her X-rays, and the CT scans of her head that she had completed, [and] discussing the case with the other medical subspecialists and the treating team in the intensive care unit" and considering the presence of "extensive bilateral retinal hemorrhages in multiple layers of the retinae in her eyes," "significant cerebral edema or swelling," and "a subdural hemorrhage or hematoma in her brain" and the fact that there "was no evidence of any significant abnormalities that could explain" these injuries, Dr. Berkoff concluded that Joan's injuries were caused by "physical abuse, child physical abuse, with abusive head trauma."

Dr. Berkoff rejected Defendant's claim that Joan had been injured in a fall for a number of reasons. Among other things, when a child is injured in a simple accidental fall, Dr. Berkoff would generally "expect to see a very small collection of blood, a really tiny amount of blood in that child's brain." Although Dr. Berkoff had observed "subdural hemorrhages or hematomas in children [who] have had accidental trauma," the "types of subdural hematomas or hemorrhages [generally found in such instances] are different in appearance from those [characteristic of] abusive head trauma" in that they are "smaller" and "usually confined to a particular location." Similarly, retinal bleeding from natural causes is limited to "small, very scattered few retinal hemorrhages in isolated layers of the retina from birth trauma" and in children with certain illnesses. On the other hand, "extensive retinal hemorrhages in all areas of the retina, having multiple retinal hemorrhages of the eye in all areas of the retina" "is something that you don't see from a simple fall in an otherwise healthy child." As a result, although Dr. Berkoff acknowledged on cross-examination that subdural hematomas, cerebral edemas, and retinal hemorrhages could result from an accidental injury, she did not believe that such an accident had occurred in this instance.

Dr. Jonathan Privette, an associate chief medical examiner for the State of North Carolina, performed an autopsy on Joan's body. During that procedure, Dr. Privette observed small blunt force injuries to Joan's forehead and lip, bruises on both of Joan's hips, and a recently inflicted blunt force injury to Joan's ribs that was not consistent with the

administration of CPR. After completing an external examination, Dr. Privette examined Joan's brain tissue and identified the injury caused by the insertion of the intracranial pressure monitor. In addition, Dr. Privette found at least six other areas of subdural bruising or bleeding that were not consistent with the medical treatment that Joan had received. Dr. Privette determined that Joan had sustained "blunt force [head] injuries" that caused "impact or pressure significant enough to damage the tissue and cause blood to leak out into the soft tissues," with the various bruises being "separate from one another, indicating that" they were caused by separate applications of impact or pressure to Joan's skull. An examination of the brain tissue in the back of Joan's head revealed the presence of additional hematomas, including at least one that was "so deep" that "the severity of the hemorrhage" led Dr. Privette to conclude that it resulted from impact rather than mere pressure. In addition, Dr. Privette found a large quantity of blood and a degree of swelling in Joan's brain indicative of a "significant injury." According to Dr. Privette, the degree of swelling and injury that he saw in Joan's brain was equivalent to the degree of trauma that was typically associated with injuries sustained in motor vehicle collisions. In Dr. Privette's opinion, Joan's injuries were inconsistent with those that he would expect to occur during a simple fall from a height of two feet. Based upon his autopsy findings, Dr. Privette concluded that "the cause of [Joan's] injuries and subsequent death" was "nonaccidental head injury" or a "constellation of injuries" not "caused by an accident" which were "most likely inflicted." Although Dr. Privette acknowledged on cross-examination that accidental injuries can also cause cranial bruising, subdural hematomas, and swelling, he stated on redirect that, "[i]n [his] opinion, a fall from a love seat onto a carpeted floor didn't cause these injuries or this constellation of injuries" and that Joan's injuries might have resulted from blows by a human hand.

Dr. Thomas Bouldin, a professor of pathology at the University of North Carolina medical school, reviewed Dr. Privette's autopsy report and conducted his own examination of Joan's eyes and brain. Dr. Bouldin observed recent subdural bleeding, which is typically caused by the rupture of blood vessels, and swelling of the brain, both of which are typically indicative of trauma to the brain. A microscopic examination of the tissues in both of Joan's eyes revealed the presence of multiple retinal hemorrhages that "were not superficial hemorrhages but involve[d] multiple layers of the retina." In Dr. Bouldin's opinion, "the combination of an acute subdural hematoma and the presence of retinal hemorrhages in a dead child" in the absence of an alternative medical explanation for the child's death "always raises very strongly the possibility of inflicted

head injury." As was the case with Dr. Berkoff and Dr. Privette, Dr. Bouldin agreed that any one of the types of injuries that he observed during his examination might, considered in isolation, be accidental in origin. However, on redirect examination, Dr. Bouldin reiterated that the existence of a constellation of unexplained brain swelling, subdural hematoma, and retinal hemorrhages caused him to conclude that Joan's injuries were, most likely, intentionally inflicted.

2. Defendant's Evidence

Dr. Donald Jason, an associate professor in the Department of Pathology at Wake Forest University School of Medicine, examined the medical and investigative reports relating to Joan's injuries. In Dr. Jason's opinion, Defendant's account of the events surrounding Joan's injuries was consistent with the possibility that Joan had fallen off the couch and landed on the back of her head, sustaining "a concussion with consequent loss of [her] gag reflex," losing consciousness as the result of inhaling milk, and, for that reason, being unable to deliver oxygen to her brain for eight to ten minutes. Dr. Jason opined that the injuries to the back of Joan's head might have been caused by a short fall and that the bruises on her body were relatively minor and consistent with Joan's status as a toddler. In addition, Dr. Jason denied that retinal hemorrhages indicated that child abuse had occurred and opined that Joan's subdural hematoma was "easily explainable" as resulting from the intracranial pressure monitor. Dr. Jason testified that the combination of subdural hemorrhage, subgaleal hemorrhage, and retinal hemorrhage was "not necessarily" indicative of abuse because Joan's injuries "could have" occurred accidentally. In his experience, child abuse often resulted in skull and rib fractures, neither of which were present in this instance. Finally, Dr. Jason told the jury that the diagnosis of "shaken baby syndrome" was "controversial" and sometimes inaccurate and that none of Joan's injuries were "suspicious of being intentional under the circumstances." On cross-examination, Dr. Jason acknowledged that Dr. Berkoff's notes indicated the presence of cerebral edema and subdural bleeding prior to the installation of an intracranial pressure bolt and conceded that the relevant medical literature indicated that fatal injuries rarely resulted from a short fall.

B. Procedural History

Warrants charging Defendant with felonious child abuse inflicting serious bodily injury and first degree murder were issued on 9 December and 10 December 2010, respectively. On 4 January 2011, the Wake County grand jury returned bills of indictment charging Defendant

with first degree murder and felonious child abuse inflicting serious bodily injury. The charges against Defendant came on for trial before the trial court and a jury at the 29 May 2012 Criminal Session of Wake County Superior Court. On 4 June 2012, the jury returned verdicts finding Defendant guilty of first degree murder on the basis of the felony murder rule, with felonious child abuse inflicting serious bodily injury as the predicate felony, and felonious child abuse inflicting serious bodily injury. After arresting judgment in connection with Defendant's conviction for felonious child abuse inflicting serious bodily injury, the trial court entered a judgment sentencing Defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first degree murder. Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Admissibility of Expert Testimony

[1] In his first challenge to the trial court's judgment, Defendant argues that the trial court committed plain error by allowing the admission of "unreliable and inaccurate testimony from the State's experts regarding the cause of [Joan's] injuries." More specifically, Defendant contends that the trial court should have precluded the admission of the testimony of Dr. Berkoff, Dr. Bouldin, and Dr. Privette "because it was not sufficiently reliable" given recent developments in "[c]urrent medical science" and that the trial court's failure to do so severely prejudiced him. We do not find this argument persuasive.

"When, as in this case, a defendant fails to object to the admission of the testimony at trial, we review only for plain error." *State v. Moore*, 366 N.C. 100, 105-06, 726 S.E.2d 168, 173 (2012) (citing N.C. R. App. P. 10(a)(4) (stating that, "[i]n criminal cases, an issue that was not preserved by objection . . . 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"); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (internal citation omitted); and *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983)). The plain error rule:

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of

> justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Moore, 366 N.C. at 106, 726 S.E.2d at 173 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). In order for an unpreserved evidentiary error to constitute plain error, the defendant must meet the burden of showing that, "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom* at 660, 300 S.E.2d at 378, and citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). We will now apply this standard to evaluate the validity of Defendant's argument.

The admission of expert testimony is governed by N.C. Gen. Stat. § 8C-1, Rule 702, which provides, in pertinent part, that:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Although Defendant has not argued that any of the State's expert witnesses were not qualified to present expert testimony or that their testimony was based on insufficient data, he does argue that certain opinions presented by the State's experts were "unreliable given the current state of medical research[.]" Thus, Defendant's argument focuses on the proper application of N.C. Gen. Stat. § 8C-1, Rules 702(a)(2) and 702(a)(3).

Although their specific areas of expertise varied, all three of the State's expert witnesses testified that their review of the pertinent

medical records and other available information indicated that Joan's external bruises, retinal bleeding, and intracranial bleeding and swelling were consistent with previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries, such as a simple fall as suggested in Defendant's statements.

For example, Dr. Berkoff observed bruises and scratches on Joan's body, including unusual marks and bruises on her buttocks that were not in "a typical location" for bruises resulting from a toddler's fall. In addition, the extent and location of bleeding in Joan's brain, coupled with the extensive swelling of her brain, was not consistent with cases in which a child was known to have been injured as the result of a simple fall. Furthermore, Dr. Berkoff testified that the "pattern of the subdural bleeding did not look like that in children that [she had] assessed" after a simple fall. In Dr. Berkoff's experience, "having a child die as a result of a simple fall would be an extremely rare occurrence." As a result, in light of the unusual bruising on Joan's body; the fact that she had unexplained "extensive bilateral retinal hemorrhages in multiple layers of the retinae in her eyes," "significant cerebral edema or swelling," and "a subdural hemorrhage or hematoma in her brain;" and the fact that Joan's injuries would be extremely unlikely to have resulted from a simple fall from a couch, Dr. Berkoff was of the opinion, to a reasonable degree of medical certainty, that Joan's injuries and death were caused by "child physical abuse, with abusive head trauma."

Similarly, Dr. Privette testified that he observed a recently inflicted blunt force injury to Joan's ribs that was not located at a place where CPR-related bruising tends to occur. Dr. Privette also determined that Joan had sustained a number of individual and separate "blunt force injuries" that resulted in "impact or pressure significant enough to damage the tissue and cause blood to leak out into the soft tissues." The extent of the cerebral bleeding that he observed, separate from that associated with the intracranial pressure bolt, including at least one very deep hematoma, led Dr. Privette to conclude that this cerebral bleeding stemmed from an impact in which Joan's "head either struck something or something struck [her] head" rather than from mere pressure. In Dr. Privette's opinion, the type and degree of Joan's injuries were not typical of those generally seen as the result of a fall from a height of less than five feet. Instead, the degree of swelling and brain injury that Joan exhibited was similar to that seen in those injured in automobile collisions. Based upon his examination and findings, Dr. Privette testified that "the cause of [Joan's] injuries and subsequent death" was "nonaccidental head

injury" or a "constellation of injuries" that were "most likely inflicted" rather than "caused by an accident."

Finally, Dr. Bouldin observed that Joan had multiple retinal hemorrhages that "were not superficial hemorrhages but involve[d] multiple layers of the retina." As a result, Dr. Bouldin opined that "the combination of an acute subdural hematoma and the presence of retinal hemorrhages in a dead child" given the absence of any other medical explanation for the child's death "always raises very strongly the possibility of inflicted head injury." Thus, the common thread in the State's expert testimony was that it would be highly unusual for a child to suffer serious injury or death as the result of a fall of approximately two feet from a sofa onto a carpeted floor; that, at the time of her death, Joan had sustained extensive and profound damage to her brain; that the nature and degree of her injuries was comparable to the sorts of serious trauma seen in a motor vehicle accident; and that, based upon the type, location, and severity of her injuries coupled with the absence of any alternative explanation for the nature and extent of those injuries, Joan's death most likely resulted from an intentionally inflicted injury.

According to Defendant, the opinions of the State's experts "concluding that [Joan's] injuries were intentionally inflicted" rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." Based upon that set of assertions, Defendant contends that "medical experts should be precluded" from offering testimony such as that allowed by the trial court in this case.

The fundamental deficiency in Defendant's argument is that it rests upon information that is not contained in the record developed before the trial court. " 'The appellate courts can judicially know only what appears of record.' 'This Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings.' " *State v. Price*, 344 N.C. 583, 593, 476 S.E.2d 317, 323 (1996) (quoting *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988), and *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985) (internal citation omitted)). "In making our review and reaching our determination upon the facts of a particular case, we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record." *State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982) (citing *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100 (1947)).

The record developed at trial contains no information concerning the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur. In his brief, Defendant supports his argument with citations to a recent dissenting opinion in which Justice Ginsberg expressed doubts about shaken baby syndrome and to a 2009 law review article, neither of which rest upon evidence presented to the trial court and neither of which are binding upon this Court. Although Defendant contends that "the current state of medical research" in the diagnosis of head injuries in children rendered the testimony of the State's witnesses "unreliable," we cannot evaluate the validity of this claim in the absence of record evidence establishing what the current state of medical research into the subject of childhood head injuries actually is. While Defendant is correct in reminding us that, when a trial court is "presented with 'compelling new perspectives on otherwise settled theories or techniques,' " *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 460, 597 S.E.2d 674, 687 (2004), it should look "beyond precedent to determine whether an expert's area of testimony is sufficiently reliable," the trial court was simply not presented with any such evidence in this case and did not, for that reason, have any opportunity to determine whether accepted medical thinking on the issues relevant to this case had changed. Moreover, Defendant's contention that aspects of the testimony of the State's witnesses conflicted with certain autopsy findings and with other "medical facts" and that there were contradictions and inconsistencies among the testimony offered by the State's experts ignores well-established North Carolina law to the effect that "[d]iscrepancies and contradictions in the evidence are for the jury to resolve." *State v. Hendrix*, 19 N.C. App. 99, 101, 197 S.E.2d 892, 893 (1973). Finally, Defendant's contention that the testimony of Dr. Privette and Dr. Bouldin was overly "speculative" cannot be deemed persuasive in light of the detailed reasons that they gave in support of the conclusions that they reached. As a result, Defendant has failed to show that the trial court committed plain error by admitting the testimony of the State's expert witnesses, so he is not entitled to relief on the basis of this claim.

B. Sufficiency of the Evidence

[2] Secondly, Defendant argues that the trial court erred by denying his motion to dismiss the charge against him for insufficiency of the evidence. More specifically, Defendant contends that "the evidence was insufficient to show that [Joan's] injuries were intentionally inflicted; that [Defendant] used his hands as deadly weapons; and that the injuries occurred at the time [Defendant] was caring for [Joan]." Defendant's argument lacks merit.

"In reviewing a motion to dismiss, this Court must determine 'whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense.' Substantial evidence has been defined as 'that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' Further, the evidence should be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal." *State v. Carrilo*, 149 N.C. App. 543, 548, 562 S.E.2d 47, 50 (2002) (quoting *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985), and *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (other citation omitted)). "Further, if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Wright*, 127 N.C. App. 592, 597, 492 S.E.2d 365, 368 (1997) (citing *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988)), *disc. review denied*, 347 N.C. 584, 502 S.E.2d 616 (1998).

N.C. Gen. Stat. § 14-17(a) provides, in pertinent part, that any murder "which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" "[F]elonious child abuse committed with the use of a deadly weapon may serve as the underlying felony for felony murder purposes [in the event that the State proves] beyond a reasonable doubt that defendant actually intended to commit the underlying offense (felonious child abuse) with the use of [his] hands as a deadly weapon[.]" *State v. Krider*, 145 N.C. App. 711, 714, 550 S.E.2d 861, 863 (2001) (citing *State v. Jones*, 353 N.C. 159, 168, 538 S.E.2d 917, 925 (2000), and *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997)), *appeal dismissed*, 355 N.C. 219, 560 S.E.2d 150 (2002).

According to N.C. Gen. Stat. § 14-318.4(a), "[a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony[.]"

> Specific-intent crimes are "crimes which have as an essential element a specific intent that a result be reached." General-intent crimes are "crimes which only require the

> doing of some act." Felonious child abuse requires the State to prove "that the accused intentionally inflicted a serious physical injury upon the child or intentionally committed an assault resulting in a serious physical injury to the child." The State is not required to prove that the defendant "specifically intended that the injury be serious." Felony murder on the basis of felonious child abuse requires the State to prove that the victim was killed during the perpetration or attempted perpetration of felonious child abuse with the use of a deadly weapon. See N.C. [Gen. Stat.] § 14-17. This crime does not require the State to prove any specific intent on the part of the accused.

Pierce, 346 N.C. at 494, 488 S.E.2d at 589 (quoting *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995); *State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 218-19 (1996), *cert. denied*, 520 U.S. 1106, 117 S.Ct. 1111, 137 L.Ed.2d 312 (1997); and *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986)). As a result, "[f]elony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *See* N.C. [Gen. Stat.] § 14-17. "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589 (citing *Elliott*, 344 N.C. at 268-69, 475 S.E.2d at 213 and *State v. Lang*, 309 N.C. 512, 527, 308 S.E.2d 317, 325 (1983)). Moreover, "when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120-21 (2003) (citing *State v. Riggsbee*, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984)).

A careful examination of the record evidence considered in the light most favorable to the State tends to show that Joan was a normal, healthy baby who had no medical problems in the days leading up to her death. By the age of fourteen months, Joan could walk, drink from a cup and hold a bottle, and had no tendency to choke when consuming food or drink. After Defendant moved in with Ms. Wright, Joan "started to . . . scream a lot" when Defendant held her, while Defendant "just didn't like the fact" that Joan tended to cling to her mother. The record further reflects that, on the morning of 7 December 2010, Joan had no

visible bruises, ate normally and appeared healthy. After Ms. Wright left the house on the morning of 7 December 2010, Defendant was the only adult in the house with Joan. Although Joan sounded normal when Ms. Wright heard her over the phone at around 11:30 a.m., Defendant told Ms. Wright that Joan was not breathing and was "gone" about 30 minutes later. At the time that emergency medical services personnel arrived, Joan was unconscious, unresponsive, and barely breathing. By the time that an ambulance carrying Joan reached the hospital, Joan had started to "seize and posture," indicating that she had a grave, potentially fatal, condition. Although Joan was treated at Wake Medical Center and University of North Carolina Medical Center, she never regained consciousness and was pronounced dead early on 9 December 2010. An external examination of Joan's body revealed the presence of bruises and scratches, including unusual bruises on her buttocks that were not "typical" of the bruises that usually resulted from a toddler's fall and a recently inflicted blunt force injury to her ribs that did not appear to have resulted from the administration of CPR. An internal examination showed that Joan had suffered extensive bilateral retinal hemorrhages in multiple layers of the retinae in her eyes, significant cerebral edema or swelling, and extensive bleeding or subdural hemorrhage in her brain, indicating that Joan's head had been subjected to a number of individual and separate blunt force injuries that were sufficiently significant to damage Joan's brain and to cause a leakage of blood. Joan's injuries, which could have been caused by human hands, did not result from medical treatment or a mere fall from a couch onto a carpeted floor. According to the State's evidence, it would be an extraordinarily rare occurrence for a child to die from a two to three foot fall, and the size, location, and degree of Joan's subdural hematoma and edema and the fact that Joan exhibited the presence of extensive retinal hemorrhages were inconsistent with the minor injuries that are typically sustained in a fall and are more consistent with the sort of injuries that are typically sustained in a motor vehicle accident. The record evidence which we have summarized in this paragraph is more than sufficient to support a jury determination that Defendant had exclusive custody of Joan at the time that she suffered fatal injuries, that her injuries were neither self-inflicted nor accidental, and that Defendant's account of what had happened to Joan conflicted with the relevant medical evidence. For that reason, the record contained sufficient evidence to allow the jury to find that Defendant had intentionally assaulted Joan while using his hands as deadly weapons and that Joan sustained fatal injuries as a result of this assault. Therefore, we conclude that the trial court did not err by denying Defendant's dismissal motion.

In seeking to persuade us to reach a different result, Defendant argues that the State did not adduce evidence that Joan's injuries were intentionally inflicted, rather than accidental. However, Dr. Berkoff specifically testified that, in her opinion, Joan's death resulted from abusive head trauma. In addition, both Dr. Privette and Dr. Bouldin testified that Joan's death likely resulted from an intentional rather than an accidental injury. Thus, the record contains ample evidence tending to show that Joan's injuries were intentionally, rather than accidentally, inflicted.

Secondly, Defendant directs our attention to evidence that differentiates this case from other similar cases in which we have held that the evidence was sufficient to support a conviction, and to evidence that in Defendant's view tended to show Defendant's innocence. For example, Defendant points to the fact that the record did not reveal the existence of a long-term history of abuse, that Defendant gave a consistent account of what happened on the morning of Joan's death, and that Dr. Jason testified that the injuries which Joan sustained could have been of accidental origin. However, as we have previously discussed, the fact that the record contains evidence that tends to contradict the evidence presented by the State does not justify the dismissal of a criminal charge for insufficiency of the evidence.

Similarly, Defendant argues that the record does not contain sufficient evidence to permit the jury to find that he used his hands as a deadly weapon. In support of this argument, Defendant places principal reliance on a comparison of the facts in this case with the facts present in other cases in which a defendant's hands have been found to be a deadly weapon, noting that, in each of these cases, either the defendant admitted to having used his hands to injure a child or there was additional evidence bearing on the "hands as a deadly weapon" issue. In light of the testimony given by the State's expert witnesses that Joan suffered severe injuries that were traumatic in origin, that Joan's death resulted from these injuries, that the injuries which Joan had sustained could have been caused by human hands, and that, until the morning of 7 December 2010, Joan was a normal, healthy, and uninjured child, we hold that the record contained sufficient circumstantial evidence to support a determination that Defendant used his hands as a deadly weapon.

Moreover, Defendant argues that the State failed to establish that Joan's injuries occurred when she was in Defendant's exclusive custody. However, Dr. Berkoff testified that Joan's injuries occurred after Ms. Wright heard Joan speaking normally at around 11:30 a.m. on 7 December 2009 given the "rapid onset" of symptoms resulting from abusive head trauma. The undisputed evidence reflects that Joan was in

the exclusive custody of Defendant during the time between his 11:30 a.m. phone call with Ms. Wright and the time at which Joan's injuries were reported to Ms. Wright and emergency medical services personnel. Although Defendant argues that certain "medical literature" suggests that a child may have a "lucid interval" of up to 72 hours after an injury, no such evidence was offered at trial. Even if such evidence had been presented for the jury's consideration, such evidence would go to the weight rather than the sufficiency of the State's evidence. Finally, Defendant's citation to *State v. Reber*, 71 N.C. App. 256, 321 S.E.2d 484 (1984), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985), is unavailing in that, in *Reber*, unlike this case, none of the expert witnesses testified that the child's injuries had occurred during the time when she was alone with the defendant. Thus, we conclude that there was sufficient evidence to allow an inference that Joan's injuries were sustained while she was in Defendant's exclusive custody. As a result, the trial court did not err by denying Defendant's dismissal motion.

C. Felony-Murder Charge Predicated on Felonious Child Abuse

[3] Thirdly, Defendant argues that, "under the merger doctrine, felony child abuse is not a viable underlying felony" sufficient to support a conviction for first degree murder under the felony murder rule. Although Defendant "acknowledges that this issue has been decided adversely [to his position] by the Court of Appeals," he has "raise[d] the claim for potential further review." However, we lack the authority to provide Defendant with the further review that he seeks. According to well-established law, "[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." *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As a result, Defendant is not entitled to relief based on this challenge to the trial court's judgment.

D. Cruel and Unusual Punishment

[4] Finally, Defendant argues that his conviction and resulting sentence of life imprisonment without the possibility of parole are "disproportionate" and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendant's argument lacks merit.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual

punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Graham v. Florida*, 560 U.S. 48, __, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). In determining whether a particular sentence is categorically disproportionate, the United States Supreme Court has "used categorical rules to define Eighth Amendment standards" which consider both the nature of an offense and the offender characteristics, and has concluded, among other things, that capital punishment is impermissible for offenses other than homicide, for offenders who committed a homicide before the age of eighteen, or for persons with very low intellectual functioning. *Id.*

Defendant does not argue that imposition of a sentence of life imprisonment without the possibility of parole for the offense of first degree murder is categorically impermissible, or that he is a member of a category or class of offender for whom such a sentence would violate the Eighth Amendment. Moreover, the Supreme Court has held "that neither imposition of a life sentence nor imposition of consecutive life sentences for first-degree murder constitutes cruel and unusual punishment." *State v. Bronson*, 333 N.C. 67, 81, 423 S.E.2d 772, 780 (1992). In addition, "North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by the statute, the punishment cannot be classified as cruel and unusual in a constitutional sense." *State v. Evans*, 162 N.C. App. 540, 544, 591 S.E.2d 564, 567 (2004) (citation omitted). According to N.C. Gen. Stat. § 14-17(a), a murder committed during the commission of certain categories of felonies constitutes first degree murder, which is a Class A offense. N.C. Gen. Stat. § 15A-1340.17(c) provides that, upon conviction of a Class A offense, a defendant shall be sentenced to "life imprisonment without parole or death[.]" Thus, the sentence imposed upon Defendant was authorized by statute. Once again, as we have already noted, this Court is bound by its previous decisions. As a result, given that the sentence imposed upon Defendant was authorized by the relevant statutory provisions, it cannot be "classified as cruel and unusual in a constitutional sense." *Evans*, 162 N.C. App at 544, 591 S.E.2d at 567. Thus, Defendant is not entitled to relief on the basis of a categorical challenge to his sentence.

In addition, Defendant urges this court to find that, even if his sentence is constitutional under the principle enunciated in the preceding paragraph, it is not "proportionate to the crime committed." In support of this contention, Defendant directs our attention to the proportionality review conducted in capital cases and urges us to conduct a similar

review in this case. We conclude that Defendant has failed to establish a right to relief based on the argument that his sentence, while generally permissible for the crime of first degree murder, is disproportionate when applied to his individual circumstances.

"The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime" and directed that a "court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at __, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S. Ct. 2680, 2707, 115 L. Ed. 2d 836, 871 (1991) (opinion of Kennedy)). "Only in exceedingly rare noncapital cases will sentences imposed be so grossly disproportionate as to be considered cruel or unusual." *State v. Green*, 348 N.C. 588, 609, 502 S.E.2d 819, 832 (1998) (citing *Rummel v. Estelle*, 445 U.S. 263, 272, 63 L. Ed. 2d 382, 389, 100 S. Ct. 1133 (1980) (other citation omitted), *cert. denied*, 525 U.S. 1111, 119 S.Ct. 883, 142 L.Ed.2d 783 (1999). We see no basis, given the facts surrounding the crime for which Defendant has been convicted, for concluding that this is one of the "exceedingly rare noncapital cases" in which the sentence imposed is "grossly disproportionate" to the crime for which Defendant stands convicted.

In urging us to reach a different result, Defendant argues, among other things, that the record evidence fails to conclusively establish his guilt. For example, Defendant contends that the evidence against him was circumstantial, repeats his argument that the expert testimony presented by the State was "contrary to medical facts and current research," and reiterates that his expert witness testified that Joan's injuries could have been the result of an accident. In addition, Defendant directs our attention to other felonious child abuse cases that, in his opinion, were more egregious than this case. However, the evidence presented in this case by the State, which the jury clearly believed, tended to show that Defendant intentionally inflicted a number of severe and traumatic injuries to the head and body of a previously healthy fourteen month old child, causing massive swelling and bleeding in and around the brain, extensive retinal hemorrhaging, and death. As a result, we see no basis for concluding that Defendant's sentence was so disproportionate as to constitute prohibited cruel and unusual punishment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As

a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STROUD concur.

STATE OF NORTH CAROLINA
v.
JAMES ERIC PRESSON

No. COA12-1518

Filed 20 August 2013

1. Homicide—voluntary manslaughter—motion to dismiss—sufficiency of evidence—not acting in perfect self-defense

The trial court did not err by denying defendant's motion to dismiss the charge of voluntary manslaughter. The State presented sufficient evidence to permit a reasonable jury to find that defendant was not acting in perfect self-defense. A reasonable jury could find that defendant was the aggressor and used excessive force.

2. Criminal Law—jury instruction—self-defense—aggressor

The trial court did not commit plain error in a voluntary manslaughter case by instructing the jury that defendant would lose the right to self-defense if he was the aggressor. Contrary to defendant's assertion, there was sufficient evidence for the jury to find he was the aggressor.

3. Jury—denial of request to review testimony—harmless error

The trial court did not abuse its discretion in a voluntary manslaughter case by denying the jury's request to review the testimony of a security guard. Any error in the trial court's denial of the jury's request to review testimony was harmless since the testimony tended to show defendant's guilt as opposed to his innocence. Further, the trial court instructed the jury to recall and consider all evidence that had been introduced at trial.

Appeal by defendant from judgment entered 25 May 2012 by Judge Walter H. Godwin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Tina A. Krasner, for the State.

Kimberly P. Hoppin, for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence presented that defendant was the aggressor or used excessive force in this homicide case, we reject defendant's challenges to the sufficiency of the evidence and to the jury instructions and find no prejudicial error in the trial court's response to a jury request.

Facts and Procedural History

On 6 June 2010, defendant James Eric Presson had arranged to meet his cousin Jessica at a local bar after work. Upon arriving, defendant discovered Jessica was preparing to enter a wet T-shirt contest. Defendant first followed her into the ladies room where she was about to change but was made to leave. When Jessica came out of the ladies room, defendant physically picked her up and carried her out of the bar to stop her from participating in the contest. They caused a scene outside the bar with Jessica yelling at defendant and trying to get away from him, telling him not to put his hands on her while defendant had her by the shoulders trying to prevent her going back into the bar. When people, including the head of security, started coming outside to see what was going on, Jessica was able to squeeze through the crowd, get away from defendant, and go back inside. Brandon Presgraves, a friend of Jessica's, confronted defendant outside the bar regarding defendant's actions. Friends escorted Brandon away from the confrontation. Brandon, however, went outside again and attempted to punch defendant; defendant was able to avoid Brandon's punch and delivered a punch to Brandon's face.

Donnie Fox, a bouncer and head of security that night, disrupted the fight and ordered both defendant and Brandon to leave the bar. Defendant began walking along a beach road carrying his bag which included among other things, his chef's knife. (Defendant was a cook at a local restaurant.) Brandon was seen running after defendant with nothing but his T-shirt in his hands. Defendant testified that he was struck in the head with an object swung by Brandon, but could not tell what the object was, just that it was "long, like a pole." He testified that Brandon attacked him, that Brandon choked him and forced defendant's head underwater. Defendant testified that he flailed at Brandon with his knife and stabbed him, before leaving the scene. Defendant called his father

who picked him up, and they contacted police to report the incident. Brandon was found dead, floating face down in water that had collected beside the road. He had been stabbed 33 times.

Defendant's chef's knife, a 12-inch knife with an 8-inch blade, was found approximately 30 feet from Brandon's body, in the general area defendant admitted throwing it. After more than two hours searching however, investigators never found anything resembling the weapon defendant alleges Brandon used to hit him.

Defendant was arrested, and later indicted on one count of second-degree murder. Following a trial by jury beginning at the 21 May 2012 session of Superior Court of Dare County defendant was found guilty of the lesser included offense of voluntary manslaughter. Judgment was entered on 25 May 2012, and defendant was ordered to serve an active term of imprisonment of 73 to 97 months. Defendant appeals.

Defendant raises three issues in this appeal: whether the trial court erred in (I) denying defendant's motion to dismiss where the State presented insufficient evidence that defendant was not acting in perfect self-defense; (II) instructing the jury that defendant may not receive the benefit of self-defense if he was the aggressor where evidence did not support defendant was the aggressor; and (III) denying the jury's request to review the testimony of Donnie Fox.

I. Motion to Dismiss

[1] Defendant first contends the State failed to present sufficient evidence that defendant was not acting in perfect self-defense and that the trial court erred in denying his motion to dismiss. 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) (citation omitted). When ruling on a motion to dismiss for insufficient evidence, the trial court must determine whether the State presented substantial evidence of each essential element of the charged offense and that defendant was the perpetrator. *State v. Turnage*, 362 N.C. 491, 493, 666 S.E. 2d 753, 755 (2008) (citing *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its

favor." *State v. Sheppard*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA12-1435, 2013 WL 3305439, at *2 (2013) (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994)).

"Voluntary manslaughter is the unlawful killing of a human being without malice . . . and without premeditation and deliberation. Voluntary manslaughter occurs when one kills intentionally, but does so in the heat of passion aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor." *State v. Lassiter*, 160 N.C. App. 443, 454, 586 S.E.2d 488, 497 (2003) (citation omitted).

> Perfect self-defense excuses a killing altogether while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For a defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (citations omitted).

There are four elements required to establish the existence of perfect self-defense during a killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e. did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Cruz, 203 N.C. App. 230, 236, 691 S.E.2d 47, 51 (2010), (citation omitted). Imperfect self-defense is established if the first two elements are present at the time of the killing, but the defendant was the aggressor or used excessive force. *State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681 (2009) (quoting *State v. Lyons*, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995)).

Defendant argues that the evidence established a "perfect self-defense" that required a verdict of not guilty and therefore the conviction must be reversed. In essence, defendant argues that the four elements necessary for a perfect self-defense and to justify the killing were present at the time he killed Brandon. Defendant contends there is evidence to show that 1) he believed it necessary to kill, 2) his belief was reasonable, 3) he was not the aggressor, and 4) he did not use excessive force. While there may be some evidence favorable to defendant as to each of the elements, there is also evidence favorable to the State to show that defendant's belief that it was necessary to kill was not reasonable, and that defendant was the aggressor or used excessive force. Therefore, contrary to defendant's contentions, the State did present sufficient evidence to permit a reasonable jury to find that defendant was not acting in perfect self-defense.

The test on a motion to dismiss is whether the State has presented substantial evidence which, when taken in the light most favorable to the State, would be sufficient to convince a rational trier of fact that the defendant did not act in self-defense. *State v. Gilreath*, 118 N.C. App. 200, 208, 454 S.E.2d 871, 876 (1995) (citation omitted).

We therefore consider the evidence in the light most favorable to the State that shows defendant did not act in perfect self-defense. Here, the evidence tends to show that Brandon approached defendant from behind as they both walked down the road after an earlier altercation, the last one resulting in Brandon receiving a bloody, swollen lip as a result of defendant's punch. Defendant was carrying a chef's knife with an 8-inch blade. The State presented evidence tending to show that Brandon was unarmed despite defendant's allegations that Brandon first swung at him with a vaguely described, unidentifiable object. No object fitting the description defendant gave was discovered at the scene, and no witnesses observed anything other than a t-shirt in Brandon's hand. Under the circumstances of this encounter, the lack of an object, in conjunction with a lack of physical injury to any part of defendant's body, except blood on the knuckle of his right hand, supports the State's contention that defendant's belief was not reasonable.

Defendant also asserts that during the fight Brandon held him in a chokehold and held his head under water, and so at the time he had the reasonable belief that it was necessary to kill Brandon to save himself from death or bodily harm. However, in the light most favorable to the State, other evidence shows that although defendant's head and body were wet, it had been raining steadily that evening, such that six to twelve inches of water had collected beside the road. There was further evidence to show that defendant and Brandon were seen fighting from one side of the road to the other, that someone crossed the road, picked up something and came back to join the fight. Viewing that evidence in the light most favorable to the State, a jury could find that defendant went across the road, retrieved his chef's knife from his bag and went back to join the fight with Brandon who did not possess a weapon of any kind. Such evidence was sufficient for a jury to determine not only that defendant's belief was not reasonable but that defendant was the aggressor.

Further, the lack of injuries to defendant, compared to the nature and severity of the wounds on Brandon at his death, is sufficient evidence from which a jury could find that defendant was the aggressor or that defendant used excessive force. There was evidence - testimony and photographs showing that, other than blood on his right knuckle, defendant had no visible injuries to his body: No injuries to his arms, forearms, back, chest, abdomen or legs. Neither photographs nor testimony depicted any injury to the top of his head, nor were there injuries to his knees. Brandon, on the other hand, had lacerations to his head, face, neck, chest, right and left shoulder, and lower body - his internal organs were hanging out when his body was found face down in 6 to 12 inches of water on the shoulder of the road two blocks from the bar. He had 33 knife wounds, and had bled to death. This evidence alone is sufficient to allow a jury to find that defendant was the aggressor and that defendant used excessive force. Viewing the evidence in the light most favorable to the State, it is sufficient to show defendant did not act in perfect self-defense. The trial court did not err in denying defendant's motion to dismiss.

II. Jury Instruction

[2] Defendant next argues that the trial court committed reversible error when it instructed the jury that defendant would lose the right to self-defense if he was the aggressor, because the State failed to put forth evidence that defendant was the aggressor. We find this argument without merit.

Because defendant failed to object to the jury instructions at trial, this issue must be reviewed for plain error. *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) (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, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation, quotations, and brackets omitted).

Defendant bases this claim on similar grounds as those stated in his first argument, arguing that there is insufficient evidence to support the finding that defendant was in any way the aggressor in the fatal confrontation. But, as we have set forth above, the State did put forth sufficient evidence from which a reasonable jury could find that defendant was the aggressor or used excessive force. Accordingly, we find no error with the jury instruction explaining that defendant was not entitled to perfect self-defense if he was found to be the aggressor.

III. Jury Request to Review Testimony

[3] Defendant's final contention is that the trial court erred when it denied the jury's request to review the testimony of security guard, Donnie Fox. We disagree.

Upon a request by the jury to review evidence or hear certain testimony, "[t]he judge in his discretion . . . may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence." N.C. Gen. Stat. §15A-1233(a) (2011).

The trial court must uphold its duty to "exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *State v. Hinton*, ___ N.C. App. ___, ___, 738 S.E.2d 241,

248 (2013) (quoting *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985)). When a court denies a jury's request to review a transcript on the ground that it has no discretion to grant the request, the assignment of error is preserved regardless of whether defendant timely objects. *State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011). It is "the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request." *Id.* at 318, 718 S.E.2d at 366. However, defendant has the burden to show that any error was prejudicial, that there exists "a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." *Id.* at 319, 718 S.E.2d at 366 (citation omitted).

Here, after the jury deliberated for a brief time, it sent a note to the judge requesting to be allowed to review photographs introduced into evidence at trial and to review the testimony of Donnie Fox, the bouncer and head of security at the bar the night of the confrontation. After agreeing to grant the request to see the photographs, the judge stated to the attorneys, "[a]s to Mr. Fox's testimony, that was not recorded and is not available to be given to them so that is what I am going to—read that to them." The judge then called the jury back into court and instructed them to recall the requested testimony on their own.

Defendant argues the trial court's failure to articulate that the decision to not allow the jury to review the witness's testimony was made at its discretion, was error. Assuming without deciding that the trial court's actions amount to error, we determine whether the actions prejudiced defendant or constituted harmless error. *See id.*

Fox testified that in his role as head of security, he stepped in to break up the initial altercation between defendant and his cousin Jessica, and broke up the fights between defendant and Brandon. As a result of the altercations, he asked both defendant and Brandon to leave the bar. At some point later, defendant left and Brandon followed him down the road. From a distance, through the darkness and rain, Fox witnessed some of the encounter. All he could see were silhouettes; he noted that the bodies were "locked up" fighting and moved from the west side to the east side of the road; that they were splashing around as he could see water splashing up around them. He could not specifically identify either silhouette, but he did see one run back across the road, lean over and do something, then run back to the middle of road where the other silhouette had run to meet him. Later, he saw someone again cross the road, pick up an object and walk north on the road.

Defendant argues that Fox's testimony is material to the determination of whether defendant was the aggressor or used excessive force during the encounter and therefore, the trial court erred to defendant's prejudice in not allowing the jury to review the testimony. We disagree.

Defendant relies on *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980), to support his argument. In *Lang*, our Supreme Court held the trial court's ruling that it lacked discretion to grant the jury's request to have transcript testimony read aloud was an error of law. And, as the requested transcript testimony was material to the defendant's alibi defense and in direct conflict with the State's evidence, the trial court's ruling was prejudicial. *Id.*

Here, the testimony of Cox was not material to defendant's guilt or innocence. In addition to Cox, several witnesses testified that Brandon was acting aggressively toward defendant, and that Brandon followed defendant down the road. They also testified to not seeing anything in Brandon's hand other than his t-shirt. The remaining testimony of Cox regarding the movement of the silhouettes he observed, if believed, would tend to show that defendant did not act in perfect self-defense, that in fact defendant became the aggressor and that he used excessive force. Therefore, unlike in *Lang*, the testimony in the instant case tended to show defendant's guilt as opposed to his innocence.

Additionally, we find that the trial judge instructed the jury, "it is your duty to recall and consider all evidence that has been introduced in this trial." Therefore, any error in the trial court's denial of the jury's request to review testimony is harmless.

From our review of the record and the issues raised on appeal, we determine that defendant received a trial free of prejudicial error.

No prejudicial error.

Judges STEPHENS and DILLON concur.

BURNHAM v. S&L SAWMILL, INC.

[229 N.C. App. 334 (2013)]

NICHOLAS BURNHAM, PLAINTIFF
v.
S&L SAWMILL, INC., RANDY D. MILLER LUMBER CO., INC., AND
RANDY D. MILLER, JANET B. MILLER, AND RYAN MILLER,
INDIVIDUALLY, AND AS OFFICERS AND SOLE OWNERS OF THE CORPORATION, DEFENDANTS

No. COA12-1581

Filed 3 September 2013

1. Negligence—injury to logging truck driver—no duty of care

The trial court correctly granted summary judgment for defendants and correctly denied plaintiff's Rule 60(b)(2) motion for relief from the summary judgment in a negligence action by a logging truck driver injured by a falling log when he was unloading at defendant S&L Sawmill. The court correctly found that defendants had not violated any negligence-based duty owed to plaintiff.

2. Negligence—unloading logging truck—not an independent contractor—duty of care

A sawmill where a logging truck driver was injured while unloading logs did not owe plaintiff (the logging truck driver) a nondelegable duty of care due to the inherently dangerous nature of the work where plaintiff was not an independent contractor.

3. Negligence—contributory—unloading logging truck

There was no merit to the contention of a logging truck driver injured while unloading logs that his claim should not be deemed barred by contributory negligence. The record contained ample evidence that, assuming defendants were negligent as contended by plaintiff, a reasonable person in plaintiff's position would have been aware of the same risks and taken action to avoid sustaining injury.

4. Negligence—unloading logging truck—assumption of responsibility by sawmill—evidence not sufficient

The trial court did not err by denying plaintiff's motion for relief from a summary judgment in a negligence action by a logging truck driver injured by a falling log at defendant S&L Sawmill. The newly discovered evidence did not show that plaintiff's load had arrived in an unsafe condition, even if it sufficed to establish that defendants had assumed an affirmative responsibility when they saw that a load was unsafe.

Appeal by plaintiff from orders entered 28 September 2012, 16 October 2012, and 27 November 2012 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2013.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, and the Law Office of Seth Bernanke P.C., by Seth M. Bernanke, for Plaintiff.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for Defendants.

ERVIN, Judge.

Plaintiff Nicholas Burnham appeals from orders entered by the trial court granting summary judgment in favor of Defendants S & L Sawmill, Inc., Randy D. Miller Lumber Co., Inc., Randy D. Miller, Janet B. Miller, and Ryan Miller, denying Plaintiff's summary judgment motion, and denying Plaintiff's motion for relief from the trial court's order granting Defendants' summary judgment motion.[1] On appeal, Plaintiff argues that he forecast sufficient evidence, including an affidavit submitted after the entry of the summary judgment order, to support a determination that he was injured as a proximate result of Defendants' negligence and that the trial court's orders should, for that reason, be overturned. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff began working as a dump truck driver for McGee Brothers Company, Inc., in 2006. In the course and scope of his employment, Plaintiff loaded and transported dirt, gravel, brush, logs, and similar materials. Plaintiff had been taught how to load and operate dump trucks in such a manner as to keep the materials being transported from falling out of the trucks, including how to use binding straps. As part of his job responsibilities, Plaintiff was required to ensure that the truck he was operating had been safely loaded, including making sure that

1. As will be explained in more detail later in this opinion, the motion in question was advanced pursuant to a number of different provisions of the North Carolina Rules of Civil Procedure. However, in the interests of brevity, we will refer to this motion as a motion for relief from the trial court's order throughout the remainder of this opinion.

binding straps were used to keep loose materials, such as logs, from falling off the truck.

According to Plaintiff, one binding strap should be utilized to secure the front end of a load while the other should be utilized to secure the rear of the load. After the truck had been loaded, Plaintiff was required to conduct a "walkaround" in order to ensure that nothing was protruding from the truck and that the load on the truck could be safely transported. In addition, Plaintiff was responsible for determining if any items in the truck had shifted in transit to such an extent that they would fall when the binding straps were removed. After the straps had been released during the unloading process, Plaintiff would enter the truck and raise the truck bed to the point where the logs rolled out and the load was successfully dumped.

The logs that Plaintiff occasionally transported to sawmills came from job sites at which McGee Brothers was engaging in clearing land. Plaintiff delivered logs to multiple sawmills, including the sawmill operated by Defendant S & L Sawmill. Plaintiff was not required to communicate with S & L Sawmill prior to delivering a load of logs; instead, he was authorized to simply deliver a load of logs to the S & L Sawmill facility, unload the logs, and receive payment. Upon arriving at S & L Sawmill, Plaintiff would drive his truck onto a scale, enter the office to get a ticket indicating the weight of the truck's load, undo the binding straps which secured the load of logs, and unload the logs. Although Plaintiff would utilize his best efforts to find level ground upon which to unload the logs, he acknowledged being aware that "the yard was just dirt and uneven ground all over the place." However, if Plaintiff was uncomfortable with the angle at which he had parked the truck as part of the unloading process, he simply refrained from loosening the binding straps.

On 3 April 2008, Plaintiff went to S & L Sawmill for the purpose of unloading a truck full of logs. After weighing his truck, Plaintiff chose the location at which he wished to unstrap his load without having received any specific directions from Defendants. He had previously parked in the same spot without incident on multiple occasions and saw no reason to believe that it would be unsafe to do so in this instance. At the time that he selected a place to park, Plaintiff was aware that the ground at that location was "fairly," although not completely, level and that the truck would be leaning toward the location at which he would be standing. Although Plaintiff could have moved the truck to a location at which the load was not leaning in this manner, he did not do so because of his assumption, based on past experience, that nothing untoward would occur.

As he began the unloading process, Plaintiff released the front binding strap without incident. At that point, Plaintiff walked around the truck for the purpose of inspecting the terrain and confirming that the truck was safely positioned. During that process, Plaintiff did not observe that any portion of the load of logs was protruding from the truck so as to be in danger of falling off. As Plaintiff released the second binding strap, however, it "snapped out" towards him. Although he ducked his head towards the truck in the expectation that a log would fall off of the edge of the truck, Plaintiff's efforts at evading the falling log were unsuccessful. As a result of the injuries that he sustained when the falling log struck him, Plaintiff is now confined to a wheelchair.

S & L Sawmill had not acted to provide wheel stops for Plaintiff's use, to check to make sure that the dump truck could be safely unloaded before allowing Plaintiff to release the binding straps, to ensure that Plaintiff was protected by "racks or stanchions" during the unloading process, or to inquire as to whether Plaintiff was adequately trained to perform the unloading function before allowing Plaintiff to proceed with that process. According to Defendant Ryan Miller, S & L Sawmill's Vice President and manager of the facility at which Plaintiff was injured, no one, including drivers employed by McGee Brothers, had ever complained that the dump sites at S & L Sawmill were unsafe or interfered with their ability to unload their dump trucks. In addition, Ryan Miller stated that no one from S & L Sawmill was aware that any condition on Defendants' property posed any danger to Plaintiff or other dump truck drivers.

B. Procedural History

On 30 March 2011, Plaintiff filed a complaint alleging that he had been injured as the result of Defendants' ordinary, gross, and willful and wanton negligence and seeking an award of compensatory and punitive damages. Among other things, Plaintiff asserted that Defendants had violated a number of regulations which had been promulgated by the Occupational Safety and Health Administration and that the business in which they were engaged was inherently dangerous, a fact which precluded them from delegating any of their safety-related responsibilities to anyone else. On 16 May 2011, Defendants[2] filed an answer in which

2. The answer in question was filed on behalf of all Defendants except for Ryan Miller, whom Defendants contended had not been served as of that date. However, Ryan Miller did join in an amended answer filed on behalf of all Defendants on 15 November 2011 which was substantively identical to the answer filed on behalf of the other Defendants on 16 May 2011. As a result, we will treat the answer filed on 16 May 2011 as having been filed on behalf of all Defendants.

they denied the material allegations set out in Plaintiff's complaint and asserted contributory negligence, gross contributory negligence, and negligence on the part of McGee Brothers as affirmative defenses.

On 28 June 2012, Defendants filed a motion seeking the entry of summary judgment in their favor on the ground that Plaintiff could not show that Defendants had breached any duty owed towards him and that the claims that he had asserted against Defendants were barred by Plaintiff's contributory negligence. On 10 July 2012, Plaintiff filed a motion seeking the entry of summary judgment in his favor on the issue of whether Defendants were engaged in an inherently dangerous activity sufficient to preclude them from assigning responsibility for their negligence to any other party. On 28 September 2012, the trial court entered an order granting Defendants' motion for summary judgment and denying Plaintiff's partial summary judgment motion.

On 4 October 2012, Plaintiff filed a motion for relief from the trial court's order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(2), or, alternatively, for reconsideration of the trial court's order granting summary judgment in favor of Defendants pursuant to N.C. Gen. Stat. § 1A-1, Rules 52 and 59, on the basis of alleged newly discovered evidence set out in an attached affidavit executed by Gary Fisher, an S & L Sawmill employee, in which Mr. Fisher described steps that he had been instructed to take by Defendants in instances involving apparently unsafe loads of logs for the purpose of stabilizing the load in question. On 16 October 2012, the trial court entered an order denying Plaintiff's motion for relief from its earlier order. On 27 November 2012, the trial court entered an amended order, which contained findings of fact and conclusions of law, denying Plaintiff's motion for relief from the trial court's earlier order. Plaintiff noted an appeal to this Court from the 28 September 2012, 16 October 2012, and 27 November 2012 orders.

II. Legal Analysis

A. Summary Judgment Order

In his brief before this Court, Plaintiff argues that the trial court erred by granting summary judgment in Defendants' favor on the grounds that the record reflected the existence of numerous issues of material fact concerning the extent to which Defendants were engaged in an inherently dangerous activity, the extent to which Defendants operated the sawmill in a negligent manner, and the extent to which Plaintiff's claim was barred by contributory negligence. We do not believe that any of Plaintiff's challenges to the trial court's summary judgment order have merit.

1. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Thus, this Court must "determine, on the basis of the materials presented to the trial court, whether there is any genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Util., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citing *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, __ N.C. __, 276 S.E.2d 283 (1981). In doing so, this Court "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citing *Coats v. Jones*, 63 N.C. App. 151, 154, 303 S.E.2d 655, 657, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983)). "A trial court's grant of summary judgment receives *de novo* review on appeal . . . ." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). Under a *de novo* standard of review, this 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) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)) (internal quotation marks omitted).

2. Substantive Legal Analysis

a. Negligence

[1] In order for a negligence claim to survive summary judgment, the plaintiff must forecast evidence tending to show "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630-31 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (per curiam) (citations omitted). Although Plaintiff argues at length that he sustained an injury as a result of Defendants' negligence, he has not clearly stated in his brief the nature of the duty that he believes to have been owed to him by Defendants. However, the cases cited in his brief in support of this argument all appear to involve the application of a premises liability theory. Such an approach seems reasonable to us, so we will utilize it

in analyzing the validity of this aspect of Plaintiff's challenge to the trial court's order.

The ultimate issue which must be decided in evaluating the merits of a premises liability claim is determining whether Defendants breached "the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). "In order to prove a defendant's negligence, a 'plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence.' " *Fox v. PGML, LLC*, __ N.C. App. __, __, 744 S.E.2d 483, 485 (2013) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992)). "A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered . . . [and] need not warn of any 'apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Von Viczay*, 140 N.C. App. at 739, 538 S.E.2d at 631 (2000) (quoting *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 105, 479 S.E.2d 259, 262 (1997)) (citations omitted). However, "[i]f a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor's knowledge of the danger or the obvious nature of the danger, the landowner has a duty to take precautions to protect the lawful visitor." *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 223, 542 S.E.2d 303, 308 (2001), *aff'd*, 355 N.C. 465, 562 S.E.2d 887 (2002). After carefully reviewing the record, we have been unable to find any record evidence tending to show that Defendants either created the condition which caused Plaintiff's injury or failed to correct such a condition after notice of its existence.

A careful examination of Plaintiff's argument with respect to the negligence issue indicates that his claim is predicated on the theory that Defendants had a duty to take affirmative action to ensure that he unloaded the logs which he was transporting on behalf of McGee Brothers to the S & L Sawmill in a safe manner. For example, Plaintiff argues that Defendants were negligent because they failed to ensure that a "knuckle boom" was used to stabilize the load on Plaintiff's dump truck prior to the loosening of the binding straps or failed to take other steps to ensure the safety of the manner in which employees of other entities, such as Plaintiff, unloaded their vehicles. Although Plaintiff directs our attention to a number of cases in support of his contention that Defendants could be held liable on the basis of the theory which he espouses, each of them involves a situation in which the plaintiff was injured as the result of a

condition which existed upon the defendant's property, *Newton v. New Hanover County Board of Education*, 342 N.C. 554, 556-57, 467 S.E.2d 58, 61 (1996) (involving a situation in which a police officer responding to a call at a school fell on a stairway); *Martishius*, 142 N.C. App. at 218-22, 562 S.E.2d at 305-07 (involving a situation in which the plaintiff made contact with a power line which crossed the defendant's property), or which resulted from affirmative action which the defendant took in a negligent manner. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 322-23, 291 S.E.2d 287, 288-89 (1982) (involving a situation in which the plaintiff fell on an inadequate ramp which had been constructed by the defendants).[3] In other words, Plaintiff has not cited any decision of this Court or the Supreme Court holding that a defendant had a duty to take affirmative action to protect an individual who lawfully entered upon the defendant's property from a harm which did not result from the condition of the defendant's property which the defendant had not created and of which the defendant was not aware. As a result, we will evaluate the validity of the trial court's decision to grant summary judgment in Defendants' favor utilizing the traditional standard applicable in premises liability cases.

The first problem with Plaintiff's claim, when evaluated in accordance with the applicable principles governing premises liability cases, is that he has never established that his injuries resulted from any condition that existed on Defendants' property. Although Plaintiff points to evidence that the place at which he sought to unload his dump truck was uneven, the record does not contain any indication that this condition in any way contributed to the fact that a log fell from the dump truck and landed on Plaintiff when he loosened the second binding strap. In addition, even if the uneven condition of the location at which Plaintiff attempted to unload the logs from his dump truck did, in fact, contribute to his injuries, the nature of the condition in question was just as apparent to Plaintiff as it was to Defendants, and yet he proceeded to attempt to unload his dump truck at that location. Moreover, the undisputed evidence in the record establishes that Plaintiff, rather than Defendants, selected the exact location at which the dump truck was to be unloaded and that nothing about the manner in which the logs were loaded on

3. Although a number of the decisions upon which Plaintiff relies were decided prior to the Supreme Court's decision in *Nelson*, which eliminated the common law "trichotomy" governing the duties owed by landowners to persons who came on their property in favor of a unitary negligence standard applicable to all persons lawfully on the premises, we see no need to consider whether any of these decisions would come out differently under our current approach to premises liability given our belief that such an undertaking would not make a difference in the outcome we reach in this case.

the dump truck indicated that there was any risk that they would fall, facts which deprived Defendants of any opportunity to warn Plaintiff of the danger that he faced. Finally, Plaintiff has not identified any unreasonable danger arising from the condition of Defendants' property, like the overhanging power lines at issue in *Martishius*. Although Plaintiff points to the inherent dangers involved in operating a sawmill and to various OSHA regulations applicable to such an operation, he has not established that those dangers arose from the condition of Defendants' property rather than from the nature of the activity in which both Defendants and Plaintiff were engaged. As a result, Plaintiff's contention that the trial court erred by finding that Defendants had not violated any negligence-based duty which they owed to him has no merit.

b. Non-Delegable Duties

[2] Secondly, Plaintiff argues that Defendants owed him a non-delegable duty to provide him with a safe working environment due to the inherently dangerous nature of the work that Plaintiff was performing on Defendants' property. According to Plaintiff, Defendants owed him a duty to provide him with a safe working environment regardless of the fact that he was employed by McGee Brothers rather than Defendants because of the non-delegable nature of that duty. We do not find Plaintiff's argument persuasive.

According to well-established North Carolina law, "one who employs an independent contractor is not liable for the independent contractor's negligence"; however, "if the work to be performed by the independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability may attach despite the independent contractor status." *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) (quoting *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991)) (quotation marks and citations omitted). As a result, "[w]here a landowner hires an independent contractor to perform an inherently dangerous activity, and the owner knows or should know of the circumstances creating the danger, the owner has the nondelegable duty to the independent contractor's employees to exercise due care to see that . . . [these employees are] provided a safe place in which to work and [that] proper safeguards against any dangers as might be incident to the work [are in place]." *Dunleavy v. Yates Constr. Co.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197 (quoting *Cook v. Morrison*, 105 N.C. App. 509, 517, 413 S.E.2d 922, 927 (1992)) (first alteration in original) (quotation marks omitted), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992).

At the conclusion of a summary of a number of decisions rendered by this Court, Plaintiff states in his brief that:

> [t]he consistency of the holdings stated above is that each property owner or general contractor who accepted workers on their property failed to act to protect the safety of those employees when the property owner or the general contractor had displayed years of understanding of the worksite and obvious understanding of the risk imposed upon the individual who was hurt.

However, the decisions upon which Plaintiff relies do not sustain the claim which he has advanced in this case. In each of the decisions upon which Plaintiff relies, the non-delegable duty imposed upon the defendant landowners or general contractors did not arise merely because of their "understanding of the worksite" or the fact that the defendant "property owner or general contractor . . . accepted workers on their property." Instead, in each of the decisions upon which Plaintiff relies, the defendants had a contractual relationship with an independent contractor and the plaintiff was either the independent contractor with whom the defendant had contracted or the employer of such an independent contractor.

A person is an independent contractor of a landowner if he or she is a party to a contract involving the performance of work on behalf of or at the behest of the landowner and for the landowner's benefit in circumstances such that the contractor, rather than the landowner, controls the manner in which the job in question is performed. *See Bryson v. Gloucester Lumber Co.*, 204 N.C. 664, 665-66, 169 S.E. 276, 276 (1933) (holding that "an independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his own discretion in matters and things not specified"); *Black's Law Dictionary* 785 (8th ed. 2004) (defining "independent contractor" as "[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it"); *Restatement (Second) of Agency* § 2(3) (1958) (defining an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking"). The record contains no indication that either Plaintiff or McGee Brothers had an independent contractor relationship with Defendants. Instead of entering upon Defendants' property for the purpose of performing work at that location for Defendants'

benefit, Plaintiff was delivering a load of logs to be sold to S & L Sawmill. In light of that fact, McGee Brothers was nothing more than Defendants' seller. Although a seller (or the employee of a seller) is entitled to the same legal protections which must be afforded to all persons lawfully on the landowners' premises, he or she is not entitled to the additional protections afforded to independent contractors, or their employees, who are hired by the landowner to engage in inherently dangerous activities. As a result, Plaintiff's challenge to the trial court's order predicated on the theory that Defendants owed Plaintiff a non-delegable duty to provide him with a safe working environment necessarily fails.

3. Contributory Negligence

[3] Finally, Plaintiff argues that his claim should not be deemed barred on contributory negligence grounds. According to the argument advanced in his brief, Plaintiff contends that the record reveals the existence of a genuine issue of material fact concerning the extent to which he was contributorily negligent given that Plaintiff "had the least experience of anyone involved in this case" in safely unbinding logs. Once again, we conclude that Plaintiff's argument lacks merit.[4]

According to well-established North Carolina law, a plaintiff cannot recover if he, too, was negligent where that negligence was a proximate cause of his injuries. *Muteff v. Invacare Corp.*, __ N.C. App. __, __, 721 S.E.2d 379, 384, *disc. review denied*, 365 N.C. 566, 724 S.E.2d 533 (2012). "[T]he existence of contributory negligence does not depend on [a] plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior–the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Duval v. OM Hospitality, LLC.*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (quoting *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 670, 268 S.E.2d 504, 507 (1980)) (quotation marks omitted).

In seeking to persuade us that his claim was not barred by the doctrine of contributory negligence, Plaintiff relies on this Court's holding in *Cook v. Export Leaf Tobacco Co.*, 50 N.C. App. 89, 272 S.E.2d 883 (1980), *disc. review denied*, 302 N.C. 396, 279 S.E.2d 350 (1981). In *Cook*, the plaintiff, who was employed by an independent contractor that had been hired to perform maintenance work on the defendant's building,

4. We are aware that, having failed to find that the record evidence provided any basis for finding Defendants liable to Plaintiff, we need not address the issue of contributory negligence. As a result, our discussion of the contributory negligence issue should be understood as an alternative basis for upholding the trial court's order.

was injured when a portable elevator furnished by the defendant for the plaintiff's use fell into a parking lot while plaintiff was standing upon it. 50 N.C. App. at 91 272 S.E.2d at 885-86. The record evidence tended to show that, while the defendant had informed the plaintiff's employer that the elevator needed certain repairs, it later told the plaintiff that the problem had been fixed. *Id.* at 93, 272 S.E.2d at 887. Although the requisite repairs had not been performed, the defendant ordered the plaintiff to make certain repairs that required the use of the elevator. As a result, this Court held that:

> [u]nless a condition is so obviously dangerous that a man of ordinary prudence would not have run the risk under the circumstances, conduct which otherwise might be pronounced contributory negligence as a matter of law is deprived of its character as such if done at the direction or order of defendant.

Id. at 96, 272 S.E.2d at 888. Based upon this language, we believe that the essence of Plaintiff's position with respect to the contributory negligence issue is that his claim should not be barred on contributory negligence grounds on the theory that Defendants directed him to engage in conduct which was so obviously dangerous that his own negligence should be overlooked.

The facts at issue here are materially different from those at issue in *Cook*. As an initial matter, instead of being an independent contractor or the employee of an independent contractor, Plaintiff was simply lawfully on Defendants' premises in the capacity of an employee of a seller. In addition, Plaintiff was not instructed by Defendants as to where or how to unload the logs that had been transported on the dump truck he was operating. Instead, the undisputed record evidence establishes that Plaintiff selected the location at which the truck was to be unloaded and never asked for any sort of assistance in carrying out that responsibility. As a result, the principle enunciated in *Cook* simply has no application in this case.

Although the decisions of this Court and the Supreme Court have recognized that a plaintiff's contributory negligence does not bar recovery in certain instances, *e.g.*, *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (holding that "[c]ontributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries"), Plaintiff has not forecast evidence tending to show that any such exception exists here. For that reason, we see no basis for concluding that

Plaintiff's claim could not, at least in theory, be deemed barred by his own negligence. As a result, given that the record contains ample evidence tending to show that, assuming that Defendants were negligent in the manner contended for by Plaintiff, a reasonable person in Plaintiff's position should have been aware of the same risks and taken action to avoid sustaining injury. Thus, we conclude that Plaintiff's final challenge to the trial court's summary judgment order lacks merit.

B. Motion for Relief From Order

[4] Secondly, Plaintiff contends that the trial court erred by denying his motion for relief from judgment on the grounds that Mr. Fisher's affidavit[5] created a genuine issue of material fact sufficient to preclude the trial court from granting Defendants' summary judgment motion. We disagree.

A challenge to a trial court's decision to grant or deny a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) or a motion for a new trial or other relief pursuant to N.C. Gen. Stat. § 1A-1, Rules 52 and 59, is reviewed under an abuse of discretion standard. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 116 (2006) (stating that, "[a]s with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion"). Assuming, without in any way deciding, that the other prerequisites for an award of relief of the nature sought by Plaintiff have been satisfied, we are unable to conclude that the trial court abused its discretion by denying Plaintiff's motions given our determination that the trial court correctly concluded that consideration of Mr. Fisher's affidavit would not have changed the outcome with respect to Defendants' summary judgment motion.

The essential thrust of Mr. Fisher's affidavit was that he had, on his own initiative or at the direction of Defendants, taken affirmative action to ensure that trucks delivering loads to S & L Sawmill were unloaded safely in the event that anyone observed that the items to be unloaded were situated in such a manner as to create a danger to those

5. In his affidavit, Mr. Fisher asserted that he had been employed at S & L Sawmill, that one of his duties was to operate a front end loader with a grapple hook attachment, that Ryan Miller and other S & L Sawmill personnel had instructed him to assist in the unloading of trucks, and that, if either Mr. Fisher or Ryan Miller observed that the load on a particular truck appeared to be unsafe, he would use the grapple hook to cover the truck's load during the unbinding process. In addition, Mr. Fisher asserted that he sometimes "got after" drivers "who had loaded the logs too high." Although Mr. Fisher had been present at the S & L Sawmill on the date of Plaintiff's injury, he had not been in a position to ascertain whether Plaintiff's load of logs had a dangerous appearance and did not express an opinion concerning that issue.

involved in the unloading process. However, neither Mr. Fisher nor anyone else testified that anything about the appearance of the load which Plaintiff brought to S & L Sawmill suggested that the load created a danger to anyone. In light of that fact, even if the information contained in Mr. Fisher's affidavit sufficed to establish that Defendants had assumed an affirmative responsibility for ensuring Plaintiff's safety during the unloading process, that duty only arose in the event that Defendants observed that Plaintiff's load was in an unsafe condition. The record does not, as we understand it, contain any such evidence. As a result, given that the information contained in Mr. Fisher's affidavit does not suggest that Defendants' summary judgment motion should have been denied, rather than allowed, we conclude that the trial court did not abuse its discretion by denying Plaintiff's motions for relief from the trial court's order.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the trial court's orders have merit. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STROUD concur.

LOGAN B. GILMORE AND BLAKE C. GILMORE, PLAINTIFFS
v.
SHERRIE LYNN HICKS GILMORE, DEANA CARLYLE, AND MILTON SINGLETARY, DEFENDANTS

No. COA12-1426

Filed 3 September 2013

1. Civil Procedure—Rule 12(b)(6)—judicial notice—outside the pleadings

The Court of Appeals did not take judicial notice of facts outside the complaint in an appeal from a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6).

2. Appeal and Error—request for judicial notice—no gross violation of Appellate Rules

Defendant's motion for dismissal of an appeal or for sanctions against plaintiffs for requesting judicial notice of certain facts was

denied. Although the Court of Appeals agreed that the request for judicial notice should be denied, plaintiffs' conduct did not grossly violate the Appellate Rules.

3. Perjury—no basis for a civil claim

Plaintiffs' claims for fraud and conspiracy to commit fraud were properly dismissed pursuant to Rule 12(b)(6) where the essence of plaintiffs' amended complaint was that defendants committed fraud and conspiracy when they prepared false affidavits and testified falsely in attempting to submit a false will for probate. A civil action for damages may not be maintained against a witness who testified falsely.

4. Obstruction of Justice—civil claim—not supported by perjury

The trial court correctly dismissed pursuant to N.C.G.S. § 1A-1 Rule 12(b)(6) plaintiffs' claim for obstruction of justice arising from an allegedly fraudulent will submitted to probate. The crux of the claim was defendants' alleged commission of perjury, which will not support a civil suit.

5. Racketeer Influenced and Corrupt Organizations—failure to state a claim—injury to business or property—pecuniary gain

Plaintiffs failed to plead a valid North Carolina RICO claim for purposes of N.C.G.S. § 1A1, Rule 12(b)(6) where plaintiffs' amended complaint failed to sufficiently allege both the injury and pecuniary gain elements.

Appeal by plaintiffs from order entered 13 August 2012 by Judge Clarence E. Horton, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 26 March 2013.

Robinson, Bradshaw & Hinson, P.A., by Thomas P. Holderness, for plaintiffs-appellants.

Hausler Law Firm, PLLC, by Kurt F. Hausler, for defendant-appellee Milton Singletary.

DAVIS, Judge.

Logan B. Gilmore and Blake C. Gilmore (collectively "plaintiffs") appeal from the trial court's order dismissing their amended complaint against defendants Sherrie Lynn Hicks Gilmore ("Mrs. Gilmore"), Deana Carlyle ("Carlyle"), and Milton Singletary ("Singletary") (collectively

"defendants") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court's order.

Factual Background

We have summarized the pertinent facts below using plaintiffs' own statements from their amended complaint, which we treat as true in reviewing the trial court's order dismissing the complaint under Rule 12(b)(6). *See, e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

Between 29 November 2011 and 12 December 2011, defendants conspired to create a fraudulent will for Mrs. Gilmore's husband, Jackie Dean Gilmore ("Mr. Gilmore"). Carlyle and Singletary signed the fraudulent will as witnesses despite knowing that Mr. Gilmore (1) did not sign the document; (2) did not ask them to sign the document; and (3) did not indicate that he intended the document to be his will. After Mr. Gilmore's death on 4 December 2011, Mrs. Gilmore submitted the fraudulent will for probate on or about 13 December 2011. In the application for probate, Mrs. Gilmore "knowingly falsely stated" that the document was the last will and testament of Mr. Gilmore and submitted an "Oath/Affirmation" swearing, under penalty of perjury, that she believed the document to be the last will and testament of Mr. Gilmore.

Carlyle and Singletary each signed an "Affidavit of Subscribing Witnesses for Probate of Will" dated 12 December 2011, where they falsely stated, under penalty of perjury, that "[t]he decedent, in my presence, signed the paper-writing, or acknowledged his/her signature thereto and at such time declared the paper-writing to be the decedent's instrument." Mrs. Gilmore then submitted these affidavits to the clerk of court in conjunction with the application for probate. Based on this application, the clerk of court probated the fraudulent will, and plaintiffs subsequently moved to revoke probate.

At the February 2012 hearing on plaintiffs' motion to revoke probate of the false will, Carlyle and Singletary falsely testified that Mr. Gilmore (1) told them that the document was, in fact, his will; and (2) asked them to sign it as witnesses. Mrs. Gilmore gave fraudulent testimony at this hearing that Mr. Gilmore had showed her the document in May 2010 and that she later found the executed copy of the document in a box in his closet.

On 15 June 2012, plaintiffs filed an amended complaint asserting claims for (1) fraud; (2) conspiracy to commit fraud; (3) a pattern

of racketeering activity in violation of the North Carolina Racketeer Influenced and Corrupt Organizations Act ("N.C. RICO"); and (4) obstruction of justice.

On 28 June 2012, defendants filed a motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The trial court heard defendants' motion to dismiss on 6 August 2012 and granted the motion in an order entered on 13 August 2012, determining that:

> [H]aving carefully considered the precedents, including particularly the line of cases beginning with *Godette v. Gaskill*, 151 N.C. 52 (1909), [the trial court] has concluded that while subornation of perjury and perjury are indictable criminal offenses, they do not give rise to a civil cause of action in North Carolina, so that plaintiffs' amended complaint fails to state a claim for fraud, conspiracy to commit fraud, obstruction of justice, a violation of the North Carolina RICO statutes, and punitive damages . . . .

Plaintiffs appealed to this Court.

Analysis

I. Standard of Review

In their sole argument on appeal, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss under Rule 12(b)(6). "The standard of review of an order granting a [Rule] 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). On appeal, we review the pleadings *de novo* "to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation and quotation marks omitted).

II. Judicial Notice

[1] Plaintiffs ask this Court to take judicial notice of the following facts: (1) Singletary was subsequently charged with felony conspiracy and perjury; (2) Mrs. Gilmore was subsequently charged with forgery of a will, uttering forged endorsements, felony conspiracy, and perjury; and (3) on

21 December 2012, the trial court revoked the probate of the purported will. As "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed[,]" we decline to take judicial notice of materials outside of the plaintiffs' amended complaint. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007) (citation and quotation marks omitted) ("As a general proposition . . . matters outside the complaint are not germane to a Rule 12(b)(6) motion."). Accordingly, we deny plaintiffs' request.[1]

III. Claims for Fraud and Conspiracy to Commit Fraud

[3] It is well established in North Carolina that neither perjury nor subornation of perjury may form the basis for a civil action. *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 74 (2008).

> [N]o action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn perjury, whether committed in the course of, or in connection with, a civil action or suit, criminal prosecution or other proceeding, and whether the perjurer was a party to, or a witness in, the action or proceeding.

Brewer v. Carolina Coach Co., 253 N.C. 257, 262, 116 S.E.2d 725, 728 (1960) (citation and quotation marks omitted).

This principle was first set out over a century ago by our Supreme Court in *Godette v. Gaskill*, 151 N.C. 52, 65 S.E. 612 (1909). In *Godette*, the Supreme Court determined that a civil action for damages against a witness who testified falsely could not be maintained because such an action "did not lie at common law, and we have no statute authorizing it." *Id.* at 52, 65 S.E. at 613. The Court further reasoned that allowing such actions would jeopardize the finality of judgments and provide "a great leverage to litigants to intimidate witnesses." *Id.*

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1. **[2]** Singletary filed a motion with this Court seeking dismissal of the appeal or, in the alternative, sanctions against plaintiffs for requesting judicial notice of the above-referenced facts. He contends that requesting judicial notice of these facts after plaintiffs' motion to supplement the record was denied constitutes a violation of the North Carolina Rules of Appellate Procedure. Although we agree that the request for judicial notice should be denied, we do not believe that plaintiffs' conduct "grossly violated" the Appellate Rules. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("[T]he appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.'"). Accordingly, we deny defendant's motion for dismissal of the appeal and sanctions.

On numerous occasions, both this Court and our Supreme Court have applied the principles set out in *Godette*. In *Brewer*, the plaintiff brought an action seeking to compel the defendant to reinstate him to his former employment and to award him damages for the wages he lost after his employment was wrongfully terminated. *Brewer*, 253 N.C. at 258, 116 S.E.2d at 725-26. His complaint alleged that he was improperly dismissed from his position as a bus driver after a collision based on the defendant's submission of a false accident report and successful attempt to coerce its employees into testifying falsely at the hearing plaintiff requested to contest his discharge. *Id.* Our Supreme Court, citing *Godette*, determined that the plaintiff's claims only asserted damages "resulting from the giving of false and perjured testimony" and held that the trial court properly dismissed the complaint because our courts do not recognize "any injury from false testimony upon which a civil action for damages can be maintained." *Id.* at 260-61, 116 S.E.2d at 727 (citation and quotation marks omitted).

In *Gillikin v. Sprinkle*, 254 N.C. 240, 118 S.E.2d 611 (1961), another case decided by our Supreme Court, the plaintiff was the administrator of the estate of an individual who had died in a motor vehicle accident after colliding with a vehicle owned by the county coroner. The plaintiff filed an action against the coroner, claiming that he had manufactured false evidence of the decedent's negligence and used his position to launch a fraudulent investigation of the accident in order to avoid possible liability as the owner of the other vehicle involved in the collision. *Id.* at 241, 118 S.E.2d at 613. Specifically, the plaintiff alleged that the defendant's "wicked and wrongful scheming and the wrongful use of the functions and prerogatives of his office as coroner, coercion of witnesses, . . . concealment of truth, [and] conspiracy with others to show the collision was caused by the negligence of [the decedent]" caused the trial court to dismiss his wrongful death claim against the defendant. *Id.* (internal quotation marks omitted). The Supreme Court rejected this argument, stating the following:

> [I]t appears plaintiff asserts tortious conduct by defendant to plaintiff's detriment by (1) initiating a conspiracy to suborn perjured testimony in an action to which plaintiff was a party, (2) fraud perpetrated by defendant on plaintiff by the perjured testimony, thereby preventing plaintiff from recovering for the wrongful death of his intestate, (3) defamation of plaintiff's intestate by asserting intestate was drunk and nude when he drove the automobile and by exhibiting derogatory pictures of intestate, and (4) prostitution of the office of coroner to defendant's personal advantage.

Id. at 243, 118 S.E.2d at 614. The Court concluded that the plaintiff could not recover damages for the alleged fraud perpetrated by the defendant and affirmed the trial court's dismissal of the complaint, holding that "[p]erjured testimony and the subornation of perjury are criminal offenses, but neither are torts supporting a civil action for damages." *Id.* (internal citations omitted).

Relying on this line of cases, our Court has likewise declined to recognize various civil claims premised on the commission of perjury and conspiracy to commit perjury. In *Strickland*, we concluded that based on the rule that there is no recognized cause of action grounded in perjury or subornation of perjury, the defendants were entitled to summary judgment as to claims that they "'knowingly provid[ed] false and misleading affidavits and other false information in order to secure the issuance of . . . bogus arrest warrants' " for the purpose of having the plaintiffs arrested. *Strickland*, 194 N.C. App. at 19, 669 S.E.2d at 72-73. Similarly, in *Hawkins v. Webster*, 78 N.C. App. 589, 591-92, 337 S.E.2d 682, 684 (1985), we held that the plaintiff's claims for damages resulting from the defendants' perjured testimony and their conspiracy to commit perjury were properly dismissed "[a]s the law of this State does not recognize a civil cause of action based on perjury."

Notably, we have applied this rule regardless of how a plaintiff has denominated his claim where, as here, the claim was grounded in an allegation of perjury. For example, in *Hawkins*, the plaintiff asserted sixteen causes of action, including claims for perjury, fraud, civil conspiracy, invasion of privacy, intentional infliction of emotional distress, and unfair and deceptive trade practices — all of which were "essentially derived from allegations that the defendants knowingly gave false information to the FBI and IRS agents . . .; that defendants gave perjured testimony at Hawkins' criminal trial; and that defendants' answers to the . . . civil complaints contained information that defendants knew to be false." *Id.* at 590, 337 S.E.2d at 683.

In affirming the trial court's dismissal of *all* of the plaintiff's claims — rather than merely those denominated as claims for perjury and civil conspiracy to give false testimony — we explained that with regard to those other claims, plaintiff had "simply taken allegations of perjury and relabeled them as recognized causes of action." *Id.* at 592, 337 S.E.2d at 684 ("Since the basis of the foregoing claims is civil perjury, a cause of action North Carolina has expressly declined to recognize, the entry of dismissal as to these claims was proper.").

Here, the essence of plaintiffs' amended complaint is that defendants committed fraud and conspiracy to commit fraud when they created

a fraudulent will and attempted to submit it for probate by preparing false affidavits and testifying falsely as to its authenticity. As such, these claims are barred by the line of cases originating with *Godette*.

Plaintiffs attempt to escape the effect of *Godette* and its progeny by relying on *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), and *McCoy v. Justice*, 196 N.C. 553, 146 S.E. 214 (1929). Plaintiffs' reliance on these cases, however, is misplaced.

In *Henry*, the plaintiff, the administrator of the decedent's estate, asserted a civil conspiracy claim against the defendants, alleging that the defendants conspired to — and did in fact — destroy, falsify, and fabricate various medical records to conceal their negligence and thwart the successful prosecution of the plaintiff's wrongful death claim. *Henry*, 310 N.C. at 79, 310 S.E.2d at 329-30. Our Supreme Court stated the following in holding that plaintiff's cause of action did "not come within the purview of the cases which preclude private claims for perjury":

> Perjury is defined by statute and case law as a false statement knowingly made in a proceeding in a court of competent jurisdiction or concerning a matter wherein an affiant is required by law to be sworn as to some matter material to the issue or point in question. *The complaint in this case makes no allegations that the defendants perjured themselves by making false sworn statements.* The complaint alleging conspiracy was apparently filed *before any discovery in which sworn statements were made.* The complaint sets no precise time at which the alleged conspiracy and wrongful acts occurred other than alleging that they occurred after the investigation of Henry's death began. . . .
>
> Unlike the defendants in the *Gilliken* cases and their predecessors, at the time this action was brought the defendants were not subject to criminal sanctions for perjury. *From the pleadings it appears that at the time of the alleged conspiracy no court had jurisdiction and the defendants had not been required to give sworn statements.*

Id. at 89, 310 S.E.2d at 335-36 (emphasis added). For these reasons, the Court determined that "[t]he policy considerations often cited in support of the rule barring civil suits for perjury are inapplicable to this case." *Id.* at 89, 310 S.E.2d at 335.

Despite plaintiffs' assertions to the contrary, the facts of the present case are not analogous to those in *Henry*. Here, unlike in *Henry*,

plaintiffs' amended complaint alleges multiple instances of perjury. In paragraphs 10-12 and 15-17, plaintiffs allege that each defendant knowingly made false statements under oath — which is, of course, the definition of perjury — in two ways: (1) by submitting either a false "Affidavit of Subscribing Witnesses for Probate of Will" (in the case of Carlyle and Singletary) or a false "Oath/Affirmation" (in the case of Mrs. Gilmore); and (2) by testifying falsely during the February 2012 hearing on plaintiffs' motion to revoke probate. Moreover, in paragraphs 32-34, plaintiffs expressly refer to the above acts as "perjury." Thus, unlike in *Henry*, plaintiffs' tort claims all stem from allegations of perjury, and plaintiffs rely on their allegations of defendants' perjury and subornation of perjury in pleading the elements necessary to establish fraud and conspiracy to commit fraud.

Plaintiffs cite *McCoy* for the proposition that "regardless [of] whether someone has been charged or convicted of perjury, the commission of other bad acts subjects one to civil liability . . . ." *McCoy*, however, does not support this proposition. In *McCoy*, the plaintiff sought to vacate a prior judgment against him that was allegedly procured by "fraud, subornation of witnesses, suppression of evidence, and jury attaint." *McCoy*, 196 N.C. at 555, 146 S.E.2d at 215. Thus, unlike plaintiffs here, the plaintiff in *McCoy* was not seeking damages for the defendants' perjury — instead, he was only attempting to set aside a prior verdict that had been entered against him. *Id.* As *McCoy* does not concern civil actions for damages based on a defendant's perjury or subornation of perjury, we find it inapposite to our determination of the present case.

IV. Claim for Obstruction of Justice

[4] For similar reasons, we believe the trial court was likewise correct in dismissing plaintiffs' claim for obstruction of justice. In *Henry*, our Supreme Court concluded that the plaintiff's complaint was improperly dismissed because the defendants' alleged actions of destroying, falsifying, and fabricating the plaintiff's medical records — if found — "would amount to the common law offense of obstructing public justice." *Henry*, 310 N.C. at 87, 310 S.E.2d at 334. In so holding, however, the Court specifically distinguished the facts of *Henry* from the *Godette* line of cases – highlighting the fact that at the time of the complaint in *Henry*, no court had jurisdiction over the case and the defendants had not been required to give any sworn statements. *Id.* at 89, 310 S.E.2d at 335.

As stated above, that is not the case here. Because the crux of their claim for obstruction of justice is defendants' alleged commission of perjury and/or subornation of perjury, dismissal of this claim was proper.

V. N.C. RICO Claim

[5] Finally, plaintiffs argue that the General Assembly — by enacting the N.C. RICO statute codified in N.C. Gen. Stat. § 75D-1 et seq. — has statutorily created a civil cause of action where a defendant has committed multiple instances of perjury (or subornation of perjury). We hold that the trial court properly dismissed plaintiffs' N.C. RICO claim because plaintiffs did not adequately plead all of the essential elements of that cause of action.

Pursuant to N.C. RICO, an "innocent person who is injured or damaged in his business or property" by a defendant's pattern of racketeering activity may bring a private cause of action for treble damages and attorney's fees. N.C. Gen. Stat. § 75D-8(c) (2011). Under the statute, racketeering activity "means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under . . . Chapter 14 of the General Statutes . . . ." N.C. Gen. Stat. § 75D-3(c)(1) (2011). A pattern of racketeering activity is defined, in pertinent part, as follows:

> [A]t least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided . . . at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

N.C. Gen. Stat. § 75D-3(b). The scope of N.C. RICO is limited to cases where there is "an interrelated pattern of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain." N.C. Gen. Stat. § 75D-2(c) (2011).

"[T]o state a claim under the NC RICO Act, (1) an 'innocent person' must allege (2) an injury or damage to his business or property (3) by reason of two or more acts of organized unlawful activity or conduct, (4) one of which is something other than mail fraud, wire fraud, or fraud in the sale of securities, (5) that resulted in pecuniary gain to the defendant[s]." *In re Bostic Constr., Inc.*, 435 B.R. 46, 68 (Bankr. M.D.N.C. 2010). Here, plaintiffs' amended complaint fails to sufficiently allege both the "injury to business or property" element and the "pecuniary gain to defendants" element.

A. Injury to Business or Property Element

Plaintiffs contend that they were injured "by their expenses associated with hiring a handwriting expert and moving to revoke probate of the Fraudulent Will and to prosecute the caveat." These types of expenses, however, do not constitute an injury in fact sufficient to satisfy this element of an N.C. RICO claim.

In *Strates Shows, Inc. v. Amusements of Am., Inc.*, 379 F.Supp.2d 817 (E.D.N.C. 2005),[2] plaintiff brought a federal RICO claim alleging that it was not awarded a state fair contract as a result of the defendants' racketeering activity. *Id.* at 833. The plaintiff claimed that its resulting injury occurred by virtue of the fact that it incurred legal fees and costs during its pursuit of a bid protest at the Office of Administrative Hearings. *Id.* The court held that

> these legal fees and costs are not direct injury flowing from defendants' illegal conduct, but rather, at best, indirect injury which plaintiff did not automatically incur, but chose to incur, in mitigating the effect of defendants' conduct. Stated differently, plaintiff's choice to pursue a bid protest, however justified, was an independent cause which required the payment of legal fees and costs. Accordingly, while the illegal conduct by defendants may have been the cause-in-fact of plaintiff's legal fees and costs, it was not the proximate cause of such fees and costs.

Id. (internal citations and quotation marks omitted).

As in *Strates*, plaintiffs here made a conscious choice to take action to mitigate the effect of defendants' unlawful conduct by filing an action to revoke probate and by employing a handwriting expert to analyze the purported will. However appropriate these actions may have been, as in *Strates*, these expenses were not proximately caused by defendants' illegal behavior and, therefore, are not sufficient to satisfy this element of a claim under N.C. RICO.

Plaintiffs' reliance on *Gram v. Davis*, 128 N.C. App. 484, 495 S.E.2d 384 (1998), is misplaced. In *Gram*, a legal malpractice action, the plaintiff

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2. This Court has looked to federal caselaw interpreting the injury requirement of a federal RICO action when analyzing the analogous injury provision of N.C. RICO. *See Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729 n.3, 475 S.E.2d 247, 254 n.3 (1996) (applying federal caselaw to N.C. RICO claim because there is no "legally significant distinction" between the state and federal injury to business or property provisions), *aff'd per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997).

retained an attorney to complete a title search for two parcels of land that he intended to use in developing a subdivision. *Id.* at 485, 495 S.E.2d at 385. The plaintiff's attorney determined that one of the parcels — which was part of an existing subdivision — was restricted to residential use only but erroneously advised the plaintiff that the construction of an access road would be in compliance with the restriction. Upon the completion of the road, the plaintiff discovered that the restriction did, in fact, prohibit use of the parcel to access another subdivision. *Id.* The plaintiff then hired a second attorney to remove the encumbrance from the property. *Id.* at 486, 495 S.E.2d at 386. In determining that the plaintiff could recover the attorney's fees he incurred in freeing the parcel from the encumbrance, we held:

> Although the general rule in North Carolina is that attorneys' fees and other costs associated with litigation are not recoverable in a legal malpractice action absent statutory liability, this rule does not apply to bar recovery for costs, including attorneys' fees, incurred by a plaintiff to remedy the injury caused by the malpractice.

Id. at 489, 495 S.E.2d at 387 (internal citations omitted).

Recently, this Court expressly declined to extend the holding in *Gram* beyond the legal malpractice realm. *See Robinson v. Hope*, ___ N.C. App. ___, ___, 719 S.E.2d 66, 69 (2011) ("[W]e believe the holding in *Gram* should be limited to the circumstances of that case, namely attorney malpractice actions. Were we to extend the exception . . . such a holding would effectively erode the long-standing rule in North Carolina that attorneys' fees are not recoverable as an item of damages absent statutory authority for such an award . . . ."). Thus, we find *Gram* inapposite to our analysis of the present case.

B. Pecuniary Gain Element

"[T]he scope of NC RICO is limited to cases where pecuniary gain is derived from organized unlawful activity prohibited under the statute. Put simply, section 75D-2(c) requires the aggrieved party to establish a causal connection between the alleged pecuniary gain and [the] defendant's activities which allegedly violate section 75D-4." *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 724, 475 S.E.2d 247, 251 (1996), *aff'd per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). Plaintiffs' amended complaint altogether fails to allege any pecuniary gain by defendants as a result of the conduct alleged therein. Accordingly, for this reason as well, plaintiffs have failed to plead a valid N.C. RICO claim for purposes of Rule 12(b)(6).

Conclusion

For the reasons stated above, we affirm the trial court's order dismissing plaintiffs' amended complaint.

AFFIRMED.

Judges McGEE and GEER concur.

JUDY HAMMOND, PLAINTIFF
v.
SAIRA SAINI, M.D., CAROLINA PLASTIC SURGERY OF FAYETTEVILLE, P.C., VICTOR KUBIT, M.D., CUMBERLAND ANESTHESIA ASSOCIATES, P.A., WANDA UNTCH, JAMES BAX, AND CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., DEFENDANTS

No. COA12-1493

Filed 3 September 2013

1. Appeal and Error—interlocutory orders and appeals—discovery order interlocutory—privilege asserted—substantial right

The Court of Appeals had jurisdiction to review contentions based on the medical review privilege and the work product privilege even though the trial court order compelling discovery was interlocutory. A substantial right is affected where a party asserts a privilege or immunity directly related to the matter to be disclosed and not frivolous or insubstantial.

2. Appeal and Error—preservation of issues—argument waived—no objection

Defendants waived on appeal any argument concerning the production of documents allegedly protected by the attorney client privilege when they did not make any argument before the trial court concerning that privilege or make a specific argument on appeal regarding the applicability of the privilege, although they made a passing reference to the privilege in their brief.

3. Discovery—production of documents—medical review privilege

The trial court did not err in an action arising from an operating room fire by granting plaintiff's motion to compel production of documents, despite defendants' claim of medical review privilege.

Defendants' contentions rested on the proposition that the hospital's Root Cause Analysis (RCA) Team was in fact a medical review committee, but defendants did not show that the RCA Team was part of the medical staff of the hospital, as required by N.C.G.S. § 131E-76(5)(b), or that the RCA Team was created by the governing board or medical staff of the hospital as required by N.C.G.S. § 131E-76(5)(c).

4. Discovery—medical review privilege—statutory requirements

Even if a Root Cause Analysis (RCA) Team that examined the cause of an operating room fire qualified as a medical review committee, defendants did not meet their burden of proving that the documents at issue were privileged under N.C.G.S. § 131E-95. The mere submission of an affidavit by the party asserting the medical review privilege does suffice; such affidavits must demonstrate that each of the statutory requirements have been met.

5. Discovery—work product rule—hospital risk manager

The question of whether notes about an operating room fire made by the hospital's risk manager were protected from disclosure by the work product rule was remanded where the record did not allow a determination of whether the notes were made in the ordinary course of business.

Appeal by defendants from orders entered 18 June 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 April 2013.

McGuireWoods, LLP, by Patrick M. Meacham and Monica E. Webb, for defendants-appellants Cumberland County Hospital System, Inc., James Bax, and Wanda Untch.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and Beaver, Holt, Sternlicht & Courie, P.A., by Mark A. Sternlicht, for plaintiff-appellee.

DAVIS, Judge.

Cumberland County Hospital System, Inc. ("CCHS"), James Bax ("Bax"), and Wanda Untch ("Untch") (collectively "defendants") appeal from the trial court's orders compelling them to produce certain documents and divulge certain information in discovery to Judy Hammond ("plaintiff"). After careful review, we dismiss in part, affirm in part, and remand in part.

Factual Background

On 28 September 2011, plaintiff filed a complaint in Cumberland County Superior Court against defendants as well as Carolina Plastic Surgery of Fayetteville, P.C.; Cumberland Anesthesia Associates, P.A.; Sairi Saini, M.D. ("Dr. Saini"); and Victor Kubit, M.D. ("Dr. Kubit"),[1] which contained the following allegations: Plaintiff reported to Cape Fear Valley Medical Center – operated by CCHS – on 17 September 2010 for a surgical procedure to remove a possible basal cell carcinoma from her face. Dr. Saini, who was employed by Carolina Plastic Surgery of Fayetteville, was responsible for performing the procedure, and Dr. Kubit, an anesthesiologist with Cumberland Anesthesia Associates, was responsible for administering anesthesia during the surgery. Bax and Untch, both registered nurse anesthetists employed by CCHS, were also involved in the provision of anesthesia to plaintiff during the surgery.

Plaintiff was given total intravenous anesthesia. During the operation, Kubit, Bax, and Untch administered supplemental oxygen to plaintiff through a face mask. Drapes were placed around plaintiff's face in such a way that oxygen escaping from the face mask built up under the drapes. When Dr. Saini used an electrocautery device to stop bleeding on plaintiff's face, the oxygen trapped under the drapes ignited and burned the drapes near plaintiff's face. Plaintiff sustained first and second degree burns on her face, head, neck, upper back, right hand, and tongue. Plaintiff also suffered a respiratory thermal injury, right bronchial edema, oral stomatitis, and nasal trauma, which left her with permanent injuries, including scarring.

An answer was filed on behalf of Bax, Untch, and CCHS, generally denying plaintiff's allegations of negligence. Plaintiff subsequently served separate sets of requests for production of documents and interrogatories on Bax, Untch, and CCHS. In their responses, each of them objected to certain aspects of these discovery requests on the grounds that they sought documents or information that was protected from disclosure based on the medical review privilege, the work product doctrine, and the attorney/client privilege. Based on these objections, defendants refused to produce the responsive documents or provide answers to the challenged interrogatories.

Plaintiff filed motions to compel discovery from defendants pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. In

1. Defendants Carolina Plastic Surgery of Fayetteville, Cumberland Anesthesia Associates, Dr. Saini, and Dr. Kubit are not parties to this appeal.

opposing the motions, defendants' counsel filed an affidavit from Harold Maynard ("Maynard"), CCHS's risk manager, regarding the accident review process in existence at CCHS. Attached to the affidavit was a copy of an administrative policy of CCHS entitled "Sentinel Events and Root Cause Analysis" ("RCA Policy"). Defense counsel also submitted to the trial court a copy of a document labeled "Fire in Operating Room RCA" ("RCA Report") and copies of reports entitled "Risk Management Worksheets" ("RMWs").

After conducting an *in camera* review of the documents withheld by defendants, the trial court entered separate orders on 18 June 2012 granting plaintiff's motions to compel. Defendants appealed to this Court from these orders.

Analysis

I. Appellate Jurisdiction

[1] As a preliminary matter, we must determine whether this Court possesses jurisdiction over defendants' appeal. Defendants' contentions on appeal can be divided into two categories. First, they argue that a segment of the documents and information requested by plaintiff are immune from discovery based on recognized privileges – namely, the medical review privilege, the work product doctrine, and the attorney/client privilege. Second, they contend that portions of plaintiff's discovery requests are overbroad and seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence pursuant to Rule 26 of the North Carolina Rules of Civil Procedure.

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable. *K2 Asia Ventures v. Trota*, __ N.C. App. __, __, 717 S.E.2d 1, 4, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 37 (2011).

For this reason, orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature. *See, e.g.*, *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 123-24, 678 S.E.2d 787, 790 (2009) (medical review privilege), *disc. review denied*,

363 N.C. 813, 693 S.E.2d 353 (2010); *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 636-37, 673 S.E.2d 694, 701-02 (work product doctrine), *disc. review denied*, 363 N.C. 651, 686 S.E.2d 512 (2009). Accordingly, this Court has jurisdiction to review defendants' contentions on appeal that are based on the medical review privilege and the work product doctrine.[2]

However, with regard to the arguments advanced by defendants based on overbreadth and relevancy, we do not possess jurisdiction to consider these contentions because they do not invoke a recognized privilege or immunity, and defendants have failed to otherwise show that they affect a substantial right. *See Wind v. City of Gastonia*, __ N.C. App. __, __, 738 S.E.2d 780, 782 (2013) (holding that only questions of whether requested files were shielded from discovery by statutory privilege were properly before appellate court); *K2 Asia Ventures*, __ N.C. App. at __, 717 S.E.2d at 4 (concluding that only portion of discovery order concerning attorney/client privilege and work product immunity was immediately appealable).

For these reasons, we lack jurisdiction to consider defendants' arguments regarding overbreadth and relevancy. Consequently, those portions of defendants' appeal are dismissed.

II. Medical Review Privilege

[3] We now turn our attention to those issues on appeal that are properly before us. We begin by examining the applicability of North Carolina's medical review privilege codified in N.C. Gen. Stat. § 131E-95.

A. Statutory Framework

As this Court has recognized, "N.C. Gen. Stat. § 131E–95, part of the Hospital Licensure Act, creates protection for medical review committees in civil actions against hospitals." *Woods*, 198 N.C. App. at 124, 678

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2. **[2]** An interlocutory order compelling production of documents alleged to be protected from disclosure by the attorney/client privilege also affects a substantial right and is, therefore, immediately appealable. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 23-24, 541 S.E.2d 782, 786, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). Here, although defendants make a passing reference to the attorney/client privilege in their brief, they make no specific argument regarding the applicability of this privilege as required under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Moreover, our review of the transcript of the hearing on plaintiff's motions to compel reveals that defendants likewise did not make any argument before the trial court concerning the attorney/client privilege. As such, defendants have waived any argument based on the attorney/client privilege and, accordingly, we do not address its applicability in this opinion.

S.E.2d at 791. The privilege is set out in N.C. Gen. Stat. § 131E-95(b), which provides, in pertinent part, as follows:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132–1 . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen. Stat. § 131E-95(b) (2011).

"By its plain language, N.C. Gen. Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods*, 198 N.C. App. at 126, 678 S.E.2d at 791-92. The statute goes on to state, however, that "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C. Gen. Stat. § 131E-95(b).

N.C. Gen. Stat. § 131E-76 defines the term "[m]edical review committee" as

> any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
>
> b. A committee of a medical staff of a hospital.
>
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
>
> d. A committee of a peer review corporation or organization.

N.C. Gen. Stat. § 131E-76(5)(a)-(d) (2011).

On appeal from a trial court's discovery order implicating the medical review privilege, this Court "review[s] de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E–95(b)." *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 535, 694 S.E.2d 416, 419, *disc. review denied*, 364 N.C. 602, 703 S.E.2d 158 (2010). In the present case, defendants, as the parties objecting to the disclosure of the materials on the basis of this privilege, bear the burden of establishing that plaintiff's discovery requests fall within the scope of the privilege. *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318 (2007). Where, as here, the trial court's order does not contain findings of fact and conclusions of law but rather simply lists the documents that are discoverable, "it is presumed that the court on proper evidence found facts to support its [decision]." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (citation and quotation marks omitted), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001).[3]

B. Application of Medical Review Privilege

Defendants contend that North Carolina's medical review privilege shields from discovery: (1) the RCA Report; (2) the RMWs; and (3) notes prepared by Maynard (CCHS's risk manager) after the operating room fire.

The RCA Report is a document consisting of multiple pages, containing a "Brief Overview" of the incident resulting in the operating room fire, a description of the post-fire review process undertaken by the hospital's Root Cause Analysis Team ("RCA Team"), and the RCA Team's ultimate recommendations based on that review process. The two RMWs appear to be computer-generated reports containing several different "Data" sections that include set fields for entering information. In the "General Event Data" section of both RMWs is a "Comments" field, each of which contains a general description of the events surrounding the operating room fire. As for Maynard's meeting notes, while they were not submitted to either the trial court or this Court for review, Maynard's affidavit describes them as "notes reflecting the discussions that occurred" in meetings he conducted regarding the fire.

Defendants invoke the medical review privilege by asserting that these documents are all connected with the investigation of the operating room fire by the RCA Team. All of defendants' contentions regarding the applicability of the medical review privilege hinge on the proposition

3. A trial court is not required to make findings of fact or conclusions of law where no request is made by the parties. *J.M. Dev. Grp. v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002).

that CCHS's RCA Team is, in fact, a medical review committee for purposes of § 131E-76(5). If the RCA Team does not constitute a medical review committee as statutorily defined, then defendants' entire argument premised on the medical review privilege fails.

Defendants do not identify in their brief which specific prong(s) of § 131E-76(5) they believe the RCA Team falls under in order to qualify as a medical review committee. At oral argument, however, counsel for defendants stated that the RCA Team would qualify as a medical review committee under either subsection (b) or (c) of § 131E-76(5). After carefully reviewing the record, we conclude that defendants failed to meet their burden of showing that the RCA Team qualifies as a medical review committee for purposes of § 131E-76(5)(b) or (c).

In order to fall within § 131E-76(5)(b), defendants must show that (1) the RCA Team was comprised of the "medical staff of a hospital"; and (2) it was "formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing[.]" N.C. Gen. Stat. § 131E-76(5)(b).

Defendants have failed to meet even the first of these two prongs. Neither the RCA Report itself nor any other document presented by defendants identifies the members of the RCA Team as being part of the "medical staff of [CCHS]," as required by the statute. N.C. Gen. Stat. § 131E-76(5)(b). This omission is fatal to defendants' attempt to avail themselves of this provision of § 131E-76(5). Therefore, we conclude that defendants have not shown that the RCA Team constitutes a medical review committee under § 131E-76(5)(b).

In order to qualify as a medical review committee under § 131E-76(5)(c), the RCA Team must have been "created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system." N.C. Gen. Stat. § 131E-76(5)(c). Maynard, in his affidavit, stated that "*[i]n general*, the peer review committees established to . . . prepare a root cause analysis are created by the medical staff and governing board of CCHS and operate under the [RCA Policy] . . . ." (Emphasis added.) The inherent ambiguity of the phrase "in general" leaves open the possibility that this sequence of events does not occur in every case. Notably absent from Maynard's affidavit is any statement that the RCA Team established *in this specific case* to review the operating room fire was created by the governing board or medical staff of CCHS or that the RCA Team operated under the RCA Policy. Nor does the RCA Report itself provide these details.

Similarly, defendants have also failed to establish that the RCA Policy was, in fact, "adopted by the governing board or medical staff of the hospital or system." N.C. Gen. Stat. § 131E-76(5)(c). The policy contains a notation that it was "approved by MN" – yet nothing in the record, including Maynard's affidavit, identifies who "MN" is. For all of these reasons, we believe that defendants failed to satisfy their burden of proving that the RCA Team constitutes a medical review committee for purposes of § 131E-76(5)(c).

[4] Even assuming *arguendo* that the RCA Team did qualify as a medical review committee, defendants would still have been required to "present . . . evidence tending to show that the disputed [documents] were (1) part of the [RCA Team]'s *proceedings*, (2) *produced* by the [RCA Team], or (3) *considered* by the [RCA Team] as required by" § 131E-95. *Hayes*, 181 N.C. App. at 752, 641 S.E.2d at 319 (emphasis in original). This Court has

> emphasize[d] that these are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.

Id. (footnote and emphasis omitted).

First, with respect to the RCA Report, defendants failed to submit any evidence revealing who produced or prepared it. While the document, on its cover page, identifies the event that is the subject of the report and the members of the team, it does not list its author. Defendants assert – pointing to Maynard's affidavit – that the RCA Team produced the report. Maynard's affidavit, however, states only that "[a] Root Cause Analysis Report *was prepared* . . . ." (Emphasis added.) It neither identifies the RCA Team members – individually or collectively – as the author of the RCA Report nor otherwise reveals the document's author.

Second, with respect to the computer-generated RMWs, defendants refer to these documents not as RMWs – the title provided on the face of the printouts – but rather as Quality Care Control Reports. Defendants maintain that these documents were prepared by Bax and Stephanie Emanuel ("Emanuel"), another nurse present in the operating room

during the fire, as part of the review process outlined in the RCA Policy. Although the RCA Policy does, in fact, identify Quality Care Control Reports as a "means" for initiating a review, the RCA Policy nowhere refers to RMWs, and nothing on the face of the RMWs indicates they actually are the Quality Care Control Reports contemplated by the RCA Policy.

Nor is it clear who prepared the RMWs. Both RMWs indicate on their face that the information contained in the comments section was entered by someone with the initials "RDE" – without any further indication of that person's identity. However, other sections of the RMWs suggest that they may have been completed by Emanuel and Bax – although it is not clear that this is, in fact, what occurred. Thus, the source of the information contained in the RMWs is unclear.

Finally, with respect to Maynard's meeting notes, these notes — as discussed below — may fall within the work product privilege. However, defendants have failed to meet their burden of establishing that these documents come within the purview of the medical review privilege.

In holding that defendants have failed to sustain their burden of proving that the three categories of documents at issue are privileged under § 131E-95, we find instructive our decision in *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 694 S.E.2d 416. In *Bryson*, the plaintiff – an internist – filed suit against the hospital where she had worked, claiming that her employment had been terminated in retaliation for her reporting "patient safety issues." *Id.* at 533-34, 694 S.E.2d at 418. During discovery, the hospital refused to respond to several of the plaintiff's interrogatories and document requests, "contending that they sought disclosure of the proceedings, records, and materials produced or considered by a medical review committee, which constituted information protected from discovery under N.C. Gen. Stat. § 131E–95(b)." *Id.* at 534, 694 S.E.2d at 418-19. In response to the plaintiff's motion to compel, the hospital submitted some – but not all – of the requested materials to the trial court for *in camera* review. *Id.*, 694 S.E.2d at 419. After reviewing the filed documents, the trial court entered an order protecting some documents from disclosure but directing others to be produced. *Id.*

On appeal, the hospital argued that certain internal documents ordered by the trial court to be produced were "privileged because they relate[d] to internal peer review investigations of patient charts requested by its Risk Management Department." *Id.* at 538, 694 S.E.2d at 421. In rejecting the hospital's contention, we observed that (1) "the documents on their face do not establish that they are privileged"; and

(2) the hospital "submitted no affidavits or other evidence to support its claim that the documents at issue were protected from discovery under N.C. Gen. Stat. § 131E–95(b)." *Id.* at 540, 694 S.E.2d at 422. Thus, because of the defendants' failure to provide sufficient evidence that the medical review privilege applied, *id.* at 538-39, 694 S.E.2d at 421, we were compelled to conclude that the hospital had "failed to meet its burden of showing that the documents f[e]ll into one of the three categories of privileged material under N.C. Gen. Stat. § 131E–95(b)," *id.* at 533, 694 S.E.2d at 418.

While, unlike in *Bryson*, defendants here did submit an affidavit in support of their argument based on the medical review privilege, the affidavit – as explained above – is insufficient to satisfy their burden of proving that the RCA Report, the RMWs, and Maynard's meeting notes are privileged under § 131E-95. The mere submission of affidavits by the party asserting the medical review privilege does not automatically mean that the privilege applies. Rather, such affidavits must demonstrate that each of the statutory requirements concerning the existence of the privilege have been met. Accordingly, defendants' arguments on this issue are overruled.[4]

III. Work Product Doctrine

[5] Defendants also contend that the work product doctrine — set out in Rule 26(b)(3) of the North Carolina Rules of Civil Procedure — protects from disclosure notes made by Maynard regarding his discussions with Bax, Untch, and various other individuals possessing knowledge of the operating room fire as well as information about the content of these discussions.[5]

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4. We note that defendants' brief contains a cursory, one-sentence argument that the documents at issue are also protected by the statutory privilege afforded to quality assurance committees in N.C. Gen. Stat. § 90-21.22A. This Court has recognized that the privilege applicable to quality assurance committees pursuant to § 90-21.22A "is functionally identical" to the privilege afforded to medical review committees under § 131E-95(b). *Armstrong v. Barnes*, 171 N.C. App. 287, 294, 614 S.E.2d 371, 376, *disc. review denied*, 360 N.C. 60, 621 S.E.2d 173 (2005). Accordingly, for the reasons already discussed, we conclude that defendants failed to sustain their burden of proving the applicability of § 90-21.22A as well.

5. In their brief, defendants mention in passing other discovery requests that they contend are protected by the work product doctrine. Defendants, however, fail to advance any specific argument regarding the applicability of the work product doctrine to the documents or information sought by these discovery requests. Defendants' failure to make a particularized argument regarding these specific discovery requests constitutes waiver of the issue on appeal. *See Latta v. Rainey*, 202 N.C. App. 587, 597, 689 S.E.2d 898, 908 (2010) (holding that where "defendant fail[ed] to make any specific argument in his brief" regarding certain issue, the issue was deemed abandoned on appeal).

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means.' " *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. R. Civ. P. 26(b)(3)), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003).

The party asserting the work product doctrine "bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (citation and quotation marks omitted). Our Supreme Court has made clear, however, that "[m]aterials prepared in the ordinary course of business are not protected, nor does the protection extend to facts known by any party." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citing C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 197 (1970)).

On appeal, we review "the trial court's application of the work product doctrine . . . under an abuse of discretion standard." *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788. Under this standard, a trial court's ruling may be reversed only upon a showing that it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *K2 Asia Ventures*, __ N.C. App. at __, 717 S.E.2d at 8 (citation and quotation marks omitted).

Defendants contend that Maynard's notes were prepared in anticipation of litigation, relying on the following statement in Maynard's affidavit:

> Because of the nature of the event (a fire in the operating room) and based on my experience as a Risk Manager, I immediately anticipated that litigation related to the event could result. In anticipation of litigation, I met with members of the plaintiff's family along with Jim Bax, CRNA, Dr. Saini, Dr. Kubit and Dr. Ruben Rivers to discuss the incident. I do not recall the date of that meeting. On September 20, 2010, in anticipation of litigation, I met with operating room personnel to discuss the event. This meeting occurred after my meeting with Ms. Hammond's family. After both of these meetings, and in anticipation of litigation, I prepared notes reflecting the discussions that occurred in the meetings.

Plaintiff counters, however, by arguing that the record is unclear whether Maynard actually prepared his notes in the ordinary course of business pursuant to CCHS's policies regarding "Quality Care Reports," "Reportable Incidents," and the "Patient Safety Response Team." If so, plaintiff contends, the notes would not qualify for work product immunity under Rule 26(b)(3) because they would have been prepared pursuant to hospital policy as a matter of course following incidents of this nature regardless of whether litigation was anticipated. *See Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 625, 482 S.E.2d 546, 551-52 (1997) (holding that hospital's accident report was not protected from discovery under Rule 26(b)(3) because "report would have been compiled, pursuant to the hospital's [risk management] policy, regardless of whether [plaintiff] intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital").

In this regard, we note that on at least two occasions, plaintiff requested that CCHS "[p]rovide all hospital bylaws, policies, rules, and/or procedures" relating to "the prevention of fire in operating rooms or during surgery . . . ." CCHS, however, never provided plaintiff with the responsive policies. Nor did CCHS submit them to the trial court for consideration – despite counsel's acknowledgment during oral arguments at this Court that having the requested policies would have been helpful to the trial court in determining whether Maynard's notes were prepared in anticipation of litigation as required by Rule 26(b)(3).

We are unable to determine on the record currently before us whether the trial court abused its discretion in compelling the production of Maynard's notes in the face of defendants' work product objection. Nor do we believe that the trial court was capable of making a determination of whether these notes were made in the ordinary course of the hospital's business without first examining the policies requested by plaintiff and determining whether the notes were made pursuant to hospital policy.

In concluding that a remand to the trial court is necessary on this issue, we are guided by our decision in *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006), *disc. review denied*, 361 N.C. 426, 648 S.E.2d 208 (2007). In *Diggs*, the plaintiff suffered injuries during a surgical procedure and brought a medical malpractice claim against the hospital where the procedure was performed and against the members of the medical staff involved. *Id.* at 293-94, 628 S.E.2d at 854. During discovery, the plaintiff moved to compel the defendants to produce any documents "discuss[ing]" the plaintiff's injury or "any problems . . . during her . . . hospitalization.' " *Id.* at 310, 628 S.E.2d at 864.

The defendants objected to the disclosure, arguing that the responsive documents – contained in their " 'Risk Management file' " – "were protected from production by the attorney-client privilege and the work product doctrine . . . ." *Id.* After reviewing the documents *in camera*, the trial court denied in part and granted in part the plaintiff's motion to compel. *Id.* On appeal, the plaintiff contended that the trial court erred to the extent that it did not compel production of all the responsive documents.

This Court, after explaining that the work product doctrine shields from discovery only those "documents prepared 'in anticipation of litigation,' " reviewed the submitted documents in light of the hospital's "policy 'for the reporting of all unexpected events' " in order to determine whether the documents were prepared pursuant to that policy. *Id.* at 310-11, 628 S.E.2d at 864-65. However, after "carefully examin[ing] the documents and the information provided by [the] defendants regarding the nature of those documents[,]" *id.* at 310, 628 S.E.2d at 864, we were "unable to determine from the current record whether the documents at issue were generated pursuant to [the hospital's risk management] policy[,]" *id.* at 312, 628 S.E.2d at 865.

In particular, we observed that while "certain documents appear to correspond to the reports and summaries required by the hospital's policy," they were not specifically labeled as such, and thus we could not properly determine their status. *Id.* at 312, 628 S.E.2d at 865. Thus, we "remand[ed] to the trial court for further review as to these documents," emphasizing that the "defendants b[ore] the burden of demonstrating that the specified documents" were protected. *Id.*

Similarly, here, for the reasons set out above, we remand to the trial court for it to conduct an analysis of whether Maynard's notes are protected by the work product doctrine based on its review not only of Maynard's affidavit and the other evidentiary submissions in the record but also based on its review of the pertinent policies of CCHS. We note our concern regarding the inordinate amount of time defendants have taken to provide the requested policies to plaintiff. We direct the trial court, on remand, to issue a deadline for defendants to submit the policies at issue both to plaintiff and to the trial court. After the trial court has completed its review, it shall issue a new order containing its determination of whether the work product doctrine serves as a bar to the issuance of an order compelling the production of these meeting notes. We leave it to the trial court's discretion whether defendants should be required to also submit the notes themselves to the court for an *in camera* inspection.

Finally, we reject defendants' argument that the trial court abused its discretion in compelling them to respond to plaintiff's interrogatories despite their objections based on the work product doctrine. It is well established that the work product doctrine only applies to documents or other tangible things. *See Long*, 155 N.C. App. at 136-37, 574 S.E.2d at 176 (holding that "plaintiff's interrogatories did not violate Rule 26(b)(3)" because they "did not ask defendants for documents or tangible things").

Conclusion

For the reasons stated above, we dismiss defendants' appeal in part, affirm the trial court's orders granting plaintiff's motions to compel in part, and vacate and remand that portion of the trial court's orders compelling the production of Maynard's meeting notes.

DISMISSED IN PART; AFFIRMED IN PART; REMANDED IN PART.

Chief Judge MARTIN and Judge BRYANT concur.

IN THE MATTER OF LAWRENCE BULLOCK III, RESPONDENT

No. COA13-149

Filed 3 September 2013

1. Appeal and Error—appeal not timely—writ of certiorari

The Court of Appeals granted a writ of certiorari for a respondent who did not timely appeal a recommitment order but claimed that the failure to take timely action related to a disagreement with counsel.

2. Appeal and Error—recommitment order—function of court of appeals

It is not the function of the Court of Appeals to re-weigh the evidence in an appeal from a recommitment order.

3. Mental Illness—recommitment order—findings

A recommitment order was remanded for further findings where the trial court did not make adequate factual findings relevant to whether respondent was still dangerous. Recitation of the opposing testimonies does not resolve the conflicts raised by the testimony.

4. Mental Illness—recommitment order—conditional release

The trial court did not err by not mentioning conditional release in its findings as part of a recommitment order. The record did not show that the trial court misunderstood the dispositional options, the trial court is not required to make a finding regarding conditional release in every case, and respondent failed to argue that such a disposition would be appropriate

5. Mental Illness—recommitment—forensic unit of hospital—no allegations of serious injury or death

The trial court did not err by recommitting respondent to the forensic unit of Central Regional Hospital where respondent had been found not guilty by reason of insanity (NGRI) of first-degree burglary and second-degree kidnapping. Nothing in the plain language of N.C.G.S. § 122C-168.1 forbids committing NGRI acquittees to a forensic unit when they are charged with a crime without allegations of inflicting or attempting to inflict serious physical injury or death.

On Writ of Certiorari to review Order entered 12 June 2012 by Judge Robert F. Johnson in Superior Court, Granville County. Heard in the Court of Appeals 15 August 2013.

Attorney General Roy A. Cooper III, by Assistant Attorney General Adam M. Shestak, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for respondent-appellant.

STROUD, Judge.

Lawrence Bullock ("respondent") appeals from an order recommitting him to the forensic unit at Central Regional Hospital. We reverse and remand for entry of a revised order.

I. Procedural History

In 1999, respondent was found not guilty by reason of insanity (NGRI) of first degree burglary and second degree kidnapping. He was involuntarily committed to the forensic unit at Dorothea Dix Hospital ("Dorothea Dix"). He has had recommitment hearings at least every year since and was recommitted after each one to the forensic unit at either Dorothea Dix or Central Regional Hospital ("Central Regional"). On

25 May 2012, respondent had another recommitment hearing and was recommitted again to the forensic unit at Central Regional.

II. Factual Background

During respondent's recommitment hearing on 25 May 2012, his sister testified that she has

> seen a great deal of improvement [in respondent over the past several years] because [he] has been able to come to family outings, visits, and come to [her] home on several occasions just to have meals with [her] husband and [her] . . . . He [also] was able to attend two funerals . . . . [and her] daughter's wedding.

Respondent's sister also indicated that she would "feel very comfortable" with respondent having "more frequent visits" possibly "even for [an entire] weekend." This was the totality of the evidence that respondent presented in favor of his discharge.[1]

Respondent's doctor, Dr. Vance, testified about respondent's condition generally, including his diagnosis of schizoaffective disorder and the medications that he was taking. Dr. Vance also indicated that respondent "does not necessarily feel he needs to take" his medications and that if respondent ever stopped taking his medications he "would inevitably have a relapse," experience "mania," "psychosis," "delusional beliefs," and "auditory hallucinations," as well as become "more energized," "irritable," and "sexually inappropriate." Dr. Vance further testified that even at respondent's current medication level (which respondent has declined to modify), his condition periodically manifests itself, most recently in an episode two months prior to the hearing where respondent "was convinced that [his] family members were being kidnapped and held in the hospital."

Based on this evidence, the trial court concluded that respondent had failed to show that he no longer suffers from a mental illness or that he is no longer dangerous to others. The trial court accordingly recommitted respondent for another year to the forensic unit at Central Regional.

III. Appellate Jurisdiction

Respondent appeals from the recommitment order entered 12 June 2012. He filed written notice of appeal on 23 July 2012. Appeals from

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1. The parties stipulated that the testimony of respondent's brother-in-law would corroborate that of his sister.

involuntary commitment orders are appealable "as in civil cases." N.C. Gen. Stat. § 122C-272 (2011). Appeals in civil cases must generally be taken within thirty days of entry of the judgment. N.C.R. App. P. 3(c)(1). Thus, as he acknowledges, respondent failed to timely appeal the recommitment order.

Nonetheless, respondent filed a petition for writ of certiorari with this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. He claims that his failure to take timely action related to a disagreement between him and his trial counsel as to whether, when, and how to note his appeal. The State opposes respondent's petition. We find that these circumstances are appropriate for issuance of the writ and we grant respondent's petition for writ of certiorari. Therefore, we have jurisdiction to consider the merits of respondent's appeal.

IV. Standard of Review

> [W]e review [a recommitment] order as we would a commitment order. Thus, we must determine whether there is competent evidence to support the trial court's factual findings and whether these findings support the court's ultimate conclusion that respondent still has a mental illness and is dangerous to others.

In re Hayes (*Hayes I)*, 151 N.C. App. 27, 29–30, 564 S.E.2d 305, 307, *app. dismissed and disc. rev. denied*, 356 N.C. 613, 574 S.E.2d 680 (2002).

V. Analysis

Respondent argues on appeal that (1) he proved "by a preponderance of the evidence[] that he is no longer dangerous to others," (2) "the trial court erred by failing to consider the conditional release of [respondent] as an option," (3) "the trial court violated N.C. Gen. Stat. § 15A-1321 and [respondent's] right to due process by ordering that [he] be recommitted in the forensic unit" at Central Regional, and (4) "the trial court's findings of fact were insufficient to resolve the disputed issue of whether [respondent] was dangerous to others . . . ." (Original in all caps)

We hold that the trial court's findings are insufficient at present to support its conclusions. Therefore, we must reverse the order and remand for additional findings. Because the remaining issues are likely to recur on remand, we also hold that the trial court did not err in not making a finding about whether conditional release is appropriate in these circumstances and did not err or violate respondent's due process rights in committing him to a "forensic unit."

A. Findings of Fact

During an NGRI acquittee recommitment hearing,

> The respondent shall bear the burden to prove by a preponderance of the evidence that he (i) no longer has a mental illness as defined in G.S. 122C 3(21), or (ii) is no longer dangerous to others as defined in G.S. 122C 3(11) b. If the court is so satisfied, then the court shall order the respondent discharged and released. If the court finds that the respondent has not met his burden of proof, then the court shall order inpatient commitment be continued for a period not to exceed 180 days. The court shall make a written record of the facts that support its findings.

N.C. Gen. Stat. § 122C-276.1(c) (2011); *see* N.C. Gen. Stat. § 122C-276.1(d) (establishing that third and subsequent recommitment hearings are governed by the same standard and authorizing such recommitments for periods of up to one year). Here, the trial court concluded that respondent had not shown that he was no longer mentally ill or that he is no longer dangerous to others.

[2] Respondent first argues that the trial court erred in concluding that he failed to meet his burden under the statute given the evidence presented. In making this argument, respondent is simply asking this Court to reweigh the evidence in his favor. "It is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*, ___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, ___ N.C. ___, 742 S.E.2d 803 (2013). Therefore, this argument is meritless.

[3] Respondent next argues that the trial court failed to make sufficient findings of fact to support its conclusion that respondent has failed to show that he is no longer dangerous to others. He does not contend that he is no longer mentally ill.

> "Dangerous to others" means that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and

> convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b) (2011).

"[A] trial court must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citation omitted). "Recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge." *In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) (citation and quotation marks omitted), *disc. rev. denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

The majority of the trial court's "findings" in its 12 June 2012 order are recitations of testimony, indicating that witnesses "testified" about particular topics. The trial court did not make actual findings regarding the material facts, either by making separate findings or by finding specific testimony in the record credible. Omitting those findings that merely recite testimony, we are left with only the following relevant facts to review:

> 1. The Respondent was committed to Dorothea Dix Hospital pursuant to North Carolina General Statute 15A-1321 having been found not guilty by reason of insanity to the crimes of first degree burglary and second degree kidnapping in Vance County case files 98-CRS-12164 through 12165.
>
> 2. The Respondent has been hospitalized continuously at the forensic program run by the Department of Health and Human Services since August, 1999. His present commitment is to expire May 25, 2012.
>
> . . . .
>
> 4. . . . Dr. Vance has been the treating attending physician for Mr. Bullock for slightly less than one year, although he has worked with Mr. Bullock for at least three years. Dr. Vance has examined Respondent and has reviewed the Respondent's medical records. The diagnosis of the Respondent is schizo-affective disorder and that is the primary diagnosis. . . .

> 7. [The trial court lists the medications respondent is on].
>
> . . . .
>
> 10. . . . At this point in time the Respondent's treatment team has not discussed the increase of any privileges and this is in part because the Respondent has not adequately demonstrated that he is not dangerous to society. . . .
>
> 11. The Court does note that in previous court orders apparently the Respondent's treatment team has been granted authority to allow Respondent privileges to attend on-campus activities at the forensic unit run by DHHS under a one-to-ten supervision, with one staff to no more than ten patients, and to attend off-campus activities under a one-to-ten supervision, and also to have a four-hour unsupervised pass daily on campus.

The order states that Dr. Vance testified that respondent "does not necessarily feel he needs to take" his medications, let alone increase the dosage, and that if respondent were "to stop the medication . . . . [h]e would inevitably have a relapse." A relapse would likely result in respondent experiencing "mania," "psychosis," "delusional beliefs," and "auditory hallucinations," as well as him becoming "more energized," "irritable," and "sexually inappropriate." Indeed, Dr. Vance testified that even while respondent was medicated and under the supervision of his treatment team, he had been suffering auditory hallucinations and believed that family members had been kidnapped and held in the hospital. Based on his review of respondent's medical records and his interactions with respondent, Dr. Vance concluded that respondent is not ready to be discharged.

The evidence does support the court's findings that Dr. Vance testified as noted above, but the trial court did not find that these assertions were facts. Nor did the trial court find that it considered this testimony credible, as opposed to its similar recitation of defendant's sister's testimony including her statement that she did not think defendant "was a harm to himself or anyone else." Recitation of the opposing testimonies do not resolve the conflicts raised by the testimony but merely recognizes that the conflict exists. The trial court must weigh all of the evidence and in its findings, resolve the conflicts raised, as "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge." *In re M.R.D.C.*, 166 N.C. App. at 699, 603 S.E.2d at 894.

Although the burden is on respondent to show that he is no longer dangerous, the trial court must make adequate factual findings relevant to whether respondent is still dangerous or not. It failed to do so here. Therefore, we must reverse the trial court's order and remand for entry of a revised order with appropriate findings of fact sufficient to support the trial court's conclusions of law.

B. Conditional Release

[4] Although we have concluded that we must remand for entry of a revised order, we will address the remaining issues raised by respondent because these issues will not be resolved on remand even if the trial court makes findings of fact consistent with the statements of Dr. Vance in the "testimonial" findings of fact as discussed above. Respondent argues that the trial court erred in not considering or making a finding about whether conditional release would be an appropriate disposition. Respondent effectively raises three issues: (1) whether the trial court misunderstood the available dispositional options; (2) whether the trial court must make a finding regarding conditional release in every case; and (3) whether the trial court should have found him eligible for conditional release in this case.

> N.C. Gen. Stat. §§ 122C–264, –268.1, –276.1, and –277—read *in pari materia*—establish the trial court's authority to order a conditional release as a dispositional option in § 122C–268.1 and § 122C–276.1 hearings.

In re Hayes (*Hayes II*), 199 N.C. App. 69, 82, 681 S.E.2d 395, 403 (2009), *disc. rev. denied*, 363 N.C. 803, 690 S.E.2d 694, *cert. denied*, 363 N.C. 803, 690 S.E.2d 695 (2010).

In *Hayes II*, the respondent was an NGRI acquittee who had been charged with four counts of first degree murder, five counts of felonious assault with a deadly weapon, and two counts of assault on a law enforcement officer. *Hayes II*, 199 N.C. App. at 70, 681 S.E.2d at 396. Hayes was found not guilty by reason of insanity on all charges and was involuntarily committed to a psychiatric hospital pursuant to N.C. Gen. Stat. § 15A–1321. *Id.* at 70-71, 681 S.E.2d at 396-97. From 1988 to 2007, Hayes had yearly recommitment hearings and was recommitted after each one. *Id.* at 71, 681 S.E.2d at 397.

During the 2007 hearing, Hayes presented numerous psychologists and psychiatrists, all of whom advocated for his discharge; even the State's expert psychologist advocated for Hayes' release, just a conditional one. *Id.* at 71–73, 681 S.E.2d at 397–98. After receiving this

testimony, the trial court recommitted Hayes, finding that Hayes would "be dangerous to others in the future *if unconditionally released with no supervision* . . . ." *Id.* at 85, 681 S.E.2d at 405.

Hayes appealed the trial court's recommitment order. *Id.* at 74, 681 S.E.2d at 399. He argued that "the trial court erred in failing to consider a conditional release as a dispositional option" during his recommitment hearing. *Id.* at 70, 681 S.E.2d at 396. The State argued both at trial and on appeal that the trial court was not even authorized to conditionally release Hayes. *Id.* at 76, 681 S.E.2d at 400. Although Hayes had not properly "present[ed] a distinct argument to the trial court that a conditional release was a possible disposition," we invoked Rule 2 to decide the merits of his claim. *Id.* at 76–78, 681 S.E.2d at 400–01.

We concluded that "it is apparent from the trial court's findings of fact that its assumption that it had no authority to order a conditional release played a fundamental role in its decision," to recommit Hayes and that this assumption was a "misapprehension as to the applicable law." *Id.* at 85, 681 S.E.2d at 405. Therefore, we were unable to "determine that the trial court, if aware that a conditional release was a legal disposition, would have still recommitted Hayes" because it incorrectly treated its dispositional options as binary, looking only to recommitment and full discharge. *Id.* As a result, we remanded for a *de novo* hearing regarding whether Hayes was entitled to a conditional release. *Id.*

Here, the trial court's order does not affirmatively indicate that it considered conditionally releasing respondent, but without any indication to the contrary, "[w]e presume that the trial court was aware of, and applied, the law as set forth in" *Hayes II*. *Lawing v. Lawing*, 81 N.C. App. 159, 178, 344 S.E.2d 100, 112 (1986); *Scott v. Scott*, 106 N.C. App. 606, 613, 417 S.E.2d 818, 823 (1992) ("in a bench trial, the trial judge will be presumed to know the law."), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994).

There is nothing in the record to suggest that the trial judge misunderstood the available dispositional options. The trial court's statement that it was considering whether to discharge respondent or recommit him does not show that it misunderstood the applicable law. Rather, unlike in *Hayes II*, neither defendant nor the State presented any evidence that a conditional release would be medically appropriate. Even the testimony of defendant's sister, which was the only evidence presented by defendant, does not mention conditional release. A trial court is not required to make a finding as to conditional release in every case. Trial courts are not normally required to resolve an issue that is not

raised by the parties and the evidence. *See Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992) ("In a trial without a jury, it is the duty of the trial judge to resolve all issues *raised by the pleadings and the evidence* . . . ." (emphasis added)). Neither *Hayes II* nor the statutes require the trial court to make a finding as to whether conditional release is appropriate where neither the evidence nor the parties raises that issue.

Finally, respondent did not argue to the trial court that he should be conditionally released. Therefore, the issue of whether respondent should be conditionally released has not been preserved for our review. N.C.R. App. P. 10(a)(1).[2]

Contrary to respondent's arguments, the record does not show that the trial court misunderstood the dispositional options, the trial court is not required to make a finding regarding conditional release in every case, and in this case respondent failed to argue that such a disposition would be appropriate. Therefore, the trial court did not err by "failing" to mention conditional release in its findings.

C. Commitment to the Forensic Unit

[5] In his brief, respondent points to authority granting him procedural due process protections during his recommitment hearings. *E.g.*, *In re Reed*, 39 N.C. App. 227, 249 S.E.2d 864 (1978). Respondent then argues that his "right to due process" was violated because he was placed in the forensic unit at Central Regional, which is more restrictive than the other units.[3]

He contends that this placement violated N.C. Gen. Stat. § 15A-1321(a) because the crimes of first degree burglary and second degree kidnapping

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2. Respondent requests that we invoke Rule 2, as we did in *Hayes II*, and waive his failure to preserve this issue. Given that there was no witness who testified about whether conditional release was appropriate and the only medical testimony supported recommitment, we are not convinced that applying Rule 10 in this case would work "manifest injustice" to respondent. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (reaffirming that Rule 2 is only to be invoked "cautiously" and in "exceptional circumstances.").

3. *See generally* 10A N.C. Admin. Code 28A.0102(b)(16)(2012) ("'Forensic Division' means the unit at [a psychiatric] [h]ospital which serves clients who are . . . (B) found not guilty by reason of insanity [or]. . . (D) deemed to require a more secure environment to protect the health, safety and welfare of clients, staff and the general public."); 10A N.C. Admin. Code 28C.0308 (2012) (allowing for routine searches of the forensic unit); 10A N.C. Admin. Code 28D.0403 (allowing a court order to supersede the normal rules for determining when a "forensic patient" can refuse psychotropic medication and not face forcible administration of the drug).

do not involve allegations of "inflict[ing] or attempt[ing] to inflict serious physical injury or death" on another person, and the current iteration of § 15A-1321 indicates that in such a situation an NGRI acquittee should be placed in a "State 24-hour facility designated pursuant to G.S. 122C-252." *See* N.C. Gen. Stat. § 15A-1321(a) (2011). Respondent does not explain how this claim implicates his due process rights. Thus, the only issue is whether the trial court misunderstood its statutory authority in committing respondent to the forensic unit at Central Regional. N.C.R. App. P. 28(b)(6).

"An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *Armstrong v. North Carolina State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (citations omitted), *disc. rev. denied and app. dismissed*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L.Ed. 2d 770 (1999).

Respondent was initially committed under N.C. Gen. Stat. § 15A-1321. The current iteration of § 15A-1321 differentiates between NGRI acquittees who were charged with a crime "wherein it is alleged that the defendant inflicted or attempted to inflict serious physical injury or death" and those who were not. If not alleged, the acquittee is to be committed to a "State 24-hour facility designated pursuant to G.S. 122C-252." N.C. Gen. Stat. § 15A-1321(a). If defendant is charged with a crime wherein "inflict[ing] or attempt[ing] to inflict serious physical injury or death" is alleged, the acquittee is to be committed to "a Forensic Unit operated by the Department of Health and Human Services, where the [acquittee] shall reside until the [acquittee's] release . . . ." N.C. Gen. Stat. § 15A-1321(b). Until this new version was enacted, none of the commitment statutes mentioned the forensic unit. Even now, only § 15A-1321(b) refers to that unit.

The current version of N.C. Gen. Stat. § 15A-1321 "applies to offenses committed on and after" 1 January 1999. 1999 N.C. Sess. Laws 212, § 12.35B(b). Respondent's offenses occurred in November of 1998; thus, the current version of the statute is not applicable. The applicable version of § 15A-1321 provides only that "[w]hen a defendant charged with a crime is found not guilty by reason of insanity . . . the presiding judge shall enter an order . . . committing the defendant to a State 24-hour facility designated pursuant to G.S. 122C-252." N.C. Gen. Stat. § 15A-1321 (1997).[4]

4. We do note that the original commitment order purported to commit respondeent under § 15A-1321(b), which as outlined above, does not apply to respondent. Nevertheless, respondent did not appeal from that order and it is not before us.

The applicable version of N.C. Gen. Stat. § 15A-1321 did not define a "State 24-hour facility."[5] Chapter 122C, however, did—and still does—define both "State facility" and "24-hour facility." N.C. Gen. Stat. § 122C-3(14) (1997); N.C. Gen. Stat. § 122C-3(14)(2011). A "State facility" is "a facility that is operated by the Secretary" of DHHS. N.C. Gen. Stat. § 122C-3(14)(f). A "24-hour facility" is "a facility that provides a structured living environment and services for a period of 24 consecutive hours or more and includes hospitals that are facilities under [Chapter 122C]." N.C. Gen. Stat. § 122C-3(14)(g). It follows, then, that a "State 24-hour facility" is a 24-hour facility operated by DHHS. Central Regional—where respondent was committed—is such a facility, as was Dorothea Dix.[6]

The statutes that govern the hearing at issue here do not distinguish between a forensic unit and any other unit within a 24-hour facility. Recommitment hearings for NGRI acquittees are conducted under § 122C-276.1. That section states that "proceedings of the rehearing shall be governed by the same procedures provided by G.S. 122C-268.1." N.C. Gen. Stat. § 122C-276.1. Section 122C-268.1(i), in turn, requires the trial court to "order that inpatient commitment continue at a 24-hour facility" if it finds that the respondent has not shown that he is eligible for release. N.C. Gen. Stat. § 122C-268.1(i) (2011). The statute does not mention whether an NGRI acquittee must be committed to a particular unit; it only requires that the acquittee be committed to a 24-hour facility.

Respondent argues in his reply brief that even if the new version of N.C. Gen. Stat. § 15A-1321 does not apply to him, neither the old version of § 15A-1321 nor § 122C-268.1 "authorize" his commitment to a forensic unit. We are not convinced that NGRI acquittees committed under N.C. Gen. Stat. § 15A-1321(a), the prior version of § 15A-1321, or § 122C-268.1 may not be committed to a forensic unit within a 24-hour facility simply because a subset of NGRI acquittees now *must* be committed to such a unit under N.C. Gen. Stat. § 15A-1321(b).

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013)

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5. The current version of this statute also does not define that term.

6. N.C. Gen. Stat. § 122C-181(a)(1)(a1)(2011) (authorizing the Secretary of DHHS to operate Central Regional Hospital); N.C. Gen. Stat. § 122C-252 (2011) (authorizing the Secretary of DHHS to designate 24-hour facilities); 10A N.C. Admin. Code 26C.0104(d) (2012) (noting that the list of designated facilities is available on the DHHS website); N.C. Dep't of Health and Human Serv., North Carolina Facilities Designated for the Custody and Treatment of Individuals Under Petitions for Involuntary Commitment, *available* at http://www.ncdhhs.gov/mhddsas/services/IVC/ivcdesignatedfacilities.xls (designating Central Regional as a 24-hour facility).

(citation and quotation marks omitted). A forensic unit is not a separate facility from the 24-hour facility—it is simply a particular part of that facility. If the legislature intended to specify a particular unit for those NGRI acquittees committed under the old N.C. Gen. Stat. § 15A-1321, the new N.C. Gen. Stat. § 15A-1321(a), or N.C. Gen. Stat. § 122C-168.1 they could have done so, as they did in § 15A-1321(b). Instead, the only acquittees for whom the legislature specified a particular unit were those committed under § 15A-1321(b). It makes sense that the legislature would determine that those insanity acquittees charged with a crime wherein "inflict[ing] or attempt[ing] to inflict serious physical injury or death" is alleged must be committed to the most secure unit, while leaving such determinations to the informed discretion of the treating professionals for other NGRI acquittees, subject of course to any other statutory and regulatory requirements.

The statutes under which respondent was committed require him to be committed to a 24-hour facility. He was committed to just such a facility. Nothing in the plain language of N.C. Gen. Stat. § 122C-168.1 forbids the commitment of NGRI acquittees charged with a crime wherein "inflict[ing] or attempt[ing] to inflict serious physical injury or death" is not alleged to a forensic unit. N.C. Gen. Stat. § 15A-1321(b) does not change this conclusion. Respondent has not pointed us to anything else that would forbid his commitment to the forensic unit or require his commitment to another unit. Therefore, even assuming he is correct that he would not qualify for commitment under N.C. Gen. Stat. § 15A-1321(b), the trial court did not err in committing respondent to the forensic unit of Central Regional.

VI. Conclusion

The trial court failed to make sufficient findings to support its conclusion. Nonetheless, there is sufficient evidence in the record to support such findings, so we remand for entry of a revised order with appropriate findings of fact and conclusions of law consistent with those findings. We also hold that the trial court was not required to make a finding of whether conditionally releasing respondent was appropriate because it was presented with no meaningful evidence that his conditional release was medically appropriate. Further, recommitment to the forensic unit at Central Regional did not violate N.C. Gen. Stat. § 15A-1321. For these reasons, we reverse and remand for entry of a revised order.

REVERSED and REMANDED.

Judges CALABRIA and DAVIS concur.

ELIZABETH A. KANE, Plaintiff/Petitioner
v.
NORTH CAROLINA TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, a/k/a THE STATE HEALTH PLAN, Defendants/Respondents

No. COA13-73

Filed 3 September 2013

1. Appeal and Error—omission of order from notice of appeal—jurisdiction

Although plaintiff's notice of appeal did not designate the 4 October 2011 order dismissing her breach of contract claim for failure to exhaust her administrative remedies, the Court of Appeals had jurisdiction to review that order. Plaintiff timely objected to the order, the order was interlocutory and not immediately appealable and the order involved the merits and necessarily affected the judgment.

2. Administrative Law—failure to exhaust administrative remedies—bar to claims

Plaintiff's failure to exhaust her administrative remedies or, in the alternative, to properly plead the inadequacy of those administrative remedies, barred all of her claims against defendant including breach of contract, declaratory judgment, and constitutional claims.

Appeal by Plaintiff from order entered 17 September 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 5 June 2013.

Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols and Catherine E. Lee, for Plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Heather H. Freeman, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from an insurer's denial of an insured's requests for reimbursement for medical procedures and prescriptions. In late 2007, Plaintiff Elizabeth A. Kane, a forty-one-year-old employee of the

State of North Carolina, determined that she wanted to have one or more biological children. Because Plaintiff was not in a romantic relationship with a male partner, she anticipated using donor sperm and artificial insemination to become pregnant. Plaintiff's gynecologist referred her to Carolina Conceptions, a fertility clinic, for consultation. Doctors at the clinic informed Plaintiff that she had low potential fertility due to low ovarian function and recommended hormonal treatments via several prescription medications. Plaintiff took these medications and also underwent related fertility procedures between 2008 and 2010. In addition, at several points during this period, Plaintiff underwent intrauterine insemination ("IUI") in an attempt to conceive.

As a state employee, Plaintiff was covered by Defendant North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, a/k/a The State Health Plan ("SHP"). SHP denied Plaintiff's claims for reimbursement for the cost of the medications and procedures which were followed by IUI. Plaintiff's total unreimbursed expenditures were $14,726.83 for medications and $9,000.00 for procedures. It is undisputed that SHP will reimburse for fertility medications and procedures used in conjunction with attempts to conceive via natural intercourse. However, in an affidavit, Tracy D. Stephenson, Director of Pharmacy Benefits for SHP, stated that "medications and services used in conjunction with artificial reproductive technologies (ART) . . . were excluded under the State Health Plan as part of the implementation of cost containment measures and determination of medical policies enumerated in Chapter 135 of the North Carolina General Statutes."

On 5 January 2009, Plaintiff filed an internal appeal of the denial of medication reimbursements with SHP. On 9 January 2009, SHP denied Plaintiff's appeal, stating that SHP "does not cover services, supplies, drugs[,] or charges that are not medically necessary[.]" SHP further informed Plaintiff that she could request "a 2nd level grievance review." On 30 June 2009, Plaintiff requested such a review. On 14 July 2009, however, SHP informed her that it was closing the matter and that it had "inadvertently given [her] 2nd level grievance review rights in error." SHP also notified Plaintiff that she had sixty days to appeal the SHP decision to the Office of Administrative Hearings ("OAH"). Plaintiff did not timely appeal to the OAH.

In mid-July 2011, Plaintiff filed a complaint and declaratory judgment action against SHP. Plaintiff alleged that SHP's reimbursement denial constituted breach of contract and that SHP's interpretation and application of its policy terms violated the equal protection and due process

clauses of the United States and North Carolina Constitutions and the Exclusive Emoluments Clause of the North Carolina Constitution.[1] On 11 August 2011, Defendant moved to dismiss Plaintiff's claims pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). By order entered 4 October 2011, the trial court dismissed Plaintiff's breach of contract claim based upon her failure to exhaust her administrative remedies, but denied the remainder of Defendant's motion. On 3 July 2012, Defendant moved for summary judgment on Plaintiff's declaratory judgment and constitutional claims. Following a hearing, on 17 September 2012, the trial court granted summary judgment to Defendant and dismissed Plaintiff's two remaining claims.

Discussion

On appeal, Plaintiff argues that the trial court erred in dismissing her breach of contract claim, and granting summary judgment for SHP on her declaratory judgment and *Corum* claims. We affirm.

Standard of Review

"We review a trial court's order for summary judgment *de novo* to determine whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (citation and quotation marks omitted; italics added). "The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*. The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Rowlette v. State*, 188 N.C. App. 712, 714, 656 S.E.2d 619, 621 (2008) (citations and quotation marks omitted).

Jurisdiction to Review Order Dismissing Plaintiff's Breach of Contract Claim

[1] We begin by noting that, although Plaintiff's notice of appeal does not designate the 4 October 2011 order dismissing Plaintiff's breach of contract claim for failure to exhaust her administrative remedies, this Court nonetheless has jurisdiction to review that order.

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1. Plaintiff's request for a declaration based on the alleged constitutional violations was labeled as her second claim for relief, while her direct constitutional claims made up her third claim. For clarity, Plaintiff's direct constitutional claims will be referred to as *Corum* claims in this opinion, although Plaintiff's complaint does not explicitly cite that decision. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

> Appellate Rule 3(d) states in pertinent part, the notice of appeal required to be filed and served by subsection (a) of this rule shall . . . designate the judgment or order from which appeal is taken and the court to which appeal is taken. However, upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. Therefore, our Court may still have jurisdiction to review an intermediate order even if an appellant omits a certain order from the notice of appeal where three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims.

Sellers v. FMC Corp., __ N.C. App. __, __, 716 S.E.2d 661, 665 (2011) (citations, quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012). Further,

> [u]nder [N.C. Gen. Stat. §] 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court *or makes known the action which he desires the court to take and his ground therefor*.

Inman v. Inman, 136 N.C. App. 707, 711-12, 525 S.E.2d 820, 823 (2000) (citation omitted; emphasis added).

Here, the record includes the memorandum of law in opposition to Defendant's motion to dismiss filed by Plaintiff in the trial court, which "makes known the action which [s]he desire[d] the court to take and h[er] ground therefor[,]" and thus serves as a timely exception. *Id.* In addition, the order dismissing Plaintiff's breach of contract claim was interlocutory and not immediately appealable. *See Sellers*, __ N.C. App. at __, 716 S.E.2d at 665. Finally, the order dismissing the breach of contract claim involves the merits of Plaintiff's case because it deprived Plaintiff of one of her three causes of action. *Id.* Thus, the 4 October 2011 order meets all three requirements as set forth in *Sellers*, permitting this Court to reach the merits of Plaintiff's first argument.

Failure to Exhaust Administrative Remedies

[2] After careful review, we conclude that Plaintiff's failure to exhaust her administrative remedies or, in the alternative, to properly plead the inadequacy of those administrative remedies, bars all of her claims against SHP.

While Plaintiff is correct that the Administrative Procedures Act ("APA") "does not preclude entirely the possibility of judicial review by use of the declaratory judgment act or other procedures outside the [APA,]" *High Rock Lake Assoc. v. N.C. Envtl Mgmt. Comm'n*, 39 N.C. App. 699, 707, 252 S.E.2d 109, 115 (1979), "[s]o long as the statutory procedures provide an effective means of review of the agency action, the courts *will require parties to exhaust their administrative remedies.*" *Porter v. Dep't. of Ins.*, 40 N.C. App. 376, 381, 253 S.E.2d 44, 47 (emphasis added), *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979) (citation omitted).

> As a general rule, it is the policy of this State that disputes between its administrative agencies and its citizens be resolved pursuant to the provision of the Administrative Procedure Act, [N.C. Gen. Stat.] § 150B-22, and that judicial review of an administrative decision may be had only after all administrative remedies have been resolved.
>
> Five requirements must generally be satisfied before a party may ask a court to rule on an adverse administrative determination: (1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) *administrative remedies must be exhausted;* and (5) no other adequate procedure for judicial review can be provided by another statute. Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction.

Jackson v. N.C. Dep't of Human Res., 131 N.C. App. 179, 182-83, 505 S.E.2d 899, 901-02 (1998) (emphasis added), *disc. review denied*, 350 N.C. 594, 537 S.E.2d 213 (1999).

"When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts." *Id.* at 186, 505 S.E.2d at 903. Our Courts have upheld the requirement of exhaustion when the claims asserted allege constitutional violations. *See N. Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 30-31, 394 S.E.2d 462,

466-67, *appeal dismissed and disc. review denied*, 327 N.C. 484, 397 S.E.2d 215 (1990). Further, our "Supreme Court [has] confirmed that, even in a declaratory judgment action, [w]hen an effective administrative remedy exists, that remedy is exclusive." *Wake Cares, Inc. v. Wake Cnty Bd. of Educ.*, 190 N.C. App. 1, 13, 660 S.E.2d 217, 224-25 (2008) (citing *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 209, 443 S.E.2d 716, 722 (1994) and *Lloyd v. Babb*, 296 N.C. 416, 428, 251 S.E.2d 843, 852 (1979)) (quotation marks omitted). "On the other hand, if the remedy established by the []APA is inadequate, exhaustion is not required." *Jackson*, 131 N.C. App. at 186, 505 S.E.2d at 903.

Plaintiff urges that, "[w]here an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999) (citation omitted). However, whether the claim asserted is constitutional or arises from contract, "[t]he burden of showing inadequacy is on the party claiming inadequacy, *who must include such allegations in the complaint*." *Jackson*, 131 N.C. App. at 186, 505 S.E.2d at 904 (emphasis added) (discussing claims for injunctive and monetary relief and for a declaratory judgment arising from constitutional claims); *see also Snuggs v. Stanly Cnty Dep't. of Pub. Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984) ("When the defendants' motions are viewed as motions brought under Rule 12(b)(6), they must be allowed since the *plaintiffs have failed to allege that they do not have adequate remedies under State law* which provide due process.") (emphasis added; citations omitted); *Justice for Animals, Inc. v. Robeson Cnty*, 164 N.C. App. 366, 373, 595 S.E.2d 773, 777 (2004) (affirming dismissal of claims for injunctive relief where the "plaintiffs' complaint fail[ed] to allege either the inadequacy or the futility of the administrative remedy" provided); *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715-16, 421 S.E.2d 812, 815-16 (1992) (vacating an order of summary judgment for the plaintiff where the complaint alleging breach of contract failed to raise the issue of inadequacy of administrative remedies and thus "the complaint should have been dismissed by the trial court").

For example, in *Jackson*, the plaintiff's complaint alleged that "[e]xhaustion of any purported administrative appeals was, and is, futile, pointless, and inadequate because they cannot provide the remedies sought and because they facially violate due process of law guaranteed by the state constitution and law." *Jackson*, 131 N.C. App. at 186, 505 S.E.2d at 904. Moreover, the plaintiff in *Jackson* "acknowledge[d] that

she had the burden of pleading futility or inadequacy of the administrative remedy . . . ." *Id.*

Here, Plaintiff acknowledges that she failed to exhaust her administrative remedies. Before the trial court and this Court, she advanced eloquent and compelling arguments that exhaustion would have been futile and, thus, was not required because OAH has no jurisdiction to resolve constitutional issues. Our review reveals, however, that Plaintiff's complaint and declaratory judgment action contains no allegation that her administrative remedies were inadequate, and thus, all of her claims should have been dismissed pursuant to Rule 12(b)(6).

Although the precedent discussed above requires this panel to affirm the trial court's orders, we are compelled to observe that imposition of the requirement to allege futility or inadequacy in this case appears both illogical and a subversion of the very intent behind the exhaustion of administrative remedies requirement: judicial economy.

> The exhaustion rule serves a legitimate state interest in requiring parties to exhaust administrative remedies before proceeding to court, thereby preventing an overworked court from considering issues and remedies that were available through administrative channels. It also encourages the use of more economical and less formal means of resolving disputes and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.

2 Am. Jur. 2d *Administrative Law* § 474 (2013). This focus on judicial economy likewise led to the development of the futility/inadequacy exception to the exhaustion rule, as requiring exhaustion of administrative remedies is but a purposeless waste of time and resources if the remedy sought *cannot* be obtained via administrative appeals. Certainly, the requirement that this exception be specifically alleged in a complaint makes sense where the futility of an administrative remedy is not readily apparent and the defendant could be taken by surprise or somehow prejudiced by the later raising of such an allegation. Here, however, all parties agree that SHP does not currently permit reimbursement for fertility treatments taken in conjunction with ART. This bar on reimbursements is an explicit prohibition of SHP, and there is no discretion, exception, or flexibility regarding coverage of these treatments for women such as Plaintiff. Neither Plaintiff nor Defendant has suggested that there was *any* possibility that, had Plaintiff undertaken the further administrative review available to her, relief she sought could have been

given. Rather, everyone involved in this matter was aware from the start that Plaintiff would not prevail at any level of administrative review. Simply put, Plaintiff's administrative remedies were the very definition of futility, and there is neither suggestion nor proof that SHP was prejudiced by Plaintiff's failure to allege futility in her complaint. In sum, the imposition of the requirement that Plaintiff *plead* futility here serves no purpose, aids no party or court, and acts as nothing more than a pedantic technicality preventing resolution of Plaintiff's claims on their merits.

Nevertheless, mindful 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[,]" *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted), both the 4 October 2011 order dismissing her breach of contract claim and the 17 September 2012 order granting summary judgment to SHP and dismissing with prejudice Plaintiff's constitutional claims must be

AFFIRMED.

Judges BRYANT and DILLON concur.

CLAUDE V. MEDLIN, EMPLOYEE, PLAINTIFF
v.
WEAVER COOKE CONSTRUCTION, LLC, EMPLOYER,
KEY RISK INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA 13-159

Filed 3 September 2013

Workers' Compensation—disability—burden of proof

The Industrial Commission did not err in a workers' compensation case by terminating plaintiff's ongoing compensation and awarding defendants a credit for all disability compensation paid after 22 December 2010 based on plaintiff's failure to meet his burden of proving disability from 22 December 2010 to the present. Plaintiff's earning capacity was affected solely by economic factors and not his injury.

Judge GEER dissenting.

Appeal by plaintiff from the opinion and award entered 19 October 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 June 2013.

Oxner, Thomas and Permar, PLLC, by Michael G. Soto, for plaintiff-appellant

Brooks, Stevens and Pope, PA, by Joy Brewer, for defendant-appellees

HUNTER, Robert C., Judge

Plaintiff Claude Medlin ("plaintiff") appeals from the opinion and award of the North Carolina Industrial Commission terminating his ongoing temporary total disability compensation and awarding defendants Weaver Cooke Construction and Key Risk Insurance Company (collectively "defendants") a credit for all temporary total disability compensation paid to plaintiff between 22 December 2010 and the date of termination. On appeal, plaintiff argues that the Industrial Commission erred in concluding that plaintiff had not met the burden of proving disability from 22 December 2010 to the present. After careful review, we affirm the opinion and award.

Background

In April 2006, Weaver Cooke Construction ("Weaver") hired plaintiff. Plaintiff has a Bachelor's of Science degree in civil engineering from North Carolina State University and, since graduating in 1974, he has worked in the commercial construction industry as a project engineer, project manager, and estimator. Plaintiff worked as a project manager and estimator for Weaver.

Plaintiff injured his right shoulder while moving furniture at a worksite in May 2008. On 22 December 2008, Weaver accepted plaintiff's injury as compensable via Form 60, and plaintiff began receiving medical treatment. Plaintiff continued to work after his injury until being laid off on 21 November 2008. The parties stipulated in the pre-trial agreement that the reason for his layoff was a "reduction of staff due to lack of work." During this time, Weaver had to undergo widespread layoffs, and the total number of employees for Weaver dropped from 160 to 65 and estimator positions dropped from 8 to 4. Plaintiff began receiving unemployment benefits approximately the first week of January 2009. In February 2009, plaintiff began receiving temporary total disability benefits from defendants. From early 2009 until late March 2011, plaintiff received overlapping unemployment benefits and temporary total disability benefits.

The vast majority of facts regarding plaintiff's medical history are not necessary to address the issues in his appeal. In summary, after his injury, plaintiff began seeing Dr. Raymond Carroll for medical treatment. Dr. Carroll performed surgery on plaintiff's shoulder on 10 February 2009, and plaintiff began physical therapy. Plaintiff experienced an increase in right shoulder pain until he was discharged from physical therapy in April 2009. Dr. Carroll placed plaintiff at maximum medical improvement and released him to return to work without restrictions. After experiencing an increase in pain, plaintiff returned to Dr. Carroll who recommended surgery. Although defendants authorized the surgery, plaintiff decided to seek a second opinion. After receiving authorization from defendants, plaintiff changed his physician to Dr. Kevin Speer who placed plaintiff at maximum medical improvement and assigned permanent work restrictions of no lifting greater than ten pounds, no climbing ladders, and no repetitive overhead activities.

Following his layoff, plaintiff sought employment within the construction industry. Plaintiff estimated that he had made hundreds of job inquiries after being laid off.

On 22 December 2010, defendants filed an "Application to Terminate Payment of Compensation," arguing that plaintiff was no longer able to establish disability related to his injury since the only reason he could not obtain an estimator position with another employer was due to the economic downturn and not based on any physical restrictions. The matter came on for hearing before the Full Commission on 19 October 2012. Specifically, the Full Commission concluded that "[p]laintiff cannot establish disability secondary to his work-related injury at any time from 22 December 2010 to the present[.]" Thus, it terminated plaintiff's ongoing compensation and awarded defendants a credit for all disability compensation paid after 22 December 2010. Plaintiff timely appealed.

Arguments

Plaintiff argues that the Full Commission erred in concluding that he was unable to prove disability between 22 December 2010 and the date of termination. Specifically, plaintiff contends that because he has shown that he is incapable of earning the same wages he had before his injury, even after engaging in reasonable efforts to find work, he has met his burden of proving disability. We disagree.

Review of an opinion and award of the Full Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This Court's duty goes no further

than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Disability means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011). In order to prove ongoing total disability, plaintiff must prove (1) the incapacity of earning pre-injury wages in the same employment, (2) the incapacity of earning pre-injury wages in any other employment, and (3) that this incapacity to earn wages is caused by the injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "A determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 707, 599 S.E.2d 508, 513 (2004); *see also Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) (holding that an injured employee's earning capacity must be measured by the employee's own ability to compete in the labor market).

The dissent utilizes the analytical framework set out in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993) to assert that plaintiff has met his burden of production. The purpose of the four-pronged *Russell* test is to provide channels through which an injured employee may demonstrate the required "link between wage loss and the work-related injury." *See Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494-99, 459 S.E.2d 31, 34-36 (1995) (noting that the Russell test is an evidentiary tool used to show a causal connection between injury and wage loss). The second prong of the test, which the dissent argues has been met by plaintiff, reads "[t]he employee may meet this burden [by producing] . . . evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. However, implied in this prong is the causal connection between the injury and the unsuccessful attempt at finding employment. *See id.* ("The burden is on the employee to show that he is unable to earn the same wages he had earned *before the injury*[.]") (emphasis added). Indeed, the *Fletcher* court's holding is based on its conclusion that "but for the work-related injury she sustained, [the plaintiff] would not have become unemployed and suffered wage loss in consequence of the unavailability of other employment." *Fletcher*, 119 N.C. App. at 497, 459 S.E.2d at 35.

The dissent favorably quotes the *Fletcher* court's observation that "the partially disabled employee's only burden is to show he is unable to earn wages *because of his injury*, not that he must show that the economy or other factors are not the cause of unemployment." *Id.* at 499, 459 S.E.2d at 37 (emphasis added). As is discussed in detail below, plaintiff failed to show *any* causal connection between his injury and subsequent wage loss. We therefore disagree with the dissent and find that the second prong of the *Russell* test has not been met.

In determining that plaintiff had not met his burden of proving disability, Full Commission found:

> 25. On 18 November 2010, Gregory B. Henderson, a vocational case manager and President of VocMed, conducted a targeted labor market survey in which two employers in the commercial construction industry of similar size and geographic location confirmed that someone with Plaintiff's restrictions was physically capable of performing the job duties required by the Estimator position.
>
> 26. In an updated labor market survey conducted by Mr. Henderson on July 18, 2011, an additional three employers confirmed that someone with Plaintiff's restrictions was physically capable of performing the job duties required by the Estimator position.
>
> 27. Mr. Henderson offered testimony as an expert in the field of vocational rehabilitation. Mr. Henderson opined that Plaintiff has the vocational skills and physical capabilities needed to perform work as an Estimator. He further opined that Plaintiff would be able to return to work as an Estimator but for the current economic downturn.

In other words, the Full Commission found that the only reason plaintiff is unable to find employment was based on the economic downturn and was not related to his injury. Based on these findings, the Full Commission concluded that "[a] [p]laintiff is unable to meet their [sic] burden of proving disability where, but for economic factors, the employee is capable of returning to his pre-injury position." Thus, plaintiff's inability to obtain his pre-injury wages was "attributable to large-scale economic factors," not due to his injury, and he was not entitled to receive disability compensation.

In reaching this conclusion the Full Commission relied on *Segovia v. J.L. Powell & Co.*, 167 N.C. App. 354, 608 S.E.2d 557 (2004). In

Segovia, the plaintiff suffered compensable injuries by accident. 167 N.C. App. at 354, 608 S.E.2d at 557. His employer admitted liability and began paying temporary total disability benefits. *Id.* at 355, 608 S.E.2d at 558. During this time period, the plaintiff was laid off by his employer due to a decline in business. *Id.* After the employer filed a request to stop paying disability compensation, the Full Commission terminated the plaintiff's compensation, concluding that his loss of earnings was not due to any disability arising from the injury. *Id.*

On appeal, this Court affirmed, noting that competent evidence supports the findings that the plaintiff was laid off solely to a decline in business and not due to any restrictions due to his injuries. *Id.* at 356-57, 608 S.E.2d at 559. Moreover, we found that these findings supported the Full Commission's conclusion that the "plaintiff's earning capacity [was] not currently affected by the injuries he suffered." *Id.* at 357, 608 S.E.2d at 559. Thus, we affirmed the Full Commission's determination that the plaintiff was not disabled pursuant to N.C. Gen. Stat. § 97-2(9). *Id.*

Like *Segovia*, plaintiff was laid off from his job as an estimator due to the economic downturn. Moreover, the uncontested findings of fact establish that plaintiff's inability to earn his pre-injury wages is not attributable to his injury but is based solely on the large-scale economic downturn affecting the construction industry as a whole. Applying *Segovia*, plaintiff is unable to prove disability since his earnings capacity is not affected by his May 2008 injury. Therefore, we conclude that the Full Commission did not err in concluding that plaintiff is not currently disabled as a result of his injuries and not entitled to disability compensation.

Plaintiff argues that the Full Commission improperly applied the law from *Segovia*; instead, plaintiff contends that *Eudy v. Michelin N. Am., Inc.*, 182 N.C. App. 646, 654, 645 S.E.2d 83, 89, *disc. rev. denied*, 361 N.C. 426, 648 S.E.2d 211 (2007), and *Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 760, 656 S.E.2d 676, 680 (2008), require a conclusion that plaintiff met his burden of proving disability by showing he had diligently searched for work. In other words, plaintiff seems to argue that, pursuant to *Eudy* and *Graham*, an employee whose earning capacity is affected solely by economic factors, not an injury, can still establish a showing of disability by introducing evidence that he has diligently searched for work.

Plaintiff's reliance is misplaced as the facts of *Eudy* and *Graham* are quite different from the present case. In *Eudy*, 182 N.C. App. at 654, 645 S.E.2d at 89, the laid off employee was "not physically able to work

his regular-duty job" and he sought light-duty work he could perform within his physical restrictions. Likewise in *Graham*, 188 N.C. App. at 760, 656 S.E.2d at 680, the laid off employee was not physically capable of performing his former job and sought different work due to the physical restrictions of a hip injury. Here, unlike the employees in *Eudy* and *Graham*, plaintiff is physically able to perform his pre-injury job, and he is seeking and has applied for the same type of position. He is not subject to any restrictions that would affect his ability to work in his pre-injury position. Thus, *Eudy* and *Graham* are not applicable to the present case, and plaintiff's argument is without merit. Instead, based on *Segovia*, the Full Commission did not err in concluding that plaintiff failed to meet his burden of showing he was disabled regardless of his reasonable attempts to find employment.

Conclusion

Based on the foregoing reasons, we hold that the Full Commission did not err in concluding that plaintiff's incapacity to earn his pre-injury wages was not caused by his injuries. Therefore, we affirm the opinion and award of the Full Commission.

AFFIRMED.

Judge McCULLOUGH concurs.

GEER, Judge dissenting.

The sole issue on appeal is whether plaintiff has met his burden in establishing disability arising out of his admittedly compensable injury. Because the Commission's opinion and award does not apply the controlling analytical framework set out in *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), I would reverse and remand. I do not believe that the issue in this case can be resolved without consideration of *Russell* and, yet, the Commission's opinion and award does not even mention *Russell*. Although the majority opinion concludes that *Russell* is inapplicable given the facts of this case, I disagree with its analysis of *Russell*, and I cannot agree that this Court should be addressing the applicability of each of the *Russell* prongs in the first instance. I must, therefore, respectfully dissent.

Both the majority opinion and the Commission's opinion and award point to *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), in which our Supreme Court held that an employee has the burden of proving "(1) that plaintiff was incapable after his injury of

earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." The majority opinion seems to be holding that the *Russell* framework does not encompass the third prong of *Hilliard* requiring proof that the employee's incapacity to earn wages was caused by the compensable injury.

However, the majority opinion and the Commission overlook the holding in *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 545 S.E.2d 485, *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001). This Court, as affirmed by the Supreme Court, explained an employee's burden of proving "the existence of a disability under [the Workers' Compensation Act]." *Id.* at 264, 545 S.E.2d at 489. The Court emphasized that " '[d]isability,' within the meaning of the . . . North Carolina Workers' Compensation Act, is defined as 'incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' " *Id.* (emphasis added) (quoting N.C. Gen. Stat. § 97-2(9) (1999)). In other words, proof of "disability," as defined by the Workers' Compensation Act, encompasses not only proof of an inability to earn the same wages, but also proof that the inability was caused by the compensable injury.

This Court pointed to *Hilliard*, as the majority and the Commission do in this case, regarding what "an employee has the burden of proving" in order "[t]o show the existence of a disability under [the Workers' Compensation Act]":

> To show the existence of a disability under this Act, an employee has the burden of proving:
>
> > (1) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury.
>
> *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). *The employee may meet her initial burden of production by producing:*
>
> > (1) . . . medical evidence that [she] is physically or mentally, as a consequence of the work

> related injury, incapable of work in any employment; (2) . . . evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) . . . evidence that [she] is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) . . . evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.
>
> *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

Demery, 143 N.C. App. at 264-65, 545 S.E.2d at 489-90 (emphasis added).

In other words, to prove "disability" -- which encompasses both incapacity and causation, as *Hilliard* holds -- the employee must meet one of the prongs of *Russell*. If the employee meets that initial burden of production, then "the burden of production shifts to the employer to show that suitable jobs are available and that the employee is capable of obtaining a suitable job taking into account both physical and vocational limitations." *Id.* at 265, 545 S.E.2d at 490 (internal quotation marks omitted). The Court concluded by observing, citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683, that "[t]he burden of proving a disability, however, remains on the employee." *Demery*, 143 N.C. App. at 265, 545 S.E.2d at 490.

I cannot see any way to read *Demery* -- which is an opinion of the Supreme Court by virtue of the *per curiam* affirmance -- as allowing the analysis adopted by the majority opinion and the Commission in this case. While some panels of this Court have suggested that the *Russell* methods of proof apply only to the first two prongs of *Hilliard*, *see, e.g.*, *Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 759, 656 S.E.2d 676, 679 (2008) (explaining that "[t]his Court has stated a claimant may prove the first two prongs of *Hilliard* through" one of four *Russell* prongs), *Demery*, because it was affirmed by the Supreme Court, is controlling.

Consequently, I would hold that the Commission erred in failing to apply the *Russell* analytical framework and also believe the majority opinion misapplies the controlling law. Indeed, the majority opinion

notes that "[t]he purpose of the four-pronged *Russell* test is to provide channels through which an injured employee may 'show a link between wage loss and the work-related injury' as is required by *Hilliard*." (Quoting *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 499, 459 S.E.2d 31, 36 (1995)) A "link" between wage loss and the compensable injury is the causation requirement set out in the third prong of *Hilliard*, which is the basis for the conclusion reached by the Commission and the majority opinion. In other words, *Fletcher*, on which the majority opinion relies, agrees with *Demery* that the *Russell* test not only establishes the method of proving wage loss, but also provides an employee with the method for linking that wage loss to his or her compensable injury.

Here, plaintiff contends that he met his burden of production as to the existence of his disability under *Russell*'s second method of proof. It is undisputed that he is capable of some work, although the record also contains evidence that he has restrictions resulting from the compensable injury. The Commission found that "Dr. Speer restricted Plaintiff from lifting over ten (10) pounds or engaging in repetitive overhead activities." The Commission further found that "[f]ollowing his layoff, Plaintiff sought subsequent employment within the construction industry." The Commission made no finding regarding whether plaintiff's efforts to obtain other employment were reasonable, but plaintiff presented evidence that he made numerous job inquiries and was unable to obtain employment.

I would hold that plaintiff's evidence was sufficient, if believed, to meet the second prong of *Russell*. The burden of production, therefore, would then shift to defendants to show that there were suitable jobs that plaintiff was capable of obtaining. The Commission never shifted the burden to defendants, and its findings do not suggest that defendants met that burden. The Commission's findings establish only that plaintiff was physically capable of performing the duties of his prior position and similar positions with other employers. They do not address whether there were any jobs that plaintiff could actually obtain.

Instead of applying the well-established *Russell* burden-shifting framework, the Commission held, as a matter of law, that "[a] Plaintiff is unable to meet their [sic] burden of proving disability where, but for economic factors, the employee is capable of returning to his pre-injury position." As support for this broad statement, the Commission cites only *Segovia v. J.L. Powell & Co.*, 167 N.C. App. 354, 608 S.E.2d 557 (2004). *Segovia* does not stand for that sweeping proposition, as this Court has previously recognized.

In *Segovia*, the Commission found that " 'the plaintiff's inability to earn wages since March 2001 was due to the layoff and plaintiff's lack of interest in returning to work, and not due to any disability associated with plaintiff's injury.' " *Id.* at 356, 608 S.E.2d at 559. The Commission then found that plaintiff had been offered a part-time job and " '[t]he evidence establishe[d] that work was available which was suitable for plaintiff' " in the marketplace. *Id.* Yet, "plaintiff appeared to be trying to sabotage efforts to find alternative employment." *Id.*

This Court, in affirming, concluded that the Commission's findings were supported by (1) evidence that the plaintiff performed his job satisfactorily and was laid off because of a decline in business, (2) evidence that the parties stipulated plaintiff had no restrictions due to his compensable injury after a specified date, and (3) evidence regarding the plaintiff's vocational rehabilitation and employment prospects. *Id.* at 356-57, 608 S.E.2d at 559. The Court then concluded simply that "[t]hese findings support the full Commission's conclusion that plaintiff's earning capacity is not currently affected by the injuries he suffered to his back and ear." *Id.* at 357, 608 S.E.2d at 559.

Contrary to the Commission's opinion and award in this case, the *Segovia* panel did not hold that an employee "is unable to meet [his] burden of proving disability where, but for economic factors, the employee is capable of returning to his pre-injury position." Critical to the Commission's decision in *Segovia* and this Court's affirmance of that decision was not only the fact that the plaintiff was laid off, but *also* the facts that (1) the plaintiff had no restrictions arising out of his injuries, (2) suitable jobs were available to the plaintiff, and (3) the plaintiff was not interested in returning to work as demonstrated by his interference with efforts to find him alternative employment. In other words, the plaintiff in *Segovia* could not meet his burden under any of the prongs of *Russell*.

This Court has previously expressly rejected attempts to construe *Segovia* in the manner that the Commission did in this case and as the majority opinion does. In *Eudy v. Michelin N. Am., Inc.*, 182 N.C. App. 646, 654, 645 S.E.2d 83, 89 (2007) (emphasis added), the Court explained that in *Segovia*, "[t]his Court . . . held that the Full Commission did not err in denying an employee benefits under the Workers' Compensation Act where the employee was physically able to perform his former job and the employee's inability to earn wages was due to a layoff resulting from a downturn in the economy *and the employee's lack of interest in returning to work*."

Similarly, in *Graham*, although the Commission had concluded that the plaintiff proved disability under the second prong of *Russell*, the defendants argued on appeal, citing *Segovia*, that the Commission erred because the plaintiff's termination from his employment with the defendant employer "was due to an economic downturn and plaintiff's personal misconduct." *Id.* at 758, 656 S.E.2d at 679. This Court affirmed the Commission based on its application of the *Russell* analytical framework. *Id.* at 760, 656 S.E.2d at 680. The Court distinguished *Segovia* by quoting *Eudy*'s description of *Segovia* as involving not just an economic downturn and then noted that while the Commission in *Graham* had properly determined that the plaintiff met his burden of proving disability under the second prong in *Russell*, the plaintiff in *Segovia* was physically able to do his job. *Id.* at 761, 656 S.E.2d at 680.

The Court in *Graham* then further addressed the defendants' argument that the plaintiff could not prove disability because his lack of employment was due to an economic downturn:

> "Defendants have focused on the wrong issue. While the immediate cause of the loss of plaintiff's wages . . . may have been the lay-off, that fact does not preclude a finding of disability. As *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) explained, an injured employee's earning capacity is determined by the employee's own ability to compete in the labor market. Thus, the fact that plaintiff was laid off does not preclude a finding of total disability if, because of plaintiff's injury, he was incapable of obtaining a job in the competitive labor market."

Id., 656 S.E.2d at 680-81 (quoting *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 683, 648 S.E.2d 917, 921 (2007)).

Thus, *Eudy* recognized that *Segovia* involved not only a lay-off, but also an employee who, although able to work, had made no effort to return to work, while *Graham* held that *Segovia* did not apply when an employee had made the showing mandated by *Russell*. *See also Britt*, 185 N.C. App. at 683, 648 S.E.2d at 921 (rejecting defendants' argument that employee was not disabled because his loss of wage earning capacity was not the result of injury by accident but instead was due to economic downturn).

A critical distinction between these cases, as well as this case, and *Segovia* is that the plaintiffs in *Eudy*, *Graham*, and *Britt* were all at least partially disabled, as demonstrated by the existence of physical restrictions -- the issue was whether that disability was causing any wage loss,

just as is true in this case. In *Segovia*, the plaintiff was no longer disabled. He was simply unemployed.

While the majority opinion attempts to distinguish *Eudy* and *Graham* factually, it never addresses those opinions' discussion of *Segovia* or the language in the actual *Segovia* opinion limiting its holding. In addition, the majority opinion incorrectly states that the laid off employee in *Graham* was not physically capable of performing his former job and, for that reason, sought different work. In fact, the defendants in *Graham* contended that the employee, who was an accountant, was fired because of "economics" and poor job performance. 188 N.C. App. at 757, 656 S.E.2d at 678. Neither the Commission nor this Court's opinion in *Graham* suggested that the employee was unable to perform his prior job as an accountant because of his physical restrictions. *Id.* at 756-57, 656 S.E.2d at 678.

Further, the *Segovia* Court could not have reached the conclusion attributed to it by the Commission in this case without running afoul of *Fletcher*. In *Fletcher*, the Commission awarded temporary total disability even though the plaintiff was able to work despite physical restrictions when the plaintiff made extensive, although unsuccessful, efforts to gain employment over 17 months. 119 N.C. App. at 492-93, 459 S.E.2d at 33. The defendants argued that the Commission had misapplied *Russell* by focusing " 'on whether plaintiff was able *to actually obtain* employment' instead of whether plaintiff was capable of earning the same wages." *Id.* at 494, 459 S.E.2d at 34. The defendants asserted that "the holding of the full Commission in reliance upon *Russell* 'in effect convert[ed] temporary total disability [in]to unemployment compensation.' " *Id.* at 495, 459 S.E.2d at 34.

This Court in *Fletcher* affirmed the Commission's award, holding that "an employee who suffers a work-related injury is not precluded from workers' compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment *due to unavailability of jobs*." *Id.* at 500, 459 S.E.2d at 37 (emphasis added).

In reaching this holding, the Court pointed to the purpose of the Workers' Compensation Act: " '[T]he Workers' Compensation Act was enacted to ameliorate the consequences of injuries and illnesses in the workplace and one of those consequences, at least on occasion, is that a recuperated worker capable of holding a job cannot get one. A capable job seeker whom no employer needing workers will hire is not employable.' " *Id.* at 495, 459 S.E.2d at 34 (quoting *Bridges v. Linn-Corriher*

Corp., 90 N.C. App. 397, 399-400, 368 S.E.2d 388, 390 (1988)). *See also id.* at 496, 459 S.E.2d at 35 (" 'The fact that the wage loss comes about through . . . unavailability of employment rather than through incapacity to perform the work does not change the result [of disability].' " (quoting 1C Arthur Larson, *Larson's Workmen's Compensation Law*, § 57-61(a), 10-389-97)).

The Court in *Fletcher* based its holding in part on opinions from Florida and Michigan, finding that "[t]he rationale of the foregoing authorities is sound and consistent with" our Court's holdings in *Russell* and *Bridges*. 119 N.C. App. at 500, 459 S.E.2d at 37. The *Fletcher* Court quoted the Florida District Court of Appeal: " '[I]n the broadest sense, "able to earn" takes into account many factors, *including the availability of jobs*, and such a broad interpretation is consistent . . . with the principle which requires a liberal construction in favor of the injured employee.' " *Id.* at 496, 459 S.E.2d at 35 (emphasis added) (quoting *Regency Inn v. Johnson*, 422 So. 2d 870, 875 (Fla. Dist. Ct. App. 1982)).

With respect to the argument that the Commission in effect converted workers' compensation benefits into unemployment benefits, the Court quoted approvingly the Michigan Supreme Court: " '[A] disabled worker does not bear the burden of unfavorable economic conditions that further diminish his ability to find suitable work.' " *Id.* at 499, 459 S.E.2d at 36 (quoting *Sobotka v. Chrysler Corp.*, 447 Mich. 1, 25, 523 N.W.2d 454, 463 (1994)). The Court further quoted: " 'This means that the partially disabled employee's *only burden* is to show he is unable to earn wages because of his injury, *not that he must show that the economy or other factors are not the cause of unemployment*.' " *Id.* (emphasis added) (quoting *Sobotka*, 447 Mich. at 8 n.5, 523 N.W.2d at 455 n.5).

Regarding the burden of production, the *Fletcher* Court quoted the Michigan Supreme Court: " '[I]t is the employee's burden to show a link between wage loss and the work-related injury. . . [.] [O]nce the employee shows a work-related injury and subsequent wage loss, the factfinder may infer that the employee cannot find a job because of the injury.' " *Id.* (quoting *Sobotka*, 447 Mich. at 25, 523 N.W.2d at 463).

In North Carolina, as this Court acknowledged in *Demery* and *Fletcher*, an employee meets his burden of showing work-related disability through the four-pronged *Russell* test. Once the employee makes that showing, then the Commission may infer that the employee cannot find a job because of his injury. Under *Fletcher*, the employee is *not* required to show " 'the economy or other factors are not the cause of [his] unemployment.' " *Id.* (quoting *Sobotka*, 447 Mich. at 8 n.5, 523 N.W.2d at

455 n.5). Yet, that is precisely the burden that the Commission and the majority opinion have placed on plaintiff in this case: the burden of proving that his unemployment was not due to the economy.

Because I believe, in light of the above authority, that the Commission acted under a misapprehension of law, I would reverse and remand for reconsideration. I believe the Commission should have determined whether plaintiff met his burden of production under *Russell* and, if so, whether defendants met their burden of showing that suitable jobs existed in the economy for plaintiff that he could actually obtain. The Commission swept aside -- unmentioned -- 40 years of authority that has been consistently applied and reached a conclusion that is squarely inconsistent with *Fletcher* and subsequent decisions.

It is too simplistic to assume, as the Commission did and the majority opinion does, that in a down economy, an employable employee with restrictions cannot show that his difficulties in obtaining another job are due to his injury. The *Russell* tests take into account the likelihood that prospective employers may prefer, in difficult economic conditions, to hire employees without restrictions. When presented with applicants who have no restrictions competing for a position with applicants with restrictions, we should recognize not only (1) that the prospective employers may well choose an applicant without restrictions, but also (2) that an employee is unlikely to be able to prove that he lost out on the job because of his restrictions. I, therefore, respectfully dissent.

STATE OF NORTH CAROLINA
v.
MARTY TARRELL GASTON

No. COA13-1

Filed 3 September 2013

Homicide—self-defense—manslaughter—jury instructions—insufficient evidence

The trial court did not err in a homicide case by denying defendant's request for jury instructions on self-defense and voluntary manslaughter. There was insufficient evidence presented at trial to support a conviction of voluntary manslaughter based on a theory of imperfect self-defense.

STATE v. GASTON

[229 N.C. App. 407 (2013)]

Appeal by Defendant from judgment entered 20 July 2012 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2013.

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

Tin Fulton Walker & Owen, PLLC, by Matthew G. Pruden and Noell P. Tin, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence at Trial

This case arises from the shooting death of Larry Gaither ("the decedent"), which occurred at the home of the decedent's cousin, Sheree Thomas ("Thomas"), in the early morning hours of 11 October 2008. On the night of 10 October 2008, the decedent gathered with a number of other individuals at Thomas's home to celebrate Thomas's album release. It is undisputed that, in the early morning hours of 11 October 2008, Marty Tarrell Gaston ("Defendant"), Thomas's then-boyfriend, arrived at Thomas's home for the first time. Defendant and the decedent became involved in an argument. During the argument, Defendant shot and killed the decedent. Testimony regarding the events leading up to and encompassing the killing was offered at trial by a number of individuals who attended the party. From varying perspectives, those individuals testified in pertinent part to the following:[1]

Between 2:30 and 3:00 a.m. on October 11, a Cadillac car arrived at Thomas's house. There were two people in the car. One person, later identified as Defendant, got out and went inside. When Defendant entered the house, he grabbed Thomas by the hair and pulled her up the stairs while she struggled. The decedent became upset and confronted Defendant; they exchanged words. Defendant continued pulling Thomas up the stairs, and the two eventually entered a bedroom and closed the door. After hearing a scream, the decedent entered the bedroom with his cousin and others. Defendant was holding Thomas's gun. There was a gunshot and the decedent fell to the floor. Defendant went down the stairs, out the door, and left Thomas's home.

1. Extensive testimony was offered regarding the details of the evening's events. To the extent those details are irrelevant to the issue raised on appeal, they are not repeated here.

Defendant's testimony largely corroborates the events described in the preceding paragraph. Defendant admitted to grabbing Thomas's hair, but denied pulling her up the stairs. Defendant testified that, after entering the bedroom with Thomas, he heard the decedent say he was going to kill Defendant and "go to his trunk and get a gun . . . that shoot like a missile." Defendant testified that he "got a little scared," picked up Thomas's gun, and opened the door, intending to leave. When Defendant opened the door, the decedent's cousin entered the room and grabbed him around the waist; they began struggling. During the struggle, Defendant heard footsteps and recognized the decedent. He testified that "[t]he gun went off [at that moment]. One time. I didn't aim the gun." He also testified that he did not know anyone had been shot and did not intend to kill the decedent. He stated that he did not pull the trigger on purpose, and that the gun went off accidentally.

Defendant also offered the testimony of his friend, Reginal Lindsey ("Lindsey"), who drove Defendant to Thomas's home on October 11. Lindsey testified that he entered the house and saw the decedent screaming and saying "[a]in't nobody going to do nothing to my cousin." He heard the decedent say "I got some shit out there in the trunk that shoot like a missile" and watched him go outside. The decedent came back in after about thirty seconds and went up the stairs. There was a gunshot, and Defendant came out of the house and left with Lindsey. As they were driving, Defendant disposed of the gun along the road.[2]

During the charge conference, the following exchange occurred between defense counsel and the trial court:

> [DEFENSE COUNSEL]: Well, Your Honor, I would ask for voluntary manslaughter.
>
> THE COURT: Voluntary only comes into play when you have self-defense,[3] which you don't have.
>
> [DEFENSE COUNSEL]: The [c]ourt indicated yesterday [that it] was going to instruct on self-defense.

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2. Defendant, who had been convicted of a felony before the killing in this case, testified that he disposed of the gun because he knew he "wasn't supposed to have a gun . . . ."

3. We note that voluntary manslaughter occurs either (1) "when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation *or* [(2)] in the exercise of [imperfect] self-defense where excessive force is utilized or the defendant is the aggressor." *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986) (emphasis added).

> THE COURT: No. You can't have an accident and self-defense in the same case.
>
> . . .
>
> [DEFENSE COUNSEL]: I believe the [c]ourt should give self-defense.
>
> THE COURT: Well, you can't — self-defense involves an intentional act —
>
> . . .
>
> THE COURT: — by the defendant.
>
> . . .
>
> THE COURT: . . . If it requires an intentional act, it requires proof or evidence that the defendant believed [it] necessary to do what he did to prevent death or grave bodily harm, and there's no evidence of that.
>
> [D]efendant testified that the gun went off. That he didn't intentionally fire it. You can't have self-defense if it's not an intentional act. . . .
>
> [DEFENSE COUNSEL]: Well, the interesting thing there is we're giving a charge of first-degree murder and second-degree murder and that is suggesting there was an intentional act. So there would have to be some evidence of that from somewhere.
>
> THE COURT: Well, I'm not going to give self-defense. You pack this thing up and take it down to Raleigh.

At the conclusion of the trial, the court instructed on first-degree murder, second-degree murder, and accident. Defendant was found guilty of second-degree murder and sentenced to 240 to 297 months in prison.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his request for jury instructions on self-defense and voluntary manslaughter because there was evidence presented at trial to support a conviction of voluntary manslaughter based on a theory of self-defense. We find no error.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797,

803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "An instruction about a material matter must be based on sufficient evidence." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "Where 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). Accordingly, "[t]his Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a lesser[ ]included offense . . . on a *de novo* basis." *State v. Debiase*, 211 N.C. App. 497, 503–04, 711 S.E.2d 436, 441, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 392 (2011) (citations omitted).

As a rule,

> [a] judge presiding over a jury trial must instruct the jury as to a lesser[-]included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser[ ] included offense. In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser[ ]included offense to the jury, courts must consider the evidence in the light most favorable to the defendant. However, if the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than [the] defendant's denial that he committed the offense, [the] defendant is not entitled to an instruction on the lesser offense.

Id. (citations, quotation marks, and certain brackets omitted).

"Voluntary manslaughter is an intentional killing without malice committed either in the heat of passion or through imperfect self-defense resulting in [sic] excessive force." *State v. West*, 180 N.C. App. 664, 668, 638 S.E.2d 508, 511 (2006) (citation omitted). Defendant does not contend that his killing of the decedent was committed in the heat of passion. Accordingly, our review is limited to whether there is substantial evidence of imperfect self-defense sufficient to require an instruction on voluntary manslaughter.

An instruction on imperfect self-defense and, thus, voluntary manslaughter is necessary when two questions are answered in the affirmative:

> (1) Is there evidence that the defendant in fact *formed a belief* that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Wallace, 309 N.C. 141, 148, 305 S.E.2d 548, 553 (1983) (emphasis added). When determining whether there is sufficient evidence to show that the defendant formed such a belief, the facts must be interpreted in the light most favorable to the defendant. *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986). If the court finds that the evidence is sufficient to submit the issue to the jury, then it is for the jury to determine the reasonableness of the defendant's belief that self-defense was warranted under the circumstances as they appeared to him. *Id.* at 728, 348 S.E.2d at 150.

The State argues that the evidence here cannot support a self-defense instruction and, thereby, an instruction on voluntary manslaughter because Defendant testified that the gun simply "went off," he "didn't aim the gun," he did not know anyone had been shot, he did not pull the trigger on purpose, and he did not intend to kill the decedent. Accordingly, the State contends, the trial court did not err in failing to submit either instruction to the jury. We agree.

In *State v. Williams*, our Supreme Court held that

> [the] defendant [was] not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone[,] and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996). The Court affirmed that conclusion six years later in *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002). There the defendant testified that he "felt afraid[,] fired two shots into the floor of [his] trailer as he ran outside. . . . [,] did not intend to hit anyone[,] and denied shooting either his wife or [the police chief]." *Id.* at 30, 558 S.E.2d at 130. Given that testimony, the Court determined

that "there was no evidence to support a finding that [the] defendant in fact formed a belief that it was necessary to kill either his wife or [the police chief] to protect himself from death or serious injury." *Id.* Accordingly, the Court concluded that it was error for the trial court to instruct on self-defense, pointing out that "the gratuitous instructions on self-defense [were] error favorable to [the] defendant," which constituted "a benefit to which he was not entitled." *Id.* at 31, 558 S.E.2d at 131.

Defendant attempts to rebut the State's argument by citing to a line of cases from this Court which, he contends, appear to directly conflict with *Williams* and *Nicholson*. Defendant argues that the question of "whether he was guilty of voluntary manslaughter on a theory of self-defense" should have been submitted to the jury under *those cases* because there was evidence presented at trial to support such a conviction. We disagree.

In *State v. Adams*, 2 N.C. App. 282, 163 S.E.2d 1 (1968), we determined that the trial judge erred by failing to instruct the jury on self-defense when the defendant shot and killed the decedent, even though

> the defendant contended that the actual discharge of the gun was not intended [and] also contended that he hid the loaded gun in the garage and later took it in his hands for the purpose of protecting his mother from serious harm or death at the hands of his father.

Id. at 288, 163 S.E.2d at 5. Pointing out that "[t]he defendant may rely on more than one defense" at trial, we allowed an instruction on self-defense, despite the defendant's contrary testimony, because "[p]roper instructions on self-defense and defense of another would have enabled the jury to determine whether the defendant was justified in having the loaded gun in his possession at the time of the fatality." *Id.* (citation omitted) (commenting that "[t]he tender age of the defendant[4] presented a more compelling reason why the jury should have been charged on the principles of self-defense and defense of another in addition to the defense of accident"); *see also State v. Owens*, 60 N.C. App. 434, 436, 299 S.E.2d 258, 259 (1983) (requiring the submission of voluntary manslaughter to the jury despite the defendant's testimony that he pulled his pistol out of fear of the victim and did not intend to shoot the victim, because "the jury could have concluded that [the] defendant intentionally fired the gun in self-defense but used excessive force").

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4. The defendant in *Adams* was a 14-year-old boy. *Adams*, 2 N.C. App. at 284, 163 S.E.2d at 2. Defendant Gaston was 37 years old at the time of the shooting in this case.

In *State v. Hayes*, 88 N.C. App. 749, 364 S.E.2d 712 (1988), the defendant was indicted for first-degree murder. *Id.* at 750, 364 S.E.2d at 712. At trial, she testified that she pulled out a knife to protect herself from the victim, who she believed was "trying to seriously injure her." *Id.* "[The victim] then 'charged' [the] defendant and impaled himself on the knife. [The d]efendant testified that she did not intend to stab [the victim]." *Id.* We held in *Hayes* that the trial court erred by failing to instruct on self-defense when the State's evidence tended to show that the killing was intentional and the defendant's evidence tended to show that the killing was unintentional because "the jury is free to believe all, some[,] or none of a particular witness's testimony." *Id.* at 751, 364 S.E.2d at 713. In so holding, we reasoned that:

> [T]he jury could have believed that portion of the State's evidence tending to show an intentional stabbing while also believing that part of [the] defendant's evidence tending to show [that the] defendant pulled the knife to protect herself from serious injury at the hands of [the victim]. *The contradictory statements made at trial do not cancel out the testimony given. Evidence of contradictory statements bear[s] on the weight to be given the testimony — a question for the jury.*

Id. at 752, 364 S.E.2d at 713 (citation, quotation marks, brackets, and ellipsis omitted).

To the extent that these cases conflict with the Supreme Court opinions cited by the State,[5] we find that *Adams*, *Hayes*, and their progeny have been implicitly overruled by *Williams* and *Nicholson* on the issue of whether an instruction on self-defense is proper when the defendant offers no evidence that he intended to kill the decedent upon reasonably believing that he must do so to save himself. *See Williams*, 342 N.C. at 873, 467 S.E.2d at 394; *Nicholson*, 355 N.C. 1, 558 S.E.2d 109; accord *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) (finding no error when the trial court failed to instruct on self-defense and "[the] defendant's own testimony regarding his thinking at the critical time [made clear that he intended] to scare or warn and did not intend to shoot anyone"); *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789–90 (1994) (holding that the defendant could not claim self-defense when he asserted that he did not aim his gun at the victim and did not hold the

5. We emphasize that we do not conclude that there is a conflict between the two lines of cases. The earlier opinions of the Court of Appeals obviously involve multiple distinguishing features, none of which is present here.

weapon that killed the victim); *State v. Blankenship*, 320 N.C. 152, 155, 357 S.E.2d 357, 359 (1987) ("[The d]efendant's evidence tended to show that the shooting was an accident. The trial court gave proper instructions to the jury concerning the defense of accident. The evidence did not warrant more."); *Wallace*, 309 N.C. at 148–49, 305 S.E.2d at 553 (holding that the evidence presented at trial would not support a finding of not guilty by reason of self-defense or a verdict of guilty of voluntary manslaughter where defendant's evidence indicated that he did not shoot the deceased intentionally); *State v. Mize*, 316 N.C. 48, 54, 340 S.E.2d 439, 443 (1986) ("[The defendant's] testimony that he did not aim the shotgun to kill [the victim] avails him to nothing. If this were true, the first requirement of self-defense, that [the] defendant believed it necessary to kill the victim, would not be met."); *State v. Bush*, 307 N.C. 152, 159–60, 297 S.E.2d 563, 568 (1982) ("[The] defendant's self-serving statements that he was 'nervous' and 'afraid' and that he thought he was 'protecting himself' [do not] amount to evidence that the defendant had formed any subjective belief that it was necessary to kill the deceased in order to save himself from *death* or *great bodily harm*.") (emphasis in original).

In this case, Defendant offered no evidence that he formed any belief, reasonable or not, that it was necessary to kill the decedent in order to protect himself from death or great bodily harm. Instead, Defendant repeatedly testified that he did not intend to kill the decedent, stating that he did not aim the gun, the gun went off accidentally, and he did not intentionally pull the trigger. The fact that Defendant testified he was "a little scared" is inapposite. *See Nicholson*, 355 N.C. at 30, 558 S.E.2d at 130. Therefore, as our Supreme Court noted in *Williams*, Defendant's own testimony disproves the first element of self-defense. 342 N.C. at 873, 467 S.E.2d at 394. Accordingly, we hold that the trial court committed no error in instructing the jury on accident and failing to instruct the jury on self-defense and voluntary manslaughter.

NO ERROR.

Judges BRYANT and DILLON concur.

STATE OF NORTH CAROLINA
v.
DOROTHY HOOGLAND VERKERK

No. COA12-1579

Filed 3 September 2013

Search and Seizure—motor vehicle stop—fire department lieutenant—government agent—reasonable suspicion

The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence that was obtained as the result of a vehicle stop performed by a lieutenant of the Chapel Hill Fire Department. The case was remanded for further findings as to whether the lieutenant was acting as a government agent or a private citizen at the time that he stopped defendant's vehicle; (2) whether, if the lieutenant was acting as a government agent at the time that he stopped Defendant's vehicle, the stop was supported by the necessary reasonable articulable suspicion; and (3) whether, in the event that the stop of defendant's vehicle was not supported by the necessary reasonable articulable suspicion, the evidence obtained by officers of the Chapel Hill Police Department must be suppressed.

Judge ROBERT C. HUNTER concurs in part and dissents in part.

Appeal by defendant from judgment entered 7 September 2012 by Judge A. Robinson Hassell in Orange County Superior Court. Heard in the Court of Appeals 22 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Lauren D. Tally, for the State.

Law Office of Matthew Charles Suczynski, PLLC, by Matthew C. Suczynski and Michael R. Paduchowski, for Defendant-appellant.

ERVIN, Judge.

Defendant Dorothy Hoogland Verkerk appeals from a judgment sentencing her to a term of 24 months imprisonment and suspending that sentence for a period of 18 months on the condition that she serve an active term of 30 days imprisonment, be on supervised probation for a period of 18 months, comply with the usual terms and conditions of

probation, pay a $1,000.00 fine and the costs, perform 72 hours of community service, and not drive until properly licensed to do so based upon her conviction for driving while impaired. On appeal, Defendant argues that Judge Elaine Bushfan erred by denying her motion to suppress evidence that she contends was obtained as the result of an unconstitutional vehicle stop performed by Lieutenant Gordon Shatley of the Chapel Hill Fire Department. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's conviction must be vacated and that this case must be remanded to the Orange County Superior Court for the entry of a new order containing findings of fact and conclusions of law that adequately address the issues raised by Defendant's suppression motion.

I. Factual Background

A. Substantive Facts

At around 10:30 p.m. on 27 May 2011, Lieutenant Shatley was dispatched to 1512 East Franklin Street in Chapel Hill in response to a fire alarm. At the time that Lieutenant Shatley's fire engine stopped at the intersection of Estes Drive and Fordham Boulevard, he noticed a light-colored Mercedes approaching the intersection on his left. Although there was a "pouring downpour," the headlights on the Mercedes were not on. Instead, the Mercedes was illuminated solely by an interior dome light and auxiliary front lights. A window in the Mercedes was partially down despite the rain, and the vehicle was stopped partway into the intersection, "further out into the road than you would normally stop at a stoplight."

After the traffic light turned green, Lieutenant Shatley's fire engine continued on its way to the location associated with the fire alarm. Upon arriving at the location to which he had been dispatched, Lieutenant Shatley learned that another fire engine had already responded to the call and that he could return to the fire station. As he drove back towards the fire station along Fordham Boulevard, Lieutenant Shatley saw the same Mercedes ahead of him. An amber light, which appeared to be either a turn signal or a hazard light, on the vehicle was flashing. Although the Mercedes did not appear to be moving at the time that he first saw it, Lieutenant Shatley observed as the fire engine drew closer that was it proceeding at approximately 30 m.p.h., some fifteen miles per hour below the posted speed limit of 45 m.p.h. In addition, the Mercedes repeatedly weaved over the center line before moving to the far right fog line. After making these observations, Lieutenant Shatley radioed police communications, reported that he was following a possibly impaired

driver, and provided his location and a description of the vehicle in question.

After the Mercedes exited onto Raleigh Road, which was the same direction that the fire engine needed to go in order to return to the station, Lieutenant Shatley followed it. As it entered the ramp leading to Raleigh Road, the Mercedes drove out of its lane and onto an area marked "not for traffic." Upon entering Raleigh Road, the Mercedes got into the center lane; however, it continued to weave in and out of its lane of travel. As Lieutenant Shatley followed the Mercedes, he observed that, upon approaching an intersection simultaneously with a passing bus, the Mercedes drifted into the bus' lane of travel and came within three feet of hitting it. At an intersection, Lieutenant Shatley made another call to report the location of a possibly impaired driver.

As the Mercedes continued to weave in and out of its lane of travel and other vehicles were passing both the fire truck and the Mercedes, Lieutenant Shatley instructed the fire truck's driver to activate the vehicle's red lights. Lieutenant Shatley did not order that this action be taken in order to effectuate a "traffic stop;" instead, Lieutenant Shatley acted in this manner in the hope that other cars would stop passing them. Lieutenant Shatley testified that, if the car had not stopped, he intended to continue following it and providing police communications with additional updates concerning the vehicle's location.

At the time that Lieutenant Shatley activated the fire engine's red lights and tapped the siren twice, the Mercedes drifted to the right in an abrupt manner and hit the gutter curbing with sufficient force that sparks resulted from the contact that the rim of the Mercedes made with the curbing before coming to a stop. Once the fire truck had stopped behind the Mercedes, Lieutenant Shatley called police communications to report the vehicle's location and then spoke with Defendant, who was driving the Mercedes. Lieutenant Shatley did not ask Defendant if she had been drinking or request that she perform field sobriety tests. However, when Defendant asked why he had stopped her, Lieutenant Shatley explained that he was "concerned because of her driving" and "just wanted to make sure she was okay."

After speaking with Defendant for a few minutes without hearing anything from the Chapel Hill Police Department, Lieutenant Shatley, who had intended to ask one of the assistant firefighters to park Defendant's car, inquired of Defendant as to whether she would be willing to park her car and have someone pick her up. Although Defendant agreed to this request, she then "drove off" while Lieutenant Shatley

"just stood there" and watched as she turned onto Environ Way, a side street to the right of Raleigh Road.

Shortly after Defendant drove off, officers of the Chapel Hill Police Department arrived on the scene. Lieutenant Shatley reported the observations that he had made about Defendant's driving and pointed out her vehicle to investigating officers. Upon receiving the information which Lieutenant Shatley provided, officers of the Chapel Hill Police Department pursued Defendant and stopped her vehicle. In the meantime, Lieutenant Shatley left the scene and returned to the fire station. To the best of Lieutenant Shatley's recollection, about "ten minutes maybe" had elapsed between the time he activated his red lights and the time at which officers of the Chapel Hill Police Department arrived.

B. Procedural History

On 27 May 2011, a citation charging Defendant with driving while impaired and driving while license revoked was issued. On 10 January 2012, Judge Lunsford Long found Defendant guilty of driving while impaired and entered a judgment imposing a Level I punishment. On 19 January 2012, Defendant noted an appeal to the Orange County Superior Court for a trial *de novo*.

On 23 July 2012, Defendant filed a motion seeking to have any evidence obtained as a result of the stopping of her vehicle suppressed. A hearing on Defendant's suppression motion was held before Judge Bushfan on 2 August 2012.[1] On 23 August 2012, Judge Bushfan entered an order denying Defendant's suppression motion on the grounds that (1) the stopping of Defendant's Mercedes did not constitute a seizure for Fourth Amendment purposes; (2) in the alternative, if the stopping of Defendant's vehicle constituted a seizure, it represented a lawful detention by a private citizen as authorized by N.C. Gen. Stat. § 15A-404(b); and (3) in the alternative, if the stop of Defendant's car constituted a seizure that was not authorized by N.C. Gen. Stat. § 15A-404, the seizure in question was neither a violation of Defendant's constitutional rights nor the result of a substantial violation of any provision of Chapter 15A of the North Carolina General Statutes.

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1. At the hearing concerning Defendant's suppression motion, the State rested after offering Lieutenant Shatley's testimony and Defendant refrained from presenting any evidence. At the time that the State rested, the prosecutor informed Judge Bushfan that, while he had other witnesses available, he believed that Lieutenant Shatley's testimony sufficed to support the denial of Defendant's suppression motion and had decided to rely on his testimony without supplementation by the testimony of other witnesses for that purpose.

On 7 September 2012, Defendant entered a negotiated plea of guilty to driving while impaired and stipulated that she was subject to Level I punishment on the understanding that the State would voluntarily dismiss the driving while license revoked charge and that sentencing would be in the discretion of the court. In the transcript of plea which embodied her plea agreement, Defendant specifically reserved the right to seek appellate review of the denial of her suppression motion. After accepting Defendant's plea, the trial court entered a judgment sentencing Defendant to a term of 24 months imprisonment and suspending that sentence for a term of 18 months on the condition that Defendant serve an active term of 30 days imprisonment, be subject to supervised probation for a period of 18 months, pay a $1,000.00 fine and the costs, comply with the usual terms and conditions of probation, perform 72 hours of community service, and not drive until properly licensed to do so. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). "When findings of fact are not challenged on appeal, 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " *State v. Washington*, 193 N.C. App. 670, 672, 668 S.E.2d 622, 624 (2008) (quoting *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks omitted)), *disc. review denied*, 363 N.C. 138, 674 S.E.2d 420 (2009). "Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Cathcart*, __ N.C. App __, __, 742 S.E.2d 321, 323 (2013) (quoting *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (internal citations and quotation marks omitted)). "'[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001). As a result, when "the trial court mistakenly applies an incorrect legal standard in determining whether a defendant's constitutional rights have been violated for purposes of a motion to suppress, the appellate court must remand the matter to

the trial court for a 'redetermination' under the proper standard." *State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 399 (2009) (quoting *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001)).

B. Seizure

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Although potentially brief and limited in scope, a traffic stop is considered a 'seizure' within the meaning of these provisions." *State v. Otto*, 366 N.C. 134, 136-37, 726 S.E.2d 824, 827 (2012) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979)). "Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). For that reason, "reasonable suspicion is the necessary standard for traffic stops[.]" *Styles*, 362 N.C. at 415, 665 S.E.2d at 440 (citations omitted). "As articulated by the United States Supreme Court in *Terry*, the stop must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " *Otto*, 366 N.C. at 137, 726 S.E.2d at 827 (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906) (citations omitted). "The only requirement [for reasonable suspicion] is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 11 (1989) (internal quotation marks omitted)). As a result of the fact that the record clearly reflects that Defendant stopped her Mercedes following activation of the flashing lights and siren with which the fire engine that Lieutenant Shatley commanded was equipped, we have no hesitation in concluding that, assuming that the other prerequisites for the application of the exclusionary rule exist, the stopping of Defendant's car constituted a "seizure" for Fourth Amendment purposes and that the trial court erred by reaching a contrary conclusion. Having made that determination, we must now address a number of other issues which are clearly present given the unusual set of facts which exist in this case.[2]

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2. The remainder of this opinion will focus upon Defendant's constitutional challenge to the trial court's order. Although Defendant states on a number of occasions in her brief that her suppression motion should have been allowed pursuant to N.C. Gen. Stat. § 15A-974(a)(2) (requiring the suppression of evidence obtained "as a result of a substantial violation of the provisions of this Chapter" committed in the absence of "an objectively

C. Lieutenant Shatley's Status

"The Exclusionary Rule was established in *Weeks v. United States*, 232 U.S. 383, [34 S. Ct. 341,] 58 L. Ed. 652 [] (1914), as applicable to federal law enforcement officials and was made binding on the states [and was overruled in part on other grounds] in *Mapp v. Ohio*, 367 U.S. 643, [81 S. Ct. 1684,] 6 L. Ed. 2d 1081 [] (1961). The Rule is a court-established remedy primarily for violation of the Fourth Amendment guarantee against 'unreasonable searches and seizures' and is designed to remedy police misconduct." *State v. Stinson*, 39 N.C. App. 313, 316, 249 S.E.2d 891, 893, *disc. review denied*, 296 N.C. 739, 254 S.E.2d 180 (1979). "The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents. This protection does not extend to evidence secured by private searches, even if conducted illegally. The party challenging admission of the evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny." *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990) (citing *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921), and *United States v. Snowadzki*, 723 F.2d 1427 (9th Cir. 1984), *cert. denied*, 469 U.S. 839, 105 S. Ct. 140, 83 L. Ed. 2d 80 (1984)), *cert. denied*, 498 U.S. 1051, 111 S. Ct. 763, 112 L. Ed.2d 782 (1991). "When a private party has engaged in a search and has seized property or information, the protections of the fourth amendment apply only if the private party 'in light of all the circumstances of the case, must be regarded as having acted as an instrument or agent of the State.' Once a private search has been completed, subsequent involvement of government agents does not transform the original intrusion into a government search." *State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 2048-49, 29 L. Ed. 2d 564, 595 (1971), *abrogated in part on other grounds as stated in Horton v. California*,

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reasonable good faith belief that the actions were lawful" considering "[t]he importance of the particular interest violated," "[t]he extent of the deviation from lawful conduct," "[t]he extent to which the violation was willful," and "[t]he extent to which exclusion will tend to deter future violations of this Chapter"), she has failed to advance an argument that explains why any evidence obtained as a result of the stopping of her Mercedes should be suppressed pursuant to N.C. Gen. Stat. § 15A-974(a)(2). As a result, we conclude that Defendant has abandoned any contention to the effect that her suppression motion should have been allowed on the grounds that the evidence in question was obtained as a result of a substantial violation of Chapter 15A of the North Carolina General Statutes. *See* N.C.R. App. P. 28(b)(6) (providing that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990)), and citing *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976)).

"[D]etermining whether a private citizen's search or seizure is attributable to the State and therefore subject to constitutional scrutiny demands a totality of the circumstances inquiry. Factors to be given special consideration include the citizen's motivation for the search or seizure, the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422. "Where a search [or seizure] is conducted by a private citizen, but only after the government's initiation and under their guidance, it is in reality a search by the sovereign, and is subject to the Fourth Amendment." *State v. Hauser*, 115 N.C. App. 431, 436, 445 S.E.2d 73, 77 (1994) (citing *State v. Keadle*, 51 N.C. App. 660, 663, 277 S.E.2d 456, 459 (1981)), *aff'd*, 342 N.C. 382, 464 S.E.2d 443 (1995).

In *Keadle*, a university residence hall advisor found evidence of theft during an inspection of a student's dormitory room. The trial court granted the defendant's suppression motion, ruling that the residence hall advisor "acted as an agent of the state in a quasi-law enforcement capacity when he conducted his search of defendant's dorm room." *Keadle*, 51 N.C. App at 661, 277 S.E.2d at 458. On appeal, this Court reversed the trial court's decision, stating that:

> [W]here an unreasonable search is conducted by a governmental law enforcement agent, it is subject to the restraints of the fourth amendment and the exclusionary rule. Moreover, where a search is conducted by a private citizen, but only at the government's initiation and under their guidance, it is not a private search but becomes a search by the sovereign. However, a search not so purely governmental must be judged according to the nature of the governmental participation in the search process. In the instant case, we have one of those vague factual situations requiring that we look at all of the circumstances to assess the amount of governmental participation and involvement, if any, either through the resident advisor's contact with the government as an employee of the University of North Carolina or through direct governmental initiation and guidance of the search procedure. . . . [T]here is no evidence that law enforcement officials had any part whatsoever in [the advisor's] initial search of defendant's room. . . . As a resident advisor in a dormitory,

> he had neither the status nor the authority of a law enforcement officer. It would serve no useful function as a deterrent to illegal governmental searches to apply the exclusionary rule in this instance.

Keadle at 663-64, 277 S.E.2d at 459.

Although *Keadle* is one of a relatively limited number of North Carolina cases that address the question of whether a state or local government employee who conducts what would otherwise be a search or seizure and who lacks law enforcement authority as a matter of state or local law is acting as a private citizen or as an arm of the State, the factors identified in *Sanders* and the manner in which those factors are applied in *Keadle* are similar to the approach which has been taken in other jurisdictions in addressing issues of this nature. For example, in *United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010), the Court stated that

> First of all, under the applicable test, "[t]he defendant bears the burden of proving that an agency relationship exists" between the Government and the private individual. . . . [The] "two primary factors" to be considered [are]: (1) "whether the Government knew of and acquiesced in the private" individual's challenged conduct; and (2) "whether the private individual intended to assist law enforcement or had some other independent motivation."

(quoting *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003), *cert. denied*, 540 U.S. 1185, 124 S. Ct. 1457, 158 L. Ed. 2d 90 (2004)) (internal citation omitted).

A factual situation similar to this case was present in *State v. Lavergne*, 991 So. 2d 86 (La. App. 2008), *cert. denied*, 1 So. 3d 494 (La. 2009), in which, after a volunteer firefighter stopped a suspected impaired driver, a state trooper arrived and arrested him. In light of the defendant's appeal from the denial of his suppression motion, the Louisiana Court of Appeals considered "[w]hether a Texas volunteer fireman who had activated emergency lights and sirens on his vehicle, who was reasonably believed to be a police officer, was acting under the color of state law when he stopped another vehicle." *Lavergne*, 991 So. 2d at 88. The defendant argued, on the one hand, that, "by activating his emergency lights and sirens, [the firefighter] was acting under the color of state law when he stopped the defendant's vehicle" and that, because the defendant "reasonably believed that [the firefighter] was a law enforcement official, [his] actions should be attributable to the state."

Id. The State, on the other hand, argued that the trial court had correctly ruled that the fireman was acting as a private citizen. In addressing the parties' arguments, the Court stated that:

> Useful criteria in determining whether an individual was acting as a private party or as an instrument or agent of the government are: (1) whether the government knew of and acquiesced in the intrusive conduct; (2) whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends; (3) whether the private actor acted at the request of the government; and (4) whether the government offered the private actor a reward.

Lavergne at 89 (citing *United States v. Ginglen*, 467 F. 3d 1071, 1074 (7th Cir. 2006)). After engaging in the required analysis, the Court determined that the trial court had not erred by concluding that the firefighter "acted as a private citizen in this case" given that "there is no evidence that [he] acted under the instruction of law enforcement;" that his "possession and utilization of a siren and emergency lights, items customarily used by police, did not automatically convert his actions to government actions;" and that the firefighter "stated that his primary motivation for stopping the defendant was not to assist law enforcement, but to prevent 'an accident that was going to happen any second.' " *Id.*

A number of other decisions from other jurisdictions provide additional examples of the manner in which this basic principle has been applied in particular situations. For example, in *State v. Brittingham*, 296 Kan. 597, 604, 294 P.3d 263, 268 (2013), the Kansas Supreme Court addressed the issue of whether information obtained by a housing inspector who had observed the presence of drugs in an apartment should be suppressed. In holding that the housing inspector was acting as a private citizen, the Court stated that:

> [The defendant] contends that our decision in *[State v.] Smith*, 243 Kan. 715, 763 P.2d 632 [(1988)] . . . establishes that, in this State, any government employee is subject to the constitutional prohibition against unreasonable searches and seizures any time that employee is acting within the scope of his or her employment. . . . [However, *Smith* held] that a government employee will be treated like a private citizen for Fourth Amendment search and seizure purposes where the person was acting outside of the scope of the employee's governmental duties and not

> at the instigation of or in collusion with other government officials or agents.

Similarly, in *United States v. Verlin*, 979 F. Supp. 1334 (1997), a civil process server observed illegal activity while on a hunting trip. Although the defendant sought the entry of an order suppressing the evidence obtained by the process server, the trial court held that the process server, who had no authority to effectuate an arrest, search, or seizure, was acting as a private citizen:

> At the time he "seized" Verlin and "searched" Verlin's property, Leihsing was not an agent of either the state or federal government. . . . The mere fact that the Kansas code of civil procedure permits a person such as Leihsing to serve, levy and execute process, does not mean that every act taken by that person, no matter when or where, is automatically an act which would implicate the Fourth Amendment.

Verlin, 979 F. Supp. at 1337. Thus, the extent to which a particular person is a governmental agent or a private person hinges upon a detailed factual analysis which carefully considers all relevant facts and circumstances.

In his brief, Defendant argues that the trial court erred by ruling that, when Lieutenant Shatley used his fire engine's red lights and siren to stop her car, he was not a "State actor." However, the trial court never directly decided this issue, even though it did state in one of its conclusions of law that:

> If a vehicle seizure did occur, it was a lawful detention of the defendant pursuant to [N.C. Gen. Stat.] § 15A-404(b), which allows any private citizen to "detain another person when he has probabl[e] cause to believe that the person detained has committed, in his presence: (2) A breach of the peace[.]"

Although the language in which this conclusion is couched suggests that the trial court believed that any seizure that resulted from Lieutenant Shatley's conduct represented the act of a private citizen rather than that of a governmental actor, the trial court never explicitly determined Lieutenant Shatley's status or made the findings necessary to conduct the required analysis. More specifically, the trial court made no findings relating to (1) Lieutenant Shatley's authority or lack thereof to effect a traffic stop; (2) the degree, if any, to which law enforcement officers asked or encouraged Lieutenant Shatley to stop

Defendant or took any other action which had the effect of precipitating the stopping of Defendant's vehicle; (3) whether Lieutenant Shatley stopped Defendant for law enforcement-related reasons or because he wanted to protect Defendant and the public from the consequences of her erratic driving; and (4) any other facts which bear on the question of whether Lieutenant Shatley acted as a private or governmental actor. As a result, given that we believe that the trial court could resolve this issue in different ways based upon the findings of fact which it makes in light of the credible record evidence, we conclude that the trial court's judgment must be vacated and that this case must be remanded to the Orange County Superior Court for entry of a new order containing findings of fact and conclusions of law addressing the issues raised by Defendant's suppression motion based upon an application of the proper legal standard. If, after hearing any additional evidence that it deems necessary and making the necessary finding, the trial court concludes that Lieutenant Shatley acted as a private citizen rather than as a governmental agent at the time that Defendant's vehicle was stopped, then the trial court should deny Defendant's suppression motion and reinstate the trial court's judgment. On the other hand, if the trial court determines that Lieutenant Shatley was acting as a governmental agent at the time of the challenged traffic stop, the trial court should make additional findings and conclusions addressing the constitutionality of the stopping of Defendant's vehicle on the basis of the criteria set out later in this opinion.

Our dissenting colleague argues that this case need not be remanded to the trial court for further proceedings because "the trial court's findings establish that [Lieutenant Shatley] was a state actor[.]" According to our dissenting colleague, this determination is necessitated by the fact that Lieutenant Shatley stopped Defendant "with the use of" the lights and sirens with which his fire engine was equipped and while he was on duty and wearing his firefighter's uniform. In reaching this conclusion, our dissenting colleague overlooks the fact that, under the relevant legal standard, the undisputed evidence indicates that Lieutenant Shatley's decision to stop Defendant was made without any knowledge of or encouragement by the Chapel Hill Police Department or any other law enforcement agency and that the reason given by Lieutenant Shatley for stopping Defendant stemmed from his concern for the safety of Defendant and other drivers rather than out of a desire to apprehend Defendant and ensure that she was criminally charged. Our research has not revealed the existence of any reported decision in this or any other jurisdiction holding that an individual was acting as a government agent for Fourth Amendment purposes based solely on the fact that lights and

sirens present on official equipment were used, the fact that the individual in question was wearing a uniform, or the fact that the individual in question possessed other trappings of authority, such as a firearm or badge. As a result, although we express no opinion as to the nature of the result that the trial court should reach on remand or the extent to which the trial court should hear additional evidence before making its decision, we do believe that the trial court's existing findings do not permit a proper resolution of the issue of whether Lieutenant Shatley was acting as a private person or a governmental actor and that further proceedings must be held in the trial court in order to permit a proper resolution of that issue.

D. Constitutionality of the Stop of Defendant's Vehicle

The Fourth Amendment to the United States Constitution protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. The United States Supreme Court has uniformly applied a reasonableness standard in determining whether a search or seizure conducted by a governmental actor passes constitutional muster, regardless of whether the individual in question is a sworn law enforcement officer. In fact, according to clearly established federal constitutional law, the extent to which a governmental actor is statutorily authorized to conduct searches and seizures has no bearing on the required constitutional inquiry. Instead, the constitutionality of all searches and seizures conducted by a governmental actor must be evaluated according to the applicable constitutional standard - the existence of probable cause for an arrest or the existence of reasonable articulable suspicion for an investigative detention.

For example, in *Virginia v. Moore*, 553 U.S. 164, 166, 128 S. Ct. 1598, 1601, 170 L. Ed. 2d 559, 564 (2008), the United States Supreme Court evaluated a challenge to the constitutionality of an arrest that was "based on probable cause but prohibited by state law." The Virginia courts had held that, since the officers in question lacked the authority to make the challenged arrest as a matter of state law, the seizure in question violated the Fourth Amendment. In reversing the Virginia court's decision, the United States Supreme Court noted that it had previously "concluded that whether state law authorized the search was irrelevant" and that "'whether or not a search is reasonable within the meaning of the Fourth Amendment' . . . has never 'depend[ed] on the law of the particular State in which the search occurs.' " *Moore*, 553 U.S. at 171-72, 128 S. Ct. at 1604, 170 L. Ed. 2d at 568 (citing *Cooper v. California*, 386 U.S. 58, 61, 87 S. Ct. 788, 790, 17 L. Ed. 2d 730, 733 (1967), and quoting *California*

v. Greenwood, 486 U.S. 35, 43, 108 S. Ct. 1625, 1630, 100 L. Ed. 2d 30, 39 (1988). In addition, the Court noted:

> We have applied the same principle in the seizure context. *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), held that police officers had acted reasonably in stopping a car, even though their action violated regulations limiting the authority of plainclothes officers in unmarked vehicles. We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices-even practices set by rule.

As a result, the Court held "that[,] while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections," *Moore* at 176, 128 S. Ct. at 1607, 170 L. Ed. 2d at 570-71, and that, "[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest[.]" *Moore* at 178, 128 S. Ct. at 1608, 170 L. Ed. 2d at 571-72.

More recently, in *City of Ontario v. Quon*, __ U.S. __, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010), the United States Supreme Court addressed the constitutional implications of "the assertion by a government employer of the right . . . to read text messages sent and received on a pager the employer owned and issued to an employee." *Quon*, __ U.S. at __, 130 S. Ct. at 2624, 177 L. Ed. 2d at 221. In its opinion addressing that issue, the United States Supreme Court stated that:

> Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated [18 U.S.C. § 2701 *et seq.*, or the Stored Communications Act] by giving the City the transcripts of Quon's text messages. . . . [E]ven if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that petitioners' actions were unreasonable. Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment. And the precedents counsel otherwise.

Quon, __ U.S. at __, 130 S. Ct. at 2632, 177 L. Ed. 2d at 230 (citing *Moore* and *Greenwood*). This Court and the Supreme Court have reached the same essential conclusion concerning the relationship between the protections afforded by state law and those afforded by the Fourth

Amendment. For example, in *State v. Gwyn*, 103 N.C. App. 369, 371, 406 S.E.2d 145, 146, *disc. review denied*, 330 N.C. 199, 410 S.E.2d 498 (1991), this Court clearly stated that:

> Under *Mapp v. Ohio*, 367 U.S. 643, [81 S. Ct. 1684,] 6 L.Ed.2d 1081 (1961), the test for suppressing evidence following an arrest is not the legality of the arrest, but whether the stop and search was unreasonable. Our Supreme Court has stated that an illegal arrest is not necessarily an unconstitutional arrest, *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973), and in *State v. Mangum*, 30 N.C. App. 311, 226 S.E.2d 852 (1976), we held that the defendant's illegal arrest beyond the policeman's territorial jurisdiction did not render the seizure and search unreasonable since the patrolman had probable cause.

As a result, according to well-established federal constitutional law and our own controlling precedent, a determination that Lieutenant Shatley lacked the statutory authority to stop Defendant's vehicle does not have any bearing upon whether the stopping of Defendant's vehicle violated the Fourth Amendment.

The United States Supreme Court has consistently applied traditional standards of reasonableness to searches or seizures effectuated by government actors who lack state law authority to act as law enforcement officers. For example, in *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), the Court considered the application of the Fourth Amendment to searches of a home conducted by firefighters, and held that "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman[.]" *Tyler*, 436 U. S. at 506, 98 S. Ct. at 1948, 56 L. Ed. 2d at 496. Thus, the United States Supreme Court applied the traditional warrant requirement in evaluating the validity of a firefighter's entry into a private house and held that, even though a burning building presented an exigent circumstance rendering a warrantless entry "reasonable" for Fourth Amendment purposes, a firefighter could not lawfully reenter the house several days later without having obtained a properly issued search warrant. *Tyler*, 436 U.S. at 511, 98 S. Ct. at 1951, 56 L. Ed. 2d at 500. In reaching this conclusion, the Court analyzed the constitutionality of the firefighters' actions without giving any consideration to the issue of whether the firefighters' actions were permissible for purposes of Michigan state law.

Similarly, in *N.J. v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), the United States Supreme Court analyzed the constitutionality of a search of a student's purse conducted by public school authorities without addressing the extent to which the search had been conducted in accordance with applicable New Jersey state law. As the Court noted at a later time, in "*T. L. O.*, we . . . applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student[.]" *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370, 129 S. Ct. 2633, 2639, 174 L. Ed. 2d 354, 361 (2009) (citing *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 742, 83 L. Ed. 2d at 734). In making the required constitutional determination, the Court utilized the familiar "reasonable articulable suspicion" standard even though the search in question was conducted by an individual who was not a law enforcement officer.

In addition, courts in other jurisdictions have uniformly recognized that, in *Moore*, the United States Supreme Court rejected the proposition that the constitutionality of a government actor's search or seizure in any way hinged on the extent to which the action in question was permissible as a matter of state law. *See*, *e.g.*, *United States v. Wilson*, 699 F.3d 235, 238 (2012) (holding that, even though Immigration and Customs Enforcement officers lacked the authority to act as law enforcement officers at the time that they stopped Defendant's vehicle, "the violation of the ICE policy requiring prior authorization did not affect the constitutionality of the stop under the Fourth Amendment"); *Johnson v. Phillips*, 664 F.3d 232, 238 (2011) (holding that, even though a building commissioner and Auxiliary Reserve Police Officer" "lacked authority under state law to conduct a traffic stop or arrest, that fact that did not establish that his conduct violated the Fourth Amendment") (citing *Moore*); and *State v. Slayton*, 147 N.M. 340, 342, 223 P.3d 337, 339 (2009) (stating that, "[w]hile we agree that the [police service aide] did not have the authority to detain or arrest an individual suspected of a crime, we disagree that a state actor's unauthorized seizure of a person suspected of committing a crime is *per se* a violation of the Fourth Amendment."). As a result, we conclude that, in the event that the trial court determines on remand that Lieutenant Shatley was a "government actor" at the time that he stopped Defendant's vehicle, it should then determine whether the stop was constitutionally permissible by determining whether the stop was supported by reasonable articulable suspicion, which is the standard applied in evaluating the constitutionality of traffic stops by law enforcement officers.

Although our dissenting colleague does not appear to dispute the essential validity of the relevant federal constitutional principles we

have outlined in this opinion, he argues, instead, that we should interpret N.C. Const. art. I, § 20, so as to grant a criminal defendant greater rights than those afforded by the federal constitution and hold that, since Lieutenant Shatley lacked the statutory authority to stop Defendant's vehicle, his actions should be deemed to be a *per se* violation of the North Carolina Constitution, resulting in the suppression of any evidence obtained as a result of the seizure of Defendant's vehicle. The fundamental problem with the position adopted by our dissenting colleague is that it rests upon an entirely new argument that is not even mentioned, much less discussed, in Defendant's brief. Although Defendant makes passing reference to the fact that unreasonable searches and seizures are prohibited under both the Fourth Amendment to the U.S. Constitution and under N.C. Const. art. I, § 20, she has not presented any argument whatsoever resting upon the language of the North Carolina Constitution, cited any authority addressing the proper interpretation of the search and seizure provisions of the North Carolina Constitution, and or urged this Court to interpret N.C. Const. art. I, § 20, differently from the manner in which the relevant issues have been resolved for Fourth Amendment purposes. As the Supreme Court of North Carolina has clearly reminded us, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," as doing so leaves "an appellee . . . without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*) (citation omitted). In spite of *Viar*, the dissent proposes that we resolve this case on the basis of a theory that Defendant never espoused and which the State has had no opportunity to discuss. As a result, given Defendant's failure to advance the theory on which our dissenting colleague relies in the trial court or in this Court, we decline to adopt the approach suggested by our dissenting colleague on the grounds that it is not properly before us.

We also note that the same considerations which led the United States Supreme Court to refrain from equating the protections provided by the Fourth Amendment with those afforded by state statutory law are equally applicable in the state constitutional context. Consistently with those principles, this Court and the Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights. *See*, *e.g.*, *State v. Hendricks*, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979), *disc. review denied*, 299 N.C. 123, 262 S.E.2d 6 (1980) (stating that, "[t]hough the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance

that any search or seizure must be 'supported by evidence,' is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States") (citing *State v. Vestal*, 278 NC. 561, 577, 180 S.E. 2d 755, 766 (1971), *appeal after remand*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973)); *Gwyn*, 103 N.C. App. at 370-71, 406 S.E.2d at 146 (stating that, although the "[d]fendant argues that[,] because the arrest was illegal the search incident to it violated the Fourth Amendment to the United States Constitution and Article 1, Section 20, of the North Carolina Constitution, and [that,] under the Fourth Amendment's exclusionary rule[,] the evidence must be suppressed," we "do not agree" given that "North Carolina's law of search and seizure and the requirements of the Fourth Amendment to the Constitution of the United States are the same") (citing *Hendricks*); *In re Murray*, 136 N.C. App. 648, 652, 525 S.E.2d 496, 500 (2000) (stating that, "[b]ecause there is no variance between North Carolina's law of search and seizure and the requirements of the Fourth Amendment to the Constitution of the United States . . . we hold that the search was proper under the laws of North Carolina") (citing *Hendricks*); and *Hartman v. Robertson*, 208 N.C. App. 692, 697, 703 S.E.2d 811, 815 (2010) (stating that "[w]e disagree" with the "[p]etitioner's [] argument [] that, because the traffic stop was illegal, the evidence gathered subsequent to the stop should have been suppressed" on the grounds that "Article I, section 20 of our North Carolina Constitution provides the same protections as the federal Fourth Amendment") (citing Murray).[3] As a result, even if Defendant had advanced the argument upon which our dissenting

3. Although our dissenting colleague cites a number of decisions for the proposition that the United States Constitution serves as a constitutional floor and that the North Carolina Constitution may give citizens additional rights over and above those that are federally guaranteed, neither the Supreme Court nor this Court has ever held that the substantive protections afforded by N.C. Const. art. I, s. 20, exceed those afforded by the Fourth Amendment. Admittedly, the Supreme Court rejected the "good faith" exception to the exclusionary rule found in federal search and seizure jurisprudence in *State v. Carter*, 322 N.C. 709, 710 S.E.2d 553, 554 (1988). However, we have not found, and our dissenting colleague has not cited, any decision of this Court or the Supreme Court in which the limitations upon the actual conduct of governmental actors (as compared to the scope of the remedies which are available in the event that a constitutional violation has occurred) are greater under N.C. Const. art. I, § 20, than they are under the Fourth Amendment. As a result, we believe that we are bound by the prior decisions of this Court and the Supreme Court equating the substantive limits imposed upon the conduct of governmental actors by the Fourth Amendment with those imposed by N.C. Const. art. I, § 20.

colleagues relies in his brief, we would be bound to reject it based upon the prior decisions of this Court and the Supreme Court.[4]

E. N.C. Gen. Stat. § 15A-404

In its order, the trial court concluded that, even if Lieutenant Shatley's stop of Defendant constituted a seizure, his actions would have been justified pursuant to N.C. Gen. Stat. § 15A-404, the so-called "citizen's arrest" statute. According to N.C. Gen. Stat. § 15A-404(b), a private citizen may "detain another person when he has probable cause to believe that the person detained has committed in his presence: (1) [a] felony, (2) [a] breach of the peace, (3) [a] crime involving physical injury to another person, or (4) [a] crime involving theft or destruction of property." The key provision in the language of N.C. Gen. Stat. § 15A-404 is "probable cause," which is the traditional standard utilized in evaluating the lawfulness of an arrest. On the other hand, nothing in N.C. Gen. Stat § 15A-404 authorizes private citizens to conduct investigatory stops based on "reasonable articulable suspicion" for the purpose of ascertaining whether a criminal offense has been committed. At the time that Lieutenant Shatley stopped Defendant's vehicle, he did not know whether she was an impaired driver or whether her erratic driving stemmed from an entirely different cause, such as illness or mechanical difficulties. Thus, the record clearly shows that Lieutenant Shatley was, at most, conducting what amounted to an investigative stop rather than detaining Defendant as authorized by N.C. Gen. Stat. § 15A-404. *See e.g.*, *State v. Benefiel*, 1997 Ida. App. LEXIS 35 (holding that the statutory right to make a "citizen's arrest" did not encompass a right to make a brief investigative seizure or "Terry stop"), *aff'd on other grounds*, *State v. Benefiel*, 131 Idaho 226, 228, 953 P.2d 976, 978 (holding that evidence obtained by a law enforcement officer conducting investigatory activities outside of his territorial jurisdiction did not violate the defendant's constitutional rights and was not subject to suppression),

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4. Our dissenting colleague distinguishes the cases cited in the text with respect to the lack of difference between the substantive protections found in federal and state constitutional search and seizure law on the ground that none of them involve "a seizure of a defendant by [a] state actor who lacked the training and experience of a law enforcement officer." In view of the fact that the approach adopted in the dissent in reliance upon this distinction equates state statutory law with state constitutional law, the fact that this approach has no support in the search and seizure jurisprudence developed by this Court and the Supreme Court, and the fact that our decision in *Gwyn* expressly rejected such an equation for purposes of both federal and state constitutional law, we do not believe that the distinction upon which our dissenting colleague relies supports a decision to hold that the absence of any statutory authority giving a fire fighter the authority to conduct investigative detentions necessarily results in a violation of N.C. Const. art. I, § 20.

cert. denied, 525 U.S. 818, 119 S. Ct. 58, 142 L. Ed. 2d 45 (1998)). As a result, the trial court erred by upholding Lieutenant Shatley's decision to stop Defendant's vehicle on the basis of N.C. Gen. Stat. § 15A-404 and should not take any account of that statutory provision in conducting the required proceedings to be held on remand.

F. Application of Exclusionary Rule

In the event that the trial court concludes on remand that Lieutenant Shatley was a government actor and that his decision to stop Defendant's vehicle was not supported by a reasonable articulable suspicion that Defendant was driving while subject to an impairing substance, it must also determine whether any evidence obtained by officers of the Chapel Hill Police Department as a result of their own activities must be suppressed. As the Fourth Circuit has stated, "[n]ot all evidence discovered as a result of a Fourth Amendment violation, though, is 'fruit of the poisonous tree' and necessarily inadmissible at trial. Evidence derived from an illegal search may be admissible depending upon 'whether, granting establishment of the primary illegality of the evidence to which the instant objection is made has been come at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint.' " *United States v. Gaines*, 668 F.3d 170, 173 (4th Cir. 2012) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 456 (1963)) (internal quotation marks and citation omitted). Thus, the trial court may potentially be required to determine on remand whether any evidence obtained by officers of the Chapel Hill Police Department after their arrival on the scene should be suppressed in the event that it is determined that Lieutenant Shatley engaged in unconstitutional conduct while acting as a governmental agent.

In its brief, the State argues that we should uphold the trial court's decision to deny Defendant's suppression motion on the grounds that, even if Lieutenant Shatley's stop of Defendant's vehicle violated the federal and state constitutional protections against unreasonable searches and seizures, this fact does not require exclusion of the evidence obtained as a result of her arrest by law enforcement officers. According to the State, since "[t]he stop of defendant by Chapel Hill Police Department was independent of any stop by [Lieutenant] Shatley," a proper application of "the independent source rule[, which] provides that evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure," *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (citing *State v. Phifer*, 297 N.C. 216, 224-26, 254 S.E.2d 586, 590-91 (1979)), would necessitate a

determination that any evidence obtained as a result of the activities of the Chapel Hill Police Department would still be admissible.

In addition, the State argues that, even if Lieutenant Shatley's stop of Defendant's vehicle was unconstitutional, evidence of her impaired driving should be admitted pursuant to the inevitable discovery doctrine. "The United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, [104 S. Ct. 2501,] 81 L. Ed. 2d 377 (1984), held that evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action." *State v. Pope*, 333 N.C. 106, 114, 423 S.E.2d 740, 744 (1992). In seeking to persuade us to accept its inevitable discovery argument, the State points out that Lieutenant Shatley "testified [that] he repeatedly contacted communications relaying his concern about defendant's driving, providing defendant's location, and requesting Chapel Hill police officers to respond" and argues that, in light of these communications, Defendant's vehicle would inevitably have been stopped by law enforcement officers. The record does, as the State contends, indicate that Lieutenant Shatley called police communications on multiple occasions for the purpose of reporting his current location and providing a description of Defendant's vehicle; that Lieutenant Shatley called police communications yet again to report the location at which Defendant's vehicle had been stopped; and that law enforcement officers arrived about "ten minutes maybe" after the stop. As a result, the State makes a colorable inevitable discovery argument as well.

The trial court did not address any of these exclusionary rule-related issues in its initial order. Although a determination that Lieutenant Shatley acted unconstitutionally would necessarily require the suppression of any evidence obtained at the time that he stopped Defendant's vehicle, the same is not necessarily true of evidence obtained after officers of the Chapel Hill Police Department arrived on the scene. Thus, in the event that the trial court concludes that a constitutional violation occurred at the time that Lieutenant Shatley stopped Defendant's vehicle, the trial court should, on remand, make findings of fact and conclusions of law addressing the issue of the extent, if any, to which evidence stemming from Defendant's arrest by officers of the Chapel Hill Police Department must be suppressed as the result of Lieutenant Shatley's conduct as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court's judgment should be vacated and that this case should be

remanded to the Orange County Superior Court for further proceedings. On remand, the trial court should take any additional evidence that, in the exercise of its discretion, it chooses to receive and enter a new order ruling on the issues raised by Defendant's suppression motion containing appropriate findings and conclusions addressing the issues of whether: (1) Lieutenant Shatley was acting as a government agent or a private citizen at the time that he stopped Defendant's vehicle; (2) whether, if Lieutenant Shatley was acting as a government agent at the time that he stopped Defendant's vehicle, the stop was supported by the necessary reasonable articulable suspicion; and (3) whether, in the event that the stop of Defendant's vehicle was not supported by the necessary reasonable articulable suspicion, the evidence obtained by officers of the Chapel Hill Police Department must be suppressed, including a consideration, to the extent necessary, of whether any information obtained by the Chapel Hill Police Department must be suppressed under the "fruit of the poisonous tree" doctrine or whether any evidence obtained by officers of the Chapel Hill Police Department would be rendered admissible by the independent source or inevitable discovery rules. In the event that the trial court determines, after conducting the required proceedings on remand, that Defendant's suppression motion should be denied, the trial court will reinstate the judgment that has been previously entered against Defendant. In the event that the trial court determines, after conducting the required proceedings on remand, that Defendant's suppression motion should be allowed, the trial court will order that Defendant receive a new trial.

REVERSED AND REMANDED.

Judge STROUD concurs.

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

I concur with the majority's conclusion that Lieutenant Shatley's stop of defendant's car constituted a seizure in the context of the Fourth Amendment of the United States Constitution. I also agree with the majority that Lieutenant Shatley was not authorized to stop defendant under N.C. Gen. Stat. § 15A-404. However, while the majority remands the matter to the trial court for a determination of whether Lieutenant Shatley was a state actor, I conclude that Lieutenant Shatley was not acting as a "private person" when he stopped defendant. He seized defendant while acting in his official capacity as a fireman, a state actor, and did so without lawful authority in violation of defendant's rights under

Article I, Section 20 of the North Carolina Constitution. Accordingly, I respectfully dissent from that part of the majority's opinion, and I would reverse the trial court's order denying her motion to suppress, vacate the judgment, and remand to the trial court.

In her motion to suppress, defendant argued that the evidence obtained as a result of the traffic stop was illegally obtained in violation of the Fourth Amendment and its parallel provision in the North Carolina Constitution. The trial court concluded the Lieutenant Shatley's stop of defendant was not a seizure triggering defendant's Fourth Amendment protections nor a violation of her other constitutional rights. Although not addressed at length, defendant again raised the argument that her stop by Lieutenant Shatley was in violation of the protections afforded to her by Article I, Section 20 of the North Carolina Constitution.

"Article I, Section 20 of our North Carolina Constitution, like the Fourth Amendment, protects against unreasonable searches and seizures," *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999), and it requires the exclusion of evidence obtained by such unlawful means, *State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988). The relevant provision of our state constitution provides: "General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20.

Because our Constitution and the Fourth Amendment provide these similar protections, caselaw interpreting the Fourth Amendment may provide guidance in our interpretation of Article I, Section 20. *Carter*, 322 N.C. at 712, 370 S.E.2d at 555. Yet, despite the similarities between Article I, Section 20 and the Fourth Amendment, the provisions are not identical, and we are not precluded from determining that Article I, Section 20 confers rights to our citizens that are distinct from those conferred by the Fourth Amendment. *See McClendon*, 350 N.C. at 635, 517 S.E.2d at 132 ("[W]e are 'not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.' ") (quoting *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984)).

The majority cites to several cases for the proposition that had defendant argued that her stop was unlawful under our state constitution, the majority would be bound by our prior decisions to reject the argument. *See State v. Hendricks*, 43 N.C. App. 245, 251-59, 258 S.E.2d

872, 877-82 (1979) (concluding that a search of the defendant's home and vehicle by law enforcement officers via the use of an electronic tracking device was lawful under the Fourth Amendment and Article 1, Section 20), *disc. review denied*, 299 N.C. 123, 262 S.E.2d 6 (1980); *State v. Gwyn*, 103 N.C. App. 369, 371, 406 S.E.2d 145, 146 (1991) (concluding that the defendant's arrest in Virginia by a North Carolina police officer did not render the search and seizure unreasonable under our federal or state constitutions), *disc. review denied*, 330 N.C. 199, 410 S.E.2d 498; *In re Murray*, 136 N.C. App. 648, 652, 525 S.E.2d 496, 499-500 (2000) (analyzing whether a school official's search of a student's book bag was unreasonable under North Carolina law); *Hartman v. Robertson*, 208 N.C. App. 692, 697-98, 703 S.E.2d 811, 815-16 (2010) (concluding that evidence obtained after a police officer stopped the defendant's vehicle was not subject to the exclusionary rule when the evidence is presented in a license revocation hearing, which is a civil proceeding). I conclude these cases are distinguishable as they do not involve a seizure of a defendant by a state actor who lacked the training and experience of a law enforcement officer, as occurred in this case.

Moreover, I cannot dispute that our state Constitution provides the same rights as the Fourth Amendment, but our caselaw also holds that Article 1, Section 20 may provide rights in addition to those provided by the Fourth Amendment. As the Supreme Court of North Carolina has previously stated, "the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999); *see Jones v. Graham Cnty. Bd. of Educ.*, 197 N.C. App. 279, 289-93, 677 S.E.2d 171, 178-82 (2009) (noting that "[i]f we determine that the policy does not violate the Fourth Amendment, we may then proceed to determine whether Article I, Section 20 provides basic rights in addition to those guaranteed by the [Fourth Amendment]", and concluding that while a suspicionless search may be reasonable under the Fourth Amendment under certain circumstances the defendant-employer's suspicionless drug testing policy violated plaintiff-employees' rights to be free from unreasonable searches under Article I, Section 20 of our state constitution) (citation and quotation marks omitted)); *Carter*, 322 N.C. at 710, 370 S.E.2d at 554 (holding there is no good faith exception to the requirements of Article I, Section 20 as applied to the defendant and declining to analyze whether the search and seizure at issue violated the defendant's rights under the Fourth Amendment of the federal constitution). However, due to

the relatively limited body of caselaw interpreting Article I, Section 20, reference to caselaw that determines our citizens' rights under the Fourth Amendment is helpful in our analysis, but it does not control the resolution of this case.

Under the Fourth Amendment, "[t]he 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). Such investigatory stops must be based on reasonable suspicion that criminal activity may have taken place. *Id.* Reasonable suspicion is based upon "'specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, *guided by [the officer's] experience and training*.' " *Id.* (quoting *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (emphasis added)).

Although the majority remands the case for the trial court to make additional findings as to whether Lieutenant Shatley was a state actor when he seized defendant, I conclude the trial court's findings establish that he was a state actor and that he violated defendant's right to be free from unlawful seizure under our state constitution. The trial court found that Lieutenant Shatley stopped defendant with the use of Fire Engine 32, of which he was in command and which was returning to the fire station after being dispatched to the scene of a possible fire. After notifying "emergency communications" that defendant may be an impaired driver, Lieutenant Shatley "ordered" the driver of the fire engine to activate its red lights, sirens, and horn to cause defendant to stop her vehicle. Once stopped, Lieutenant Shatley did not pass defendant, but parked Engine 32 behind defendant's vehicle. Lieutenant Shatley exited the fire truck and approached defendant wearing his firefighter's uniform. The fire engine's emergency lights continued to flash as defendant asked Lieutenant Shatley why he had stopped her, and he spoke to defendant for at least ten minutes. Chapel Hill police officers arrived on the scene shortly thereafter.

Had Lieutenant Shatley been a police officer with the appropriate training and experience as well as the lawful authority to stop defendant, defendant's erratic driving would likely support a finding of the reasonable suspicion necessary to effectuate an investigatory stop. Although Lieutenant Shatley had limited authority to enforce traffic laws at the scene of a fire or other hazards pursuant to N.C. Gen. Stat. § 20-114.1(b), the statute provides that firemen are not considered law enforcement or traffic control officers. Thus, the legislature has strictly limited the law enforcement authority of firemen to a narrow set of

situations related to the execution of their duties as firemen. *See id.* If the legislature intended to give firemen the authority to enforce traffic laws at all times, it could do so. However, under our current statutes, Lieutenant Shatley had no lawful authority or training to stop defendant. Because Lieutenant Shatley used the appearance of the state's police powers to effectuate a traffic stop, I conclude that he was a state actor acting outside of his lawful authority to seize defendant.

To permit state actors who do not have appropriate law enforcement authority, training, and experience to make traffic stops would potentially result in greater harm than not stopping someone who commits a motor vehicle violation. "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, *unless by clear and unquestionable authority of law.*' " *Terry v. Ohio*, 392 U.S. 1, 9, 20 L. Ed. 2d 889, 898-99 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 737 (1891) (emphasis added)). As our Supreme Court has aptly noted:

> One of the great purposes of the exclusionary rule is to impose the template of the constitution on police training and practices. Unavoidably, a few criminals may profit along with the innocent multitude from this constitutional arrangement . . . . "He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him."

Carter, 322 N.C. at 720, 370 S.E.2d at 560 (citation omitted).

"A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13, 20 L. Ed. 2d at 901. If state personnel who are not trained as law enforcement officers are permitted to execute traffic stops without lawful authority, experience, and training, but under the color of state police power, and the evidence obtained from such a seizure is admitted in a criminal prosecution, our courts will "be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions[,]" *id.*

Such actions are "dangerous to [the] liberty" of our citizens, N.C. Const. art. I, § 20, a violation of defendant's right to be free from unlawful seizure under our state constitution, and should not be condoned by our

courts. Accordingly, I conclude that the trial court should have granted defendant's motion to suppress to exclude the evidence obtained from Lieutenant Shatley's seizure of defendant.

STATE OF NORTH CAROLINA
v.
BRADLEY GRAHAM COOPER

No. COA12-926

Filed 3 September 2013

1. Evidence—exclusion of expert testimony—Google map files planted on laptop—reversible error

The trial court abused its discretion in a first-degree murder case by limiting Ward's testimony and preventing Ward from testifying that, in his opinion, the Google Map files had been planted on defendant's laptop. Preventing defendant from presenting expert testimony, challenging arguably the strongest piece of the State's evidence, constituted reversible error and required a new trial.

2. Discovery—violations—erroneous exclusion of expert testimony

The trial court erred in a first-degree murder case by precluding the testimony of Masucci, a forensic computer analyst, as a sanction for purported discovery violations. The error was of such magnitude, in light of the earlier exclusion of Ward's relevant testimony, that it required defendant be granted a new trial.

3. Discovery—denial of motion for discovery—due process—in camera review required—national security

The trial court erred in a first-degree murder case by denying defendant's motions for discovery of certain evidence contained in the files of some of the State's witnesses. Due process required the trial court to at least examine the records *in camera* to determine whether they should be provided to the defense. On remand, the trial court must determine with a reasonable degree of specificity how national security or some other legitimate interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review.

STATE v. COOPER

[229 N.C. App. 442 (2013)]

Appeal by Defendant from judgment entered 5 May 2011 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 9 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien and Assistant Attorney General LaToya B. Powell, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Judge.

Bradley Graham Cooper (Defendant) and Nancy Lynn Rentz Cooper (Ms. Cooper) were married in October 2000, and they moved to Cary from Canada in January 2001. They had two daughters (the daughters). Defendant worked for Cisco Systems, Inc. (Cisco). By 2008, Defendant's marriage to Ms. Cooper was in difficulty and, by April 2008, Ms. Cooper had hired a family law attorney and planned to move out of the marital home. Defendant and Ms. Cooper were still living in the marital home in July 2008, though they were leading mostly separate lives and were sleeping in separate bedrooms.

Defendant and Ms. Cooper attended a party at a neighbor's house on the evening of 11 July 2008. There was testimony that Defendant and Ms. Cooper argued at the party. Defendant left the party that evening, around 8:00 p.m., to put the daughters to bed. Ms. Cooper left the party a little after midnight, on 12 July 2008.

Sometime during the morning of 12 July 2008, Ms. Cooper disappeared. Defendant subsequently gave the following account of events to investigators about the morning of 12 July 2008: one of the daughters awoke between 4:00 a.m. and 4:30 a.m., and had difficulty getting back to sleep. The daughter wanted milk, but there was none at the house. Defendant went to a Harris-Teeter at about 6:30 a.m. to buy milk, and then returned home. Ms. Cooper was doing laundry, but had run out of detergent. Defendant returned to the Harris-Teeter to buy detergent and, while on his way there, received a call from Ms. Cooper asking him to get some "green juice." Receipts and surveillance video from the Harris-Teeter confirm that Defendant bought milk at 6:25 a.m., left the store, then returned and bought detergent and juice at 6:44 a.m. After Defendant bought the detergent and juice, he returned home. At about 7:00 a.m., Ms. Cooper called to Defendant, who was upstairs, and told him she was going running. Defendant remained at home with

the daughters and, when Ms. Cooper did not return from her run when expected, Defendant called a friend and cancelled a tennis date he had planned. Defendant stated he did laundry and cleaned around the house and, in the early afternoon, drove around with his daughters, looking for Ms. Cooper.

Evidence at trial tended to show that police began questioning Defendant that same day, and asked if they could take photographs of the couple's house. Defendant consented, and police photographed every room. Defendant provided police with a pair of Ms. Cooper's running shoes in order to give a police tracking dog Ms. Cooper's scent. However, the dog could not pick up a trail.

Police returned to the house the next morning, 13 July 2008, and questioned Defendant further. Police questioned Defendant more that day and the following day, 14 July 2008. Cary Police Detective George Daniels (Detective Daniels) asked Defendant for permission to look through Defendant's car and Ms. Cooper's car, and Defendant consented.

At approximately 7:00 p.m. on 14 July 2008, a body was found just off Fielding Drive, which was a short drive from Defendant's and Ms. Cooper's house. Detective Daniels went to Defendant's house at approximately 10:00 p.m. on 14 July 2008, and informed Defendant that a woman's body had been found on Fielding Drive. At that time, identification of the body had not been determined. However, on 15 July 2008, the body was affirmatively identified from dental records as being that of Ms. Cooper. The cause of death was determined to be strangulation. The time of death could not be determined with specificity. However, it was determined that Ms. Cooper died some time in the twelve-hour period between shortly after midnight on 12 July — when she was last seen at the party — and approximately noon that same day.

Around 5:20 p.m. on 15 July, Defendant vacated his house in order to preserve the house as a possible crime scene. One of Defendant's laptops (the laptop) was left in Defendant's house and was connected to the internet for approximately twenty-seven hours on 15 and 16 July, after Defendant had vacated the house. Cary police, pursuant to a warrant, searched both Defendant's house and his car on 16 July 2008. Police also seized the laptop, along with another computer, and various other computer-related components.

Defendant was indicted for Ms. Cooper's murder on 27 October 2008. Trial began on 28 February 2011. There was testimony concerning the strained relationship between Defendant and Ms. Cooper, and

suspicious behavior on the part of Defendant, both before and after Ms. Cooper's disappearance. However, the sole direct evidence linking Defendant to the murder was obtained from the laptop that had been left on and connected to the internet after Defendant vacated his house.

The State presented expert testimony from FBI Special Agent Greg Johnson (Special Agent Johnson) and Durham Police Detective Chris Chappell (Detective Chappell), both of whom testified as forensic computer analysts. Special Agent Johnson and Detective Chappell were forensic examiners of the Computer Analysis Response Team (CART). CART extracts "evidence off of seized digital media" such as computer hard drives. The first part of the forensic process involves taking inventory of the components. CART then checks for any portable media in or attached to the computer, opens up the case of the CPU and removes the hard drive(s). CART handles all seized material carefully so as not to compromise or contaminate the data. According to Special Agent Johnson's testimony, the integrity of the hard drive is protected by making a "forensic image" of the drive, which is "a copy that we make of the hard drive. It's a bit-per-bit copy, which gets every piece of . . . information off of the hard drive and puts it into what we call forensic image." Examination then occurs of a different hard drive containing the forensic image, not the original hard drive. The forensic image requires some type of specialized software to read and "interpret those files that it creates."

Members of the CART team performed these forensic retrieval and information processing techniques on the hard drive from the laptop. The CART team used software called Forensic Tool Kit, or FTK, to process that hard drive. FTK and similar programs index files retrieved from the hard drive, allowing for specific searches for particular data to be performed. An FTK report was then created based upon the particular search parameters utilized. One of the sub-sets of files collected in the FTK report for Defendant's laptop was temporary internet history files for dates close in time to Ms. Cooper's murder.

Special Agent Johnson and Detective Chappell testified that the temporary internet files recovered from the laptop indicated someone conducted a Google Map search on the laptop at approximately 1:15 p.m. on 11 July, the day before Ms. Cooper was murdered. They concluded that this search was done by someone using the laptop while it was at the Cisco office where Defendant worked. The State's experts testified that the Google Map search was initiated by someone who entered the zip code associated with Defendant's house, and then moved the map

and zoomed in on the exact spot on Fielding Drive where Ms. Cooper's body was found.

Defendant presented evidence at trial. Defendant called Jay Ward (Ward) to testify concerning the incriminating Google Map files recovered from the laptop. Ward had worked for more than fifteen years in the computer field, specializing in computer network security. When Defendant called Ward, the State objected, challenging Ward's credentials to testify as an expert concerning the relevant Google Map files.

The State focused on Ward's lack of training and experience as a forensic computer analyst. The trial court agreed with the State and, on 19 April 2011, ruled that Ward could not testify specifically about the Google Map files. Ward was allowed to give general testimony concerning the ease with which files could be altered or planted on a computer that, like Defendant's, had been left connected to the internet. Defendant argued, since the trial court did not find the methods by which Ward obtained his data to be reliable, that Ward be allowed to testify based upon the data produced by the State's forensic analysts. The trial court denied Defendant's request. Ward testified on *voir dire* that had he been allowed to, he would have offered his opinion that the incriminating Google Map files had been planted on Defendant's computer, and he would have further testified to the specific aspects of the files that had led him to this conclusion.

Following the trial court's ruling, Defendant immediately sought a forensic computer analyst that he could call to testify concerning the Google Map files. Defendant located a forensic computer analyst, Giovanni Masucci (Masucci), on 20 April 2011. As the court session began on 21 April 2011, Defendant gave notice of Masucci as Defendant's replacement expert. Masucci had examined the data produced by the State's forensic computer analysts, and produced a report. Masucci's report indicated that the data results obtained by Ward matched the results obtained by CART. Masucci's conclusion was the same as Ward's: that the Google Map files had "been placed on the hard drive [and] could not have been the result of normal internet activity." Masucci's *curriculum vitae* was sent to the State on 22 April 2011, and Masucci's report was sent the next day. Court was not in session on these days.

Court resumed on 25 April 2011, and Defendant attempted to call Masucci. The State objected on the basis that Masucci was not on the list of experts Defendant provided to the State before trial, nor had the State been provided with Masucci's report prior to trial, and these failures constituted discovery rules violations. The trial court again

agreed with the State, and ruled that Defendant had violated the discovery statutes by failing to notify the State that he was planning to call Masucci, and by failing to provide Masucci's *curriculum vitae* and report prior to the beginning of the trial. As a sanction for the discovery violations found by the trial court, the trial court ruled that Masucci could not testify. Pursuant to North Carolina Rule of Evidence 403, the trial court also ruled that allowing Masucci to testify would prejudice the State, and that this prejudice would substantially outweigh any probative value of Masucci's testimony. Defendant was prohibited from calling any witness to testify that the actual Google map files relied upon by the State to connect Defendant to the site where Ms. Cooper's body was found were corrupt or had been tampered with in any manner.

The jury returned a verdict of guilty of first-degree murder on 5 May 2011. Defendant was sentenced to life in prison without the possibility of parole. Defendant appeals.

I. Issues

Defendant brings forward three arguments on appeal: (1) whether the trial court erred in precluding the testimony of Masucci as a sanction for discovery rules violations, (2) whether the trial court erred in limiting Ward's testimony and preventing Ward from testifying that, in his opinion, the Google Map files had been planted on the laptop and, (3) whether the trial court erred in denying Defendant's motion to compel certain discovery. We address Defendant's second argument first.

II. Ward's Testimony

[1] In Defendant's second argument, he contends that "the trial court's ruling that . . . Ward was not qualified to give expert testimony about tampering on [Defendant's] computer was an abuse of discretion and deprived Defendant . . . of his state and federal constitutional due process right to present a defense." We agree.

It is well settled that "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (citation omitted). Generally, the decision of a trial court to exclude expert witness testimony is reviewed for an abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted). However, " '[c]onstitutional rights are not to be granted or withheld in the court's discretion.' " *State v. Vereen*, 312 N.C. 499, 508, 324 S.E.2d 250, 256 (1985) (citations omitted).

> The question presented here is one of law rather than discretion, for "(t)he right to . . . face one's accusers and witnesses with other testimony (is) guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina."

State v. Brower, 289 N.C. 644, 660, 224 S.E.2d 551, 562 (1976) (citation omitted); *see also State v. Mason*, 295 N.C. 584, 589, 248 S.E.2d 241, 245 (1978); *State v. Farrell*, 223 N.C. 321, 326-27, 26 S.E.2d 322, 325 (1943); *State v. Banks*, 210 N.C. App. 30, 47, 706 S.E.2d 807, 820 (2011) (citation omitted).

We note that the cases cited above concern denials of motions to continue. However, if the denial of a right to present a witness constitutes error, we are unable to distinguish between the constitutional significance of the denial of a defendant's right to present a witness through denial of a continuance, and the denial of a defendant's right to present a witness through a misapplication of a rule of evidence. *See Fry v. Pliler*, 551 U.S. 112, 121-22, 168 L. Ed. 2d 16, 23-4 (2007); *Holmes v. South Carolina*, 547 U.S. 319, 324-31, 164 L. Ed. 2d 503, 508-13 (2006); *Montana v. Egelhoff*, 518 U.S. 37, 52-53, 135 L. Ed. 2d 361, 373-74 (1996) (plurality opinion); *Green v. Georgia*, 442 U.S. 95, 99, 60 L. Ed. 2d 738, 742 (1979); *Chambers v. Mississippi*, 410 U.S. 284, 298-303, 35 L. Ed. 2d 297, 310-13 (1973). Of course, there can only be a constitutional violation if the evidence is excluded for an invalid reason. *Holmes*, 547 U.S. at 324-31, 164 L. Ed. 2d at 508-13.

Accuracy in criminal proceedings is a particularly compelling public policy concern:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

Ake v. Oklahoma, 470 U.S. 68, 78, 84 L. Ed. 2d 53, 63 (1985). The United States Supreme Court has stated that a defendant on trial has a greater interest in presenting expert testimony in his favor than the State has in preventing such testimony:

> The State's interest in prevailing at trial - unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying [the defendant] the assistance of [an expert witness] is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

Ake, 470 U.S. at 79, 84 L. Ed. 2d at 63-64. Nonetheless, trial courts are granted substantial freedom to regulate conduct and evidence at trial:

> We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive . . ., only marginally relevant" or poses an undue risk of "harassment, prejudice, (or) confusion of the issues." Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted.

Crane v. Kentucky, 476 U.S. 683, 689-90, 90 L. Ed. 2d 636, 644 (1986) (citations omitted). In *Crane*, the United States Supreme Court discussed the impact on a defendant's trial of the exclusion of evidence favorable to the defendant bearing on a central issue in the trial:

> [W]ithout "signal(ing) any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial.
>
> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process

> or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

Id. at 690, 90 L. Ed. 2d at 645 (citations omitted). Though the above citations involve constitutional questions, they also inform our analysis of whether there was an abuse of discretion in preventing Ward from giving his opinion that the Google Map files from Defendant's laptop had been tampered with.

Rule 702

A.

The admissibility of expert testimony is controlled by Rule 702 of the North Carolina Rules of Evidence:[1]

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C–1, Rule 702(a) (2004). "It is well-established that trial courts must decide preliminary questions concerning . . . the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). . . . .
>
> *Howerton* sets forth a three-step test for determining the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial

1. Rule 702 was amended by S.L. 2011-283, § 1.3. However, these changes only apply to actions commenced on or after 1 October 2011.

> qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" . . . .
>
> " 'The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies.' "

Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 389, 618 S.E.2d 838, 841-42, *on reh'g*, 174 N.C. App. 619, 625 S.E.2d 115 (2005) (some citations omitted). "[W]e discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience." *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688. In *Howerton*, our Supreme Court expressly rejected the adoption of the federal standard for assessing the foundational reliability of expert testimony as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693. In rejecting the *Daubert* approach, our Supreme Court stated:

> One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*.

Id. at 464-65, 597 S.E.2d at 690. " '[F]ew judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed[.]' " *Id.* at 466, 597 S.E.2d at 691 (citation omitted). Our Supreme Court cited a critic of *Daubert*, who opined that the "post-*Daubert* era can fairly be described as the period of 'strict scrutiny' of science by non-scientifically trained judges[,]" *Id.* at 466, 597 S.E.2d at 691 (citation omitted); *see also id.* at 460-61, 597 S.E.2d at 687-88. "[A]pplication of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id.* at 464, 597 S.E.2d at 690. " '[V]igorous cross-examination, presentation of contrary evidence, and

careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' " *Id.* at 461, 597 S.E.2d at 688 (citation omitted); *see also*, *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009).

The United States Supreme Court has also stated that the right of a defendant to present witnesses in the defendant's defense is fundamental:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense[.] Indeed, this right is an essential attribute of the adversary system itself.
>
> > "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. . . ."
>
> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:
>
> > "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Taylor v. Illinois, 484 U.S. 400, 408-09, 98 L. Ed. 2d 798, 810 (1988) (citations omitted); *see also Rock v. Arkansas*, 483 U.S. 44, 54-55, 97 L. Ed. 2d 37, 48-9 (1987). With these principles in mind, we must evaluate evidence regarding Ward's experience and credentials to determine if the trial court erred in excluding Ward's opinion testimony that the Google Map files located on the laptop had been tampered with.

B.

After the State concluded presentation of its evidence, it moved *in limine* to exclude Ward from testifying. Defendant objected:

> [Defendant's counsel]: And, Your Honor, we -- we would certainly object at this time to a motion in limine, given the fact that the State has had Mr. Ward on the witness list as a potential expert for quite some time now, with no -- no notice as to the concept that they were going to be moving in limine to exclude his testimony. If that was the route that they were seeking to take, that should have occurred at a more appropriate time. I certainly understand, if he wants to take Mr. Ward on voir dire, that that is appropriate.

The trial court denied Defendant's objection, and Ward testified on *voir dire* as indicated below.

Ward testified on *voir dir*e that his interest in computers began in 1982, and that he was first hired as a network administrator by a Research Triangle Park company called Persimmon Information Technologies in approximately June 1997. This job included "ensuring that all of the firewall rules were correct[,]" which broadly meant keeping "unintended people out" of the computer system, which consisted of a few hundred computers. Most of the security issues Ward addressed during this time were "intrusion attempts from the internet." In order to determine where those intrusions came from, Ward examined log files and the timestamps on the log files to "create a time line to find out exactly what's going on."

In November 1998, Ward began working for Carolinas Healthcare in Charlotte as its "senior security analyst, or senior firewall administrator[.]" The bulk of Ward's work consisted of reviewing computer log files, because "[t]hat's where you find most of the activity on the network." Ward worked on projects to insure the safe movement of private medical data between the member practices and institutions of Carolinas Healthcare. Identifying "intrusion" into the system was one

of Ward's job duties. Ward was working with thousands of systems, and described some of his duties and concerns as follows:

> Well, it's -- it's not just [knowing] computer operating systems as required. It's a -- a plethora of things, from understanding the communications path of how packets move across the internet, so there's a networking aspect to it. There's also a -- a component for the system -- the actual host or the actual server, what's going on, understanding how the various ports that are open on a machine might be used either for good or maliciously, which kind of goes into the field of understanding how viruses work, or Trojans work and the types of things that they are trying to attempt to access on a computer. Also, too, how things are written to logs in the event for logons, for processes that are actually functioning or being triggered on the machine, and if any of the -- the files have been changed.
>
> So, and -- and towards that vein, one of the things that we would -- we would typically use, but you don't find it much any more, is a program called Tripwire. And Tripwire is used for integrity of files. So basically you run a script against all of your files once you have a production-ready level server, and it will actually do hashes of all of the files on the system, put them off to a side and then, in the event that any of those files change, you -- you then have a -- a potential way to go back and say, okay, this file was changed; we need to reinstall the correct version in the event of any sort of penetration.

In 1999, Ward began working for First Citizens Bank as a senior security engineer. Ward testified that his two biggest projects at First Citizens were ensuring "the security of the internet pipe," and developing "the ability for First Citizens to take [its] online banking platforms, move them from the third party and move them in-house, so that we had complete control over them." Part of this involved "architecting the security infrastructure," and "ensuring that security, not only at the perimeter via firewalls and via intrusion detection was in place, but also that host intrusion detection or intrusion prevention was in place." Ward estimated that his computer security services for First Citizens bank were helping to protect between five and seven billion dollars in assets. Ward's work at First Citizens included both the network system as a whole and individual computer work station security. Ward testified:

> As . . . part and parcel of reviewing the logs – well, you'll often see things [in the files] that are just – that don't look right or track patterns don't look right[.]. . . And in so doing, I would often find potential — or intrusion attempts that were basically knocking on the door on the outside of the firewall.

Ward was also responsible for investigating suspicious activity of employees, including investigating employees' internet histories.

Ward testified that he used specialized software programs, such as EnCase and FTK, to assist in sorting through file data, but that there were limitations in using the software alone:

> I think that Agent Johnson or any other FBI worth their salt will tell you that it's not just tools that are important, but what you look at and understanding how -- how things look in any sort of log files and to give you, not necessarily a hunch, but things that don't look right, based upon experience of having done it for so long.
>
> So typically -- typically, whenever you see something like an internet port scan or something like that, they're automated tools -- right? -- that anybody can run. Just click a little button and it will go out and it will look for the -- the low-hanging fruit, if you will. Seeing those types of things in logs is generally a good first indication that something is amiss, or that someone is doing recognizance work against your network.
>
> Q. Now, . . . when looking for people's internet activity or towards a potential theft, did the time of the conduct ever become an issue in your investigations?
>
> A. It did. . . . .
>
> . . . .
>
> Q. When performing that task and attempting to evaluate the time of activity, would you rely solely on a tool like EnCase or FTK?
>
> A. Absolutely not.
>
> Q. And why not?
>
> A. Well, there's -- there's several reasons. Don't get me wrong, those types of tools are great for things that may

> have happened on an individual machine; however, there are some shortcomings of any software program. They're in general only as good as the people that -- that write them or the -- the specs that people have asked them to write them to. It wouldn't necessarily capture all of the information that may have been traversing the network.
>
> Additionally, as I say, the reports that are generated from these types of forensic tools are generally -- are generally good, as -- as an overall statement, in providing you with vast amounts of information. And -- and, specifically in this case, I think that there were 170 something thousand files to look through, which is -- which is fine; however, trying to pinpoint something in those files and knowing exactly -- or being able to research and find out what the individual files are becomes a little more problematic.
>
> And these tools don't necessarily go to that level, so it's -- it's based upon experience in having gone through some of these types of things before that -- it's important to look into the actual files, especially within a specific time frame that the alleged activity was supposed to have occurred.
>
> Q. Are you familiar with the terms "file name attributes" and "system information attributes"?
>
> A. I am.
>
> Q. And are you aware if the tools EnCase and FTK are even capable of evaluating file name attribute?
>
> A. They are not. Not only that, but FTK is actually not capable of noticing any file modifications or signature modifications on a file. So, if you were to change like a -- a file extension, or something like that, it's not going to pick that up.

Ward began working as an "information security architect" for Cisco Systems in 2002. Ward testified that he had many duties at Cisco, and described one such duty as follows:

> I was on the team for the implementation for Cisco's public key infrastructure. Now, I realize you might not know what that means, so suffice it to say that it -- it involves a -- a high understanding of cryptography, of encryption and decryption as it pertains to certificates. So -- and -- and I'll

> give you a really good example. A certificate that, when you go to a website and you go to a secure website and it brings up the certificate, you've probably never looked at it; most people don't. But those types of things have a -- a trust chain, so -- and they're all mathematically linked by virtue of a public key infrastructure.

In approximately 2005, Ward began working for Symantec, then known as "@stake." Ward described Symantec as a "white hat hacking company[.]" Symantec

> was hired by Fortune 500, Fortune 1000 companies, municipalities, governments, states to do penetration testing exercises. And that could be from the mobility side, which would be wireless, from web application, from external network penetration, to internal network penetration, to check for vulnerabilities internally, as social engineering, and obviously pretending to be someone that you're not in order to infiltrate some place else.

Ward's job was "[k]eeping people out of assets that they are not supposed to be in." Ward testified that he had conducted "hundreds" of these tests. Ward further testified that part of his job was looking at the file logs on particular computers to determine if there had been an intrusion and, if so, "what had happened." Part of this process was using forensic tools, including FTK, EnCase, and others.

In 2007, Ward left Symantec to form his own computer system security company, WireGhost Security, Inc. (WireGhost), a Raleigh-based computer network security company. At the time of trial, Ward was still the owner of WireGhost. Ward described his business as: "Penetration testing, risk assessments, . . . host hardening, understanding the internals of computers." When asked on voir dire if his business was to protect computers "from somebody getting into" the computers, he answered in the affirmative.

Ward testified that he was a Certified Information Systems Security Professional, a Cisco-certified network professional, and also had multiple firewall certifications. Ward was a member of InfraGard, "the public and private joint partnership between security professionals and . . . the Federal Bureau of Investigation[,]" and served as its vice-president from 2003 to 2005. Ward had also published multiple articles in the field of data security.

On cross-examination, Ward testified that his resume did not include anything specifically concerning "forensic examinations of computers"

and that his expertise was primarily "in the field of network security[.]" Ward testified that he had only done two forensic examinations, involving approximately nine computers. Ward testified that he did not hold a certification for the EnCase software he used to conduct the forensic examinations in those two instances. The State asked Ward: "And then you're asked to investigate – forensically investigate the computers in this case; is that accurate?" Ward responded: "I was asked to look at the analysis as provided by the FBI for this case." When asked if he was an expert in forensics, Ward replied: "No, sir. But you don't have to be to analyze the data." The following colloquy occurred between Defendant's attorney and Ward:

> Q. [Y]ou've spoken about specifically doing forensics on machines.
>
> A. Correct.
>
> Q. The remainder of your job as a . . . senior security analyst for the last 18 years, has that involved researching specific incidents on machines, finding out the cause, and looking into exactly what happened at set instances in time?
>
> A. Yes, sir.
>
> . . . .
>
> Q. When you say that you'd only done [two computer forensic analyses] . . . you're not including in that all of the separate instances as a security analyst . . . where you've looked at individual work stations to evaluate whether there was tampering present on those work stations[.]
>
> A. [C]orrect.

Ward then testified that the number of individual work stations he had evaluated in his career "to determine whether or not there was tampering" was "in the hundreds." Ward also testified that it was "standard operating procedure" to investigate the internet history of computers he examined to determine, as Defendant's attorney put it, "what happened at what time[.]" Ward testified that normally, "every single time I'm asked to look at a computer[,]" one of the places he [would] check was "the temporary internet files."

> Q. And what was it that you were asked to verify in this particular case?

A. That tampering possibly could have occurred.

Q. With what type of files?

A. With Google Map files.

Q. And are those temporary internet files?

A. Indeed they are, sir.

Q. And that's the type of exam you've done hundreds of times?

A. Yes.

While admitting that he was not formally trained or certified on any forensic tools, Ward testified that he did not think that was important because "the only thing I was trying to do [was] [replicate] what the FBI had done so that I was looking at . . . the same type of . . . data." Ward testified that when he conducted those tests and extracted that data, the defense had not yet been provided with the data recovered by the FBI using FTK or any other forensic tools. Ward testified that, later, after comparing what he retrieved with what was retrieved by the FBI, he would know if the data he obtained matched the FBI data. On 18 April 2011, Ward was asked when he was "first given opportunity to even look at the FBI's version of the master file tables?" Ward responded: "It was late last week when they gave -- gave us a copy of the CD-Rom." There was testimony by the State's witnesses suggesting that the Google Map file data recovered by Ward was substantially similar to that recovered by the FBI.

C.

Following *voir dire*, Defendant's counsel argued that Ward should be qualified as an expert because his "knowledge, skill, experience, training, [and] education" better qualified him, rather than the jury, to make determinations concerning the files recovered from Defendant's hard drive. Defendant's counsel argued:

> I believe that [Ward] qualifies in every possible respect as an expert, that the data extraction itself is actually irrelevant to this testimony, as the – the exact same conclusions that Mr. Ward draws from his own data, can be drawn simply from the FBI's data.
>
> As we have heard from testimony, Officer Chappell testified that the MFT [(master file table)] that we have provided was substantially similar to the one that they had provided. And, in fact, went on to compare the error

> rates in timestamps between the two, but never actually attacked the validity of the data that we had provided in our own MFT, and had an opportunity to do that.
>
> Now, I – I don't think there is any question but that Mr. Ward is the appropriate and qualified witness.

The State attacked Ward's experience as a "forensic examiner," highlighting Ward's testimony that he was not certified on the forensic tools he used to extract his data, that he had not performed many forensic examinations in the past, that he had never testified as an expert, that there was no way for the State to replicate the tests Ward performed, and that Ward testified that he did not consider himself an "expert" in forensic computer analysis. Defendant's counsel argued that, if the State did not trust Ward's techniques for data extraction, Ward could testify using the FBI data:

> [Defendant's counsel]: We could switch out all of the data that [the State's] talking about, and Mr. Ward can give the exact same opinion based on the data that the FBI has provided. Since whether or not Mr. Ward recalls, or whether or not [the State] is going to state it, the data's the same with the exception of the last -- with the exception of millionths of a second. They have the same number of invalid timestamps. We can simply accept that data, if [the State] has some question as to the extraction techniques.
>
> But moreover, what [the State] is not addressing is that there is a hierarchy of expertise in computers, and there are people that are able to do lower-level tasks, such as working with programs, pushing buttons, making things like forensic tool kit churn out a result. And, as you go up the hierarchy, the people who are at the pinnacle are actually those who are capable of network and system administration, and who are capable of detecting that kind of intrusion and tampering. That is actually the same kind of training that Special Agent Johnson had, with respect to intrusion. We go to Officer Chappell, on the other hand, he had looked at, I believe, five computers prior to this case.
>
> So the idea that [the State] is attempting to impeach Mr. Ward's capabilities, I -- given his wealth of experience, and specifically his wealth of experience in identifying tampering, is absurd. And I believe that this is entirely within the jury's province.

The trial court asked Defendant if Ward's testimony concerning the FBI data would be "as a forensic examiner." Defendant's counsel answered, "No, sir. That's his opinion as a computer security professional that tampering occurred. Determination as to whether something has been penetrated, and as to whether something has been tampered with, is directly within the province of a computer security professional, and that is exactly what Mr. Ward is."

The trial court ruled that Ward could testify as "an expert witness in the field of network security and vulnerability assessment[,]" but not as an expert "forensic examiner[.]" The trial court was troubled that there were "a number of the reports and tests that – that being specifically the Helix test that's not in [Ward's] report, and that he was supervised and told what to do by someone else [when using some of the forensic software]."

When asked by Defendant's counsel if the trial court's ruling prevented Ward from testifying about the FBI data, the trial court stated, "he is not qualified to interpret their data because that data was admitted as a forensic analysis or analyst data, and that's – that would basically be allowing him to testify as a forensic analyst, by taking their data and . . . testifying from it." The trial court stated that its ruling was based primarily on *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010). The trial court then also excluded Ward's testimony, based upon Rule 403 of the North Carolina Rules of Evidence, ruling that the probative value of the evidence to Defendant was substantially outweighed by the prejudicial effect of that evidence to the State.

D.

Even if we assume, without deciding, that the trial court did not err in excluding Ward from testifying as an expert in forensic computer analysis, the trial court did err in limiting Ward's testimony in such a manner that prevented him from testifying concerning data retrieved from the laptop, including the Google Map files.

The bulk of the *voir dire*, and the arguments by the State in favor of excluding Ward's testimony, centered on Ward's experience in forensic data retrieval. According to the testimony of Special Agent Johnson and Detective Chappell, forensic data retrieval included: securing and removing a hard drive, protecting the hard drive from further alteration, creating forensic copies of the hard drive to use for analysis, and then using specialized software to retrieve and catalog digital data from the forensic copy of the hard drive. The State did not seriously challenge Ward's ability to understand and interpret the actual data retrieved, and the *voir dire* testimony indicated that Ward had been examining

precisely the kind of files at issue — temporary internet files — on a regular basis throughout his long career as a digital data security professional.

> It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness "because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."

State v. Morgan, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004) (citation omitted). According to his *voir dire* testimony, Ward *was engaged* in a specific profession in the type of analysis in which the defense wanted him to testify, and *was experienced* with the identical subject matter — temporary internet files — at issue. Ward was certainly "in a better position to have an opinion on the subject than [wa]s the trier of fact." *Id.*

The trial court apparently believed that, because the digital data was recovered using forensic tools and methods, only an expert forensic computer analyst was qualified to interpret and form opinions based on the data recovered. The evidence on *voir dire* does not support this understanding of the nature of Ward's expertise. Assuming *arguendo* that the data Ward recovered from the forensic copy of the hard drive was suspect, neither the State nor Defendant argued that the data recovered by the State's experts was flawed – just that there was disagreement concerning the interpretation of that data. Nothing in evidence supports a finding that Ward was not qualified to testify using the data recovered by the State. Ward, based upon expertise "acquired through practical experience," *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688, was certainly "better qualified than the jury to form an opinion as to the subject matter to which his testimony applie[d]." *Miller*, 173 N.C. App. at 389, 618 S.E.2d at 841-42; *see also*, *generally*, *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010); *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009).

We cannot find sufficient evidence in the record to support the trial court's exclusion of Ward's testimony, as indicated above, for any of the three prongs of the *Howerton* analysis. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. The Google Map files recovered from Defendant's laptop were perhaps the most important pieces of evidence admitted in this trial. We hold that the trial court abused its discretion in excluding Ward from testifying, relying on the State's own evidence, to his opinion that the Google Map files recovered from Defendant's laptop had been tampered with.

Assuming *arguendo* the trial court did not abuse its discretion in disallowing Ward from giving his opinion concerning the Google Map files, *James*, 359 N.C. at 266, 607 S.E.2d at 642, we hold that the trial court erred in violation of the constitutions of the United States and North Carolina. *Farrell*, 223 N.C. at 326-27, 26 S.E.2d at 325.

Rule 403

The trial court also excluded Ward's testimony pursuant to Rule 403 of the North Carolina Rules of Evidence. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. Rule 403 (2011). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995) (citation omitted). However,

> [t]he question presented here is one of law rather than discretion, for "(t)he right to . . . face one's accusers and witnesses with other testimony (is) guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina."

Brower, 289 N.C. at 660, 224 S.E.2d at 562 (citations omitted).

The probative value of the testimony excluded was not "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. Rule 403. We hold that the exclusion of Ward's testimony constituted an abuse of discretion pursuant to general Rule 403 analysis.

Prejudice

The sole physical evidence linking Defendant to Ms. Cooper's murder was the alleged Google Map search, conducted on Defendant's laptop, of the exact area where Ms. Cooper's body was discovered. Absent this evidence, the evidence connecting Defendant to this crime was primarily potential motive, opportunity, and testimony of suspicious behavior. We hold, whether the error was constitutional or not, that erroneously preventing Defendant from presenting expert testimony,

challenging arguably the strongest piece of the State's evidence, constituted reversible error and requires a new trial, because "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011); *see also Taylor*, 484 U.S. at 409, 98 L. Ed. 2d at 810-11; *State v. Moore*, 321 N.C. 327, 344-47, 364 S.E.2d 648, 656-58 (1988). Assuming constitutional analysis applies, we also hold that the State has failed to show that the error was "harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b).

III.

[2] In Defendant's first argument, he contends that the trial court erred in precluding the testimony of Masucci, a forensic computer analyst, 'as a sanction for purported discovery violations[.]" We agree.

In light of our holding above, and because this issue is not likely to recur, we are not required to address this argument. However, resolution of this issue presents an alternate basis for granting a new trial. Therefore, in an abundance of caution, we address it.

The State did not indicate before trial that it intended to challenge Ward. Defendant called Ward, intending for Ward to testify, based upon his analysis of the data recovered from Defendant's laptop, that the Google Map files had been tampered with. The State successfully moved to exclude this testimony on the basis that Ward was not an expert in computer forensic analysis. Defendant quickly located Masucci, an expert in computer forensic analysis, to provide the testimony Ward was prevented from giving. The State then moved to exclude Masucci as a sanction for violation of discovery rules.

Based upon the facts in this case, Defendant was required under N.C. Gen. Stat. § 15A-905 (2011) to:

> Give notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court.

Generally, "[w]hether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 810 (1991) (citation omitted). A trial court may grant a continuance or recess, prohibit the party from introducing evidence not disclosed, or impose other sanctions for failure to comply with discovery orders. N.C. Gen. Stat. § 15A–910(a)(2) (2011).

However, the "Sixth Amendment [of the United States Constitution] 'guarantees a defendant's right to confront those "who bear testimony" against him.' *Melendez–Diaz*, 557 U.S. at ___, 174 L. Ed. 2d at 321 (quoting *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354, 158 L. Ed. 2d at 193)." *State v. Galindo*, 200 N.C. App. 410, 413, 683 S.E.2d 785, 787 (2009). The Sixth Amendment also guarantees a defendant's right to present a defense: "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 1023 (1967).

> The United States Supreme Court addressed the issue of whether the refusal to allow an undisclosed witness to testify violated the petitioner's constitutional right to obtain the testimony of favorable witnesses in *Taylor v. Illinois*, 484 U.S. 400, 98 L.Ed.2d 798. In *Taylor*, the United States Supreme Court stated that " 'criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.' " "Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself."

State v. Gillespie, 180 N.C. App. 514, 519, 638 S.E.2d 481, 485 (2006) *review allowed*, *writ allowed*, 361 N.C. 362, 646 S.E.2d 369 (2007), *and adopted as modified*, 362 N.C. 150, 655 S.E.2d 355 (2008).

The United States Supreme Court has stated that rules of evidence

> do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' Moreover, we have found the exclusion of evidence to be unconstitutionally

> arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

United States v. Scheffer, 523 U.S. 303, 308, 140 L. Ed. 2d 413, 418-19 (1998) (citations omitted). Therefore, a defendant has a constitutional right to present otherwise admissible expert witness testimony if that testimony is " 'likely to be a significant factor' in the defense." *Tucker*, 329 N.C. at 718-19, 407 S.E.2d at 811 (citations omitted).

In the present case, the only evidence presented by the State directly linking Defendant to the murder was the evidence of the Google Map search pinpointing the location where Ms. Cooper's body was found. Evidence challenging the State's presentation of that evidence would have clearly been a "significant factor" in Defendant's defense. Defendant was barred from presenting any evidence from his own witnesses concerning the Google Map files recovered from the laptop.

> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

Taylor, 484 U.S. at 409, 98 L. Ed. 2d at 810-11 (citations omitted).

We assume, *arguendo*, that Defendant technically violated N.C.G.S. § 15A-905. Though exclusion of Masucci's testimony may not have been arbitrary, we hold that it was disproportionate to the purposes this state's discovery rules were intended to serve. Our Supreme Court found that denial of funds to an indigent defendant to obtain an expert witness was unconstitutional for the following reasons:

> In the present case, defendant demonstrated that the determination of his guilt or innocence would hinge largely on the unrebutted testimony of the state's fingerprint expert. Defendant requested a fingerprint expert not to engage in some amorphous fishing expedition . . . but to enable him, and ultimately perhaps the jury, to assess more accurately the one item of hard evidence implicating him in the crimes charged. Under these circumstances, denying defendant the assistance of a fingerprint expert denied him "an adequate opportunity to present his claims fairly within the adversary system."

State v. Moore, 321 N.C. 327, 347, 364 S.E.2d 648, 656 (1988) (citation omitted). All else being equal, the prejudice to a defendant is the same whether he is prevented from presenting expert testimony due to indigence, or as a sanction for discovery rules violations.

The United States Supreme Court determined in Taylor that:

> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony. *Cf. United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141 (1975).

Taylor, 484 U.S. at 415, 98 L. Ed. 2d at 814 (footnote omitted). However, the Court's later holding in *Michigan v. Lucas* stated:

> We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be "adequate and appropriate in most cases." We stated explicitly, however, that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Taylor*, we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." Based on these findings, we determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate."

Michigan v. Lucas, 500 U.S. 145, 152, 114 L. Ed. 2d 205, 214 (1991) (citations omitted). The First Circuit has presented the rationale of *Taylor* in a way we find instructive:

> Although the *Taylor* Court declined to cast a mechanical standard to govern all possible cases, it established that, as a general matter, the trial judge (in deciding which sanction to impose) must weigh the defendant's right to compulsory process against the countervailing public

> interests: (1) the integrity of the adversary process, (2) the interest in the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness *vel non* of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought.

Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988) (citations omitted).

Defendant, in failing to provide earlier notice to the State, was clearly not seeking any tactical advantage. The trial court made no finding of willful misconduct, and the record divulges none. Defendant only sought out another expert, Masucci, after the State was successful in moving to limit Ward's testimony in the middle of the trial. At that point, Defendant had no way to present vital expert testimony and comply with N.C.G.S. § 15A-905(c)(2).

In light of the lack of willful misconduct on the part of Defendant, the rational reason presented for failing to inform the State before trial that Defendant would be calling Masucci, the role of the State in having this situation arise after the trial had commenced, the fundamental nature of the rights involved, the importance to the defense of the testimony excluded, and the minimal prejudice to the State had the trial court imposed a lesser sanction – such as continuance or recess, we hold that imposing the harsh sanction of excluding Masucci from testifying constituted an abuse of discretion. Assuming, *arguendo*, there was no abuse of discretion, we hold that excluding Masucci's testimony as a sanction for a discovery rules violation violated Defendant's rights under the constitutions of the United States and North Carolina.

Pursuant to either standard, we hold that the error was of such magnitude, in light of the earlier exclusion of Ward's relevant testimony, that it requires Defendant be granted a new trial.

IV. Denial of Motion for Discovery

[3] In Defendant's third argument, he contends the trial court erred in denying his motions for discovery of certain evidence contained in the files of some of the State's witnesses.

"Questions concerning discovery must be resolved by reference to statutes and due process principles, as no right to pretrial discovery existed at common law." *State v. McDougald*, 38 N.C. App. 244, 254, 248

S.E.2d 72, 81 (1978) (citations omitted); *see also State v. Cunningham*, 108 N.C. App. 185, 195-96, 423 S.E.2d 802, 808-09 (1992). "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor*, 484 U.S. at 411-12, 98 L. Ed. 2d at 812.

N.C. Gen. Stat. § 15A-903 controls discovery required to be provided by the State. N.C.G.S. § 15A-903 has been amended twice since Defendant was indicted in this matter. The version of N.C.G.S. § 15A-903 relevant to this appeal stated:

> (a) Upon motion of the defendant, the court must order the State to:
>
> (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. The term "prosecutorial agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant. . . . . The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

N.C. Gen. Stat. § 15A-903 (2009).

Certain materials are specifically excluded from the disclosure requirement of N.C.G.S. § 15A-903:

> (a) The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation

> interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.

N.C. Gen. Stat. § 15A-904 (2009). However,

> N.C. Gen. Stat. § 15A–903 provides that criminal defendants have broad pretrial access to discovery of materials obtained or prepared for the prosecution for use in its case in chief, including "not only conclusory laboratory reports, but also any tests performed or procedures utilized by chemists to reach such conclusions." This is due to "the extraordinarily high probative value generally assigned by jurors to expert testimony . . ."

State v. Llamas–Hernandez, 189 N.C. App. 640, 652–53, 659 S.E.2d 79, 86–87 (2008) (Steelman, J., dissenting), *reversed per curiam for the reasons stated in the dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009) (citations omitted). As stated by the United States Supreme Court:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353 (1974) (citations omitted).

Defendant in this case moved the trial court to compel discovery of, "FBI CART (Computer Analysis Response Team) policies and procedures for the viewing, extraction or examination of digital data;" "[m]echanism of examination or extraction to include hardware and software used;" "underlying and resultant data along with examiners' or technicians' bench notes – whether handwritten, dictated or printed as well as accompanying sketches, printed screenshots, data whether printed or handwritten, photographs or video;" "complete details as to the examiner's examination of each of the files that were modified after they were taken into exclusive law enforcement custody to determine what was modified;" and other potential information or opinion

concerning the laptop in the records of CART personnel. The State filed a motion in opposition, arguing that there exists "a law enforcement sensitive qualified evidentiary privilege" which should act to prevent discovery of these items, "because such disclosure could lead to the development of countermeasures to FBI investigative techniques. Such countermeasures could defeat law enforcement's ability to obtain forensic data in criminal cases." The State also argues that this information was protected as "work product."

The trial court denied Defendant's motion to compel discovery by order entered 4 October 2010. The trial court found as fact "[t]hat the FBI's Standard Operating Procedures and policies are the same techniques and tools that are used in counterterrorism and counterintelligence investigations[.]" The trial court concluded that "under the provisions of N.C. Gen. Stat. § 15A-903, patterned after Federal Rule of Criminal Procedure 16, the disclosure of the information sought by . . . Defendant would be contrary to the public interest in the effective functioning of law enforcement[,]" and that "under the provisions of N.C. Gen. Stat. § 15A-908[,]" disclosure of the information would result in "substantial risk" of harm to "any person, including the citizens of this State, of physical harm." The trial court did not deny Defendant's motion based upon "work product" privilege.

N.C. Gen. Stat. § 15A-908(a) states in relevant part:

> Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person of physical harm, . . . the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

N.C. Gen. Stat. § 15A-908 (2011). We have no way to evaluate the trial court's order denying discovery of the requested FBI's standard operating procedures and policies as there is nothing in the record indicating what these procedures and policies are or how making them discoverable would compromise the FBI's ability to conduct future investigations. The trial court could have conducted an *in camera* review of the requested discovery, and sealed the portions withheld to include in the record on appeal for this Court to review. *See State v. Vandiver*, 321 N.C. 570, 571-72, 364 S.E.2d 373, 374 (1988). Even in the face of a compelling State interest in keeping records confidential, due process might compel discovery, depending on how material the records are to a defendant's defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56-58, 94

L. Ed. 2d 40, 56-58 (1987); *United States v. Nixon*, 418 U.S. 683, 712, 41 L. Ed. 2d 1039, 1066 (1974) ("the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts"). We hold that on these facts due process required that the trial court at least examine the records *in camera* to determine whether they should be provided to the defense. *See Ritchie*, 480 U.S. at 56-58, 94 L. Ed. 2d at 56-58.

We do not question that N.C.G.S. § 15A-908 may serve to prevent discovery of certain otherwise discoverable materials, based upon the *concerns* argued in the present case. In this case, however, we find the blanket exclusion ordered by the trial court unsupported by the record we have before us. When cross-examination of a key State's witness is going to potentially be limited by exclusion of certain discovery in a first-degree murder trial, a more particularized and focused order is warranted. Furthermore, this determination cannot be made if the trial court does not evaluate the contested evidence. Finally, sufficient record of the excluded materials should be preserved for appellate review. *See State v. Brown*, 116 N.C. App. 445, 446-47, 448 S.E.2d 131, 132-33 (1994).

As one example of the over-broad nature of the trial court's order, and the implementation of that order, Special Agent Johnson testified that the CART team conducted a test to try to replicate the data produced by the purported Google Map search conducted on Defendant's laptop. When the defense attempted to obtain information regarding that test, the following exchange occurred:

> [MR. KURTZ – Defendant's attorney]. And when you let go of the cursor at the end of the navigation, is that consistent with when the last accessed time occurs?
>
> [Special Agent Johnson]. Again, it's -- it's my recollection on those tests that -- to answer your question, no. It was the time that we clicked on the -- the left button to close the hand. That was when the file was downloaded and those were the -- those were the consistent dates across the board. So if -- if we - - if we had went back and used that icon again, that closed hand function, it did not update those dates -- or the times. They were all reflected of when they were first initiated.
>
> Q. Do you still have that test data?

A. I'm sure we do. I -- I believe that was a large part of Officer Chappell's testimony.

Q. Is there any -- is -- the test data that resulted from Officer Chappell and your testing, is that particular data in any way a jeopardy to national security if it was disclosed to us?

MR. ZELLINGER: Your Honor, I'm going to object. This is far outside the scope of determining whether that computer is proper for an examination. And -- and we're also delving into a -- an issue of law here for the Court and not for Agent Johnson.

MR. KURTZ: Well, Judge, there is potentially a piece of information that exists on Mr. Cooper's computer that could say definitely that this material was planted, absolutely definitive. I may be wrong. Special Agent Johnson's testing may indeed be that it all has the exact same millisecond all the way across. I don't think I'm wrong. Now, one way or the other, whether it's having a -- a test done on a Vista machine now and seeing what it -- what it actually shows or giving us access to the original test data, which I don't believe has any national security ramifications since it deals with a Google Map test. One way or the other, we should be entitled to this information as it could be tremendously exculpatory.

THE COURT: Upon reconsidering this issue about this in-court test, pursuant to Rule 403, I'm going to sustain the objection and exclude any testing in Court because of the differences in the equipment and the statements made by this witness that this is not the appropriate place to do it. We need to bring the jury back in. And regarding the national security issue, that is a matter that we have already ruled on. It is something I have already dealt with.

MR. KURTZ: But, Your Honor, there is a witness on the stand that can answer specifically whether this is an issue of national security. And I'm not even going to be allowed to ask that question?

THE COURT: I believe I've already determined, because of the rules of the -- and the discovery process that you are not entitled to get those things.

MR. KURTZ: So my understanding is, the -- the rules and the discovery process, we're hiding behind national security on an issue where we could get a clear answer from a witness that this is not in fact a national security issue. And we're talking about a piece of information that could be exculpatory to Mr. Cooper.

MR. ZELLINGER: Your Honor, first of all, the exculpatory information is already in the Defendant's possession. He has all the files. The fact that his expert is -- his alleged expert can't speak to that is what the issue is before the Court. But as to any exculpatory information, all that has been given to the Defendant. All those computer files have been given to the Defendant. So I -- I want to just take issue with that and I -- I just wanted to put that on the record, as to the rest regarding –

MR. KURTZ: Your Honor, that -- that is an inaccurate statement because we're not talking about data from this computer. We're –

. . . .

MR. KURTZ: We're talking about data that Special Agent Johnson and Officer Chappell generated when they attempted to replicate the search. When they did -- when -- replicated this search, they will have generated -- and in fact, we've got a screen shot that shows the first of the timestamps. There are additional timestamps that are off screen. Those additional timestamps would answer this question definitely. And there can be no national security issue here, given we're talking about Mr. Cooper's computer alone and the data that was generated during their testing.

THE COURT: It's the methodology that they used, I think, that falls under the security issue, but –

MR. KURTZ: But if I could ask Special Agent Johnson if he has any national security concerns related to that methodology, we might be able to determine that this one particular test is a legitimate one to be disclosed, that it will not actually disclose the missile codes.

MR. ZELLINGER: Your Honor, I'm looking at the -- the affidavit of the FBI agent who provided an affidavit to the

> Court on June 10th of 2010. And -- and that set out the FBI current policies and procedures for the viewing, extraction, and or examination of digital data, the FBI's policies on the analysis, or -- or how it was -- how it was examined, numerous other documents from FBI Special Agent Johnson pertaining to his examination of the computers in this case, including but not limited to, communications logs, examiner bench notes, and all other documents completed or compiled by Special Agent Johnson beyond the report of the examination. That's what we're seeking to protect here, because we don't want, pursuant to state case law, we -- the standard operating procedures of the FBI are protected throughout our nation. And we're not hiding behind anything. All that information's been given to the Defendant. Agent Johnson's given out more information in this case than he's ever given out in any other case. And as to the -- the specific material that the Defendant wants, he has these files. If -- if their [sic] exculpatory, take them to an expert and find out how [they're] exculpatory. But the fact is that these files the Defendant has in his possession. Asking Agent Johnson on voir dire about national security just seems wildly inappropriate to me, and then he wants to know exactly how every part of every test that Agent Johnson does can affect national security and that people could be put in danger or child pornography could - could easily be deleted after this information comes out. And we're re-litigating this issue again.
>
> MR. KURTZ: Your Honor, what Mr. Zellinger is saying is -- is flat out dishonest and is ascertainable by asking Special Agent Johnson if this is information that we ever got. He's saying we have these files; we don't have these files. These are not the files from Mr. Cooper's computer. These are the files from Special Agent Johnson and Chappell's tests.
>
> THE COURT: The objection is sustained. I'm not going to allow further questioning in this line or any in-court testing of that computer. We need to bring in the jury.

It was error for the trial court to shut down this line of questioning without ascertaining how, or if, national security or some other legitimate interest outweighed the probative value of this information to Defendant. On remand, the trial court must determine with a reasonable degree of specificity how national security or some other legitimate

interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review.

New trial.

Judges GEER and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ALVIN GIBERT, DEFENDANT

No. COA12-1087

Filed 3 September 2013

Indictment and Information—short form indictment—attempted statutory rape

The short form indictment used to charge defendant with the crime of attempted statutory rape was sufficient to vest jurisdiction in the trial court.

Appeal by defendant from judgment entered 23 March 2012 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant Alvin Gibert appeals from his conviction of taking indecent liberties with a child and attempted statutory rape. Defendant's sole argument on appeal is that the indictment for attempted statutory rape was facially defective because it did not allege that he specifically intended to rape a child who was 13, 14, or 15 years old. We hold, however, that the State was permitted to use a short form indictment to charge the crime of attempted statutory rape. Since the indictment in

this case complied with the requirements for a short form indictment, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On 31 May 2010, "Sonia" was a 13-year-old girl living with her mother in Winston-Salem, North Carolina.[1] She was asleep in her mother's bedroom when her mother received a phone call about a relative who was ill.

Sonia's mother left the house, telling Sonia to stay in the house and not open the door. Sonia had gone back to sleep when there was a knock on the door that she believed to be her mother returning. When Sonia opened the door she found defendant at the door. She knew defendant because he had dated one of her cousins and had been present at family gatherings. He had also cut the grass at Sonia's home.

Defendant, who was 46 years old, asked if Sonia's mother was home. When Sonia replied that her mother was not home, defendant pushed the door open, causing Sonia to trip over a fan onto the floor. As Sonia tried to get away from defendant, he pulled down his pants and tried to pull down Sonia's pants. Defendant told Sonia to stop moving as Sonia screamed for defendant to let her go. Defendant felt Sonia's thighs with his hands, came close to her vaginal area, and tried to open her thighs, but there was no penetration.

Sonia's mother returned home to find defendant on top of Sonia with Sonia screaming, "No." Defendant's pants were around his ankles, while Sonia's pants were down to her knees. Defendant jumped up, apologized, and said he had not touched Sonia. As Sonia lay crying on the floor, her mother began hitting and pushing defendant. When she called the police, defendant fled.

Defendant was indicted for first degree burglary, taking indecent liberties with a child, and attempted statutory rape of a 13, 14, or 15 year old. The jury acquitted defendant of first degree burglary, but convicted him of taking indecent liberties with a child and attempted statutory rape of a 13, 14, or 15 year old. The trial court consolidated the charges into a single judgment and sentenced defendant to a single presumptive-range term of 157 to 198 months imprisonment. Defendant timely appealed to this Court.

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1. The pseudonym "Sonia" is used throughout this opinion to protect the privacy of the minor and for ease of reading.

Discussion

Defendant contends on appeal that the attempted statutory rape indictment was fatally defective. Although defendant did not raise this issue in the trial court, a challenge to the facial validity of an indictment "may be made at any time" because in the absence of a valid indictment, the trial court lacks subject matter jurisdiction. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000).

It is well established that "[a]n indictment or warrant charging a statutory offense must allege all of the essential elements of the offense." *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975). However, for certain crimes, our General Assembly has authorized "short form indictments" that do not necessarily require the State to allege every element of the offense. *See State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978) ("In enacting G.S. 15-144.1 the legislature prescribed a new form of indictment for rape. Prior to this enactment it was necessary that an indictment for rape contain allegations of every element of the offense. G.S. 15-144.1, in which the legislature explicitly states that '[i]n indictments for rape it is not necessary to allege every matter required to be proved on the trial,' eliminates that requirement." (internal citation omitted) (quoting N.C. Gen. Stat. § 15-144.1)).

In order to be valid, a short form indictment must contain all of the elements set forth in the particular statute authorizing the use of short form indictments for that offense. *State v. Bullock*, 154 N.C. App. 234, 244-45, 574 S.E.2d 17, 24 (2002) (holding short form indictment for murder was invalid when it omitted the element of malice required in short form indictment statute for that crime).

N.C. Gen. Stat. § 15-144.1 (2011) authorizes the use of a short form indictment for first degree rape, second degree rape, attempted rape, or assault on a female:

> (a) In indictments for rape it is not necessary to allege every matter required to be proved on [sic] the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations

> herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

Defendant contends that N.C. Gen. Stat. § 15-144.1 does not apply to an indictment alleging statutory rape of a 13 year old. In *State v. Bradley*, 179 N.C. App. 551, 559, 634 S.E.2d 258, 263 (2006), however, this Court held that N.C. Gen. Stat. § 15-144.2 (2005), the short form indictment statute for sexual offense charges, applied to the crime of statutory sex offense when the alleged victim was either 13, 14, or 15 years old. Since N.C. Gen. Stat. § 15-144.1 and N.C. Gen. Stat. § 15-144.2 have essentially identical wording, substituting "rape" for "sexual offense," *Bradley* establishes that N.C. Gen. Stat. § 15-144.1 applies to the charge in this case, and the State could use a short form indictment to indict defendant for attempted statutory rape when the alleged victim was 13, 14, or 15 years old. 179 N.C. App. at 559, 634 S.E.2d at 263.

Defendant next contends that the indictment did not meet the requirements of N.C. Gen. Stat. § 15-144.1. The indictment in this case alleged:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to engage in vaginal intercourse with [Sonia], a person of the age of 13 years. At the time of the offense, the defendant was at least six years older than the victim and was not lawfully married to the victim.

Defendant points out that this indictment omits the allegation required by N.C. Gen. Stat. § 15-144.1 that the vaginal intercourse was "by force and against her will." In *Bradley*, however, even though N.C. Gen. Stat. § 15-144.2 also included the language " 'by force and against [her] will' " and the indictment at issue omitted that language, this Court held that the indictment complied with N.C. Gen. Stat. § 15-144.2 and "was sufficient to put the defendant on notice of the crime of which he was accused." 179 N.C. App. at 558, 559, 634 S.E.2d at 263 (quoting N.C. Gen. Stat. § 15-144.2 (2005)). *Bradley* is materially indistinguishable from this case and, therefore, controls.

Further, neither force nor a lack of consent were elements of the crime alleged in this case, N.C. Gen. Stat. § 14-27.7A(a) (2011). *See State v. Anthony*, 351 N.C. 611, 616, 528 S.E.2d 321, 323-24 (2000). The

State was not required to prove that the vaginal intercourse was by force and against Sonia's will, and, therefore, such an allegation was not required in the indictment. *See* N.C. Gen. Stat. § 15-155 (2011) ("No judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . .").

Defendant also contends that the indictment was insufficient because it did not allege that defendant attempted to "ravish and carnally know" the victim. However, in *Wallace*, 351 N.C. at 505, 528 S.E.2d at 341-42, the indictments for rape similarly alleged only that the defendant engaged in vaginal intercourse with the victim and not that the defendant ravished or carnally knew the victim. The Court nonetheless held the indictments complied with N.C. Gen. Stat. § 15-144.1 and provided adequate notice to defendant under both the United States and North Carolina constitutions. 351 N.C. at 505, 528 S.E.2d at 342.

Here, the indictment, like the indictment in *Wallace*, alleged that defendant "did attempt to engage in vaginal intercourse with [Sonia]." Although defendant argues that "[t]he State made no allegation in the indictment that [defendant] either attempted or succeeded in ravishing Sonia and having carnal knowledge of her," we believe that the phrase "ravish and carnally know" is essentially synonymous with vaginal intercourse, at least when alleging intercourse with a victim under the age of consent.

Consequently, we hold that the indictment in this case was a short form indictment sufficient to vest jurisdiction in the trial court. Since defendant makes no other argument on appeal, we hold defendant received a trial free of prejudicial error.

No error.

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

TOWN OF MIDLAND v. WAYNE

[229 N.C. App. 481 (2013)]

TOWN OF MIDLAND, PLAINTIFF
v.
DARRYL KEITH WAYNE,
TRUSTEE OR ANY SUCCESSORS IN TRUST, UNDER THE DARRYL KEITH WAYNE REVOCABLE TRUST AGREEMENT, AND ANY AMENDMENTS THERETO, DATED FEBRUARY 23, 2007, DEFENDANT

No. COA12-1163

Filed 3 September 2013

1. Real property—inverse taking—sufficient evidence

The trial court did not err in a real property case by concluding that actions by plaintiff Town's contractor in using portions of defendant's land outside an easement constituted an inverse taking. There was substantial evidence to support the trial court's findings on this issue, including the ultimate finding.

2. Real property—regulatory taking—in its entirety

The trial court erred in a real property case by concluding that plaintiff Town's taking of an easement constituted a regulatory taking of defendant's property in its entirety. The trial court made no findings to support a conclusion that the property had no practical use or reasonable value. Furthermore, defendant is not entitled to additional compensation, beyond the diminution in value as provided in N.C.G.S. §40A-64, based on the loss of the right to develop the property in a certain way.

3. Appeal and Error—issue moot

Plaintiff Town's argument in a real property case that the trial court erred in relying upon the speculative opinion testimony of defendant's expert was moot.

4. Real Property—unity of ownership—separate owners

The trial court did not err in a real property case by concluding that no unity of ownership existed between tracts of land owned by defendant and a tract owned by a separate limited liability company.

Appeal by Plaintiff and cross-appeal by Defendant from orders entered 23 March 2012 and 7 June 2012 by Judge C.W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 27 March 2013.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Andrew T. Cornelius, for Plaintiff.

Vanderventer Black, LLP, by Norman Shearin, David P. Ferrell, and Ashley P. Holmes, for Defendant.

DILLON, Judge.

In February 2009, Plaintiff Town of Midland (the "Town") filed two actions to condemn portions of two adjacent tracts of land (the "Wayne Tracts") owned by Defendant, Darryl Keith Wayne, Trustee of the Darryl Keith Wayne Revocable Trust ("Defendant"). On 2 December 2011, the trial court held a hearing pursuant to N.C. Gen. Stat. § 40A-47 (2011), to consider all issues relating to the taking *other than* compensation. The trial court subsequently entered various orders regarding the matters raised at the hearing, which are the subject of this appeal.

I. Background

The Wayne Tracts, which consist of approximately 90 acres of land, form the southern portion of a tract containing 250 acres of land assembled by Mr. Wayne for the purpose of developing a residential subdivision known as Park Creek. (The entire 250-acre assemblage is hereinafter referred to as "the Property.") The northern portion of the Property consisted of several tracts which were held in the name of Park Creek, LLC, in which Mr. Wayne was a member.

On 19 June 1997, the Cabarrus County Planning and Zoning Commission approved a customized development plan (the "1997 Plan") for the Property. The 1997 Plan gave Mr. Wayne the right to develop residential lots on the Property within certain parameters so long as it remained in force.

By 2009, the first two phases of lots within the Park Creek subdivision, which were located on the northern portion of the Property, had been substantially developed and sold. However, the Wayne Tracts and one tract owned by Park Creek, LLC, remained largely undeveloped.

In February 2009, the Town commenced these actions for the purpose of taking an interest in a small portion - approximately three acres - of the two Wayne Tracts for an easement in which to construct a natural gas pipeline and a fiber optic line. (The easement within the Wayne Tracts is hereinafter referred to as "the Easement.") The Town did not name Park Creek, LLC, as a party or identify its tract in the taking since

the Easement did not include any portion of the tract owned by Park Creek, LLC.

In September 2009, a contractor employed by the Town drove vehicles and equipment and maintained construction staging areas on portions of the Wayne Tracts outside of the Easement for a period of time during construction.

In the fall of 2011, Defendant filed a counterclaim for inverse condemnation in each action claiming that the contractor's actions constituted a temporary taking of portions of the Wayne Tracts outside the Easement and that Defendant was entitled "to be paid just compensation for the taking of [the Wayne Tracts]."

Also in the fall of 2011, Park Creek, LLC, moved to intervene in the condemnation actions, claiming that the Town had inversely condemned its tract by adversely impacting its rights to develop it in accordance with the 1997 Plan. This motion, however, was denied by the trial court after a hearing on 25 October 2011.

In November 2011, the trial court held a hearing, pursuant to N.C. Gen. Stat. § 40A-47, to consider all issues other than damages. Subsequently, the trial court entered two orders on 23 March 2012, which were amended by orders entered on 7 June 2012. In these orders the trial court concluded that (1) an inverse condemnation had occurred with respect to the Wayne Tracts outside the Easement and (2) there was no unity of ownership between the Wayne Tracts and the tract owned by Park Creek, LLC. From these orders, the Town appeals; and Defendant cross-appeals.

Preliminarily, we note the orders are interlocutory, with the issue of damages remaining unresolved. However, we have held that a trial court's determination that an inverse condemnation has occurred affects a substantial right and is, therefore, immediately appealable. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 107, 338 S.E.2d 794, 797 (1986).

II. Analysis

In reviewing the Town's appeal and Defendant's cross-appeal from the trial court's orders, our standard of review is whether the findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed *de novo*. *See id.* at 111, 338 S.E.2d at 799. We address each appeal separately below.

A: The Town's Appeal

The Town challenges the trial court's determination regarding Defendant's inverse condemnation counterclaims. Additionally, the Town argues that the trial court erred by relying upon the opinion of Defendant's expert.

In these actions, the Town filed actions to condemn the Easement. In its orders, however, the trial court determined that the Town had inversely condemned the Wayne Tracts outside the Easement in two ways. First, the trial court determined that the Town had temporarily taken portions of the Wayne Tracts outside the Easement through the actions of its contractor during the construction of the pipeline and fiber optic line. Second, the trial court determined that the Town's condemnation of the Easement "ha[s] denied [Defendant] of all practical uses of the Wayne Tracts, resulting in a regulatory taking of the Wayne Tracts." We address each challenge below.

1: Temporary Taking

[1] The Town argues that the trial court erred in concluding that the actions by its contractor in using portions of the Wayne Tracts outside the Easement constituted an inverse taking. We disagree.

In this case, the trial court found that the Town's contractor drove vehicles and equipment, built a road and cleared and maintained construction staging areas, all on portions of the Wayne Tracts outside the Easement. The findings in this case are similar to the facts in *Ferrell* in which "[t]he contractor entered upon defendants' land, graded and gravelled a roadway outside the areas identified as areas to be acquired by the City, and began to haul pipe into the construction site[;] [t]he contractor used a second area outside the identified easements to store pipes and equipment." *Id.* at 105, 338 S.E.2d at 795. In *Ferrell*, we held that the trial court, "as the trier of fact, could find from the . . . evidence that the contractor's use of the roadway over defendants' property was essential to provide access to the City's sewer outfall construction site, that such use thus necessarily flowed from the construction of the improvement in keeping with the design of the condemnor, and that it thus resulted in an appropriation of land outside the easements." *Id.* at 112, 338 S.E.2d at 800. As in *Ferrell*, the trial court, here, essentially found the contractor's use of portions of the Wayne Tracts outside the Easement was essential to the construction. Specifically, in its 7 June 2012 order, the trial court made finding of fact number 10, which stated as follows:

> 10. The dimensions, size, and location of the easements acquired and the location of an existing pipeline were such that the Town's contractor was forced to enter areas of the Wayne Tracts outside such easements. The said easements were not large enough or so situated to accommodate both the piles of dirt generated by excavations required for the installation of the pipeline and other construction activities necessitated by plans for the Project.

After thorough review of the evidence in this case, we conclude that there was substantial evidence to support the trial court's findings on this issue, including the ultimate finding quoted above. Defendant offered the testimony of Alan Goodman, who testified, *inter alia*, that the area within the Easement was impassable at times during construction making it necessary for the contractor to utilize land outside the Easement. Further, Defendant also offered a number of photographs purportedly showing that the Easement was impassable. Accordingly, the Town's argument is overruled.

2: Regulatory Taking

[2] The Town next argues that the trial court erred by concluding that the Town's taking of the Easement constituted a regulatory taking of the Wayne Tracts in their entirety. We agree.

There are "two categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property." *King by & Through Warren v. North Carolina Dep't of Env't., Health & Natural Resources*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997). In the case, *sub judice*, the trial court concluded that a regulatory taking occurred based on the second category set out in *King*. Specifically, the trial court concluded in its June 2012 order as follows:

> 18. The Town's condemnations in [these actions] have denied [Defendant] all practical uses of the Wayne Tracts, resulting in a regulatory taking of the Wayne Tracts.

This conclusion is based on a series of findings in which the trial court determined that Defendant had a vested right to develop lots on the Wayne Tracts in accordance with the 1997 Plan; that because of the Town's condemnation of the Easement, "it is no longer economically feasible for [Defendant] to construct roads on the Wayne Tracts in accordance with the [1997] Plan"; and that "[c]onsequently, [Defendant]

has been deprived of all practical uses of the Wayne Tracts." In other words, the trial court concluded that the Wayne Tracts have no practical use based on a finding that Defendant might no longer be able to develop them in a particular way.

Our Supreme Court has stated in such cases that "the test for determining whether a taking has occurred . . . is whether the property . . . has a practical use and a reasonable value." *Finch v. City of Durham*, 325 N.C. 352, 364, 384 S.E.2d 8, 15 *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989) (citation omitted). However, "a taking does not occur simply because government action deprives an owner of previously available property rights." *Id.* at 366, 384 S.E.2d at 16 (citation omitted).

We do not believe that the trial court's conclusion that a regulatory taking by the Town of the Wayne Tracts in their entirety is supported by the trial court's findings. The trial court made no findings to support a conclusion that the Wayne Tracts, which include approximately 87 acres outside the three-acre Easement, have *no* "practical use . . . or reasonable value." The trial court did not find that the Wayne Tracts could not be developed residentially at all. Rather, the trial court found that "[a]ny major changes or amendments to the [1997] Plan such as the elimination of roads will also render the [1997] Plan ineffective, eliminating [Defendant's] vested rights in the Plan, and requiring [Defendant] to submit a new plan for approval by Cabarrus County[,]" which suggests that the Wayne Tracts could still be developed for residential use, though not in accordance with the 1997 Plan. Therefore, the trial court's findings do not support Defendant's claim for inverse condemnation of the Wayne Tracts in their entirety based on a regulatory taking.

Our holding does not prevent Defendant from presenting evidence at a subsequent trial on damages with respect to an inability to develop the Wayne Tracts in accordance with the 1997 Plan. Such evidence could be determined to be competent to show the diminution in value of the Wayne Tracts resulting from the taking of the Easement.

Defendant argues that its inverse condemnation claim should be sustained, in any event, based on the trial court's finding that it had a "vested right" in the 1997 Plan, because the Town did not specifically identify in its complaint that this "vested right" was being taken. Generally, a property owner may have a justified inverse condemnation claim in the event that it loses a vested right as a result of a government action where the government has not filed a declaration of taking. N.C. Gen. Stat. § 40A-51(a) provides that "[i]f property has been taken . . . and no complaint containing a declaration of taking has been filed[,] the

owner of the property . . . may initiate an action to seek compensation for the taking." *Id.*

However, here, the Town did file complaints identifying the "property [it] sought to acquire" as required by N.C. Gen. Stat. § 40A-20, which was a portion of the Wayne Tracts. Chapter 40A provides that one measure of damages where only a partial taking of a tract occurs is "the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking[.]" N.C. Gen. Stat. § 40A-64(b)(i) (2011). Our Supreme Court stated in *Board of Transportation v. Jones* that where a condemner has taken a portion of a tract, "evidence regarding the adverse effects of the condemnation on the remaining property is admissible, but such effects 'are not separate items of damages, recoverable as such, but are relevant only as circumstances tending to show a diminution in the overall fair market value of the property.' " 297 N.C. 436, 439, 255 S.E.2d 185, 187-88 (1979) (quoting *Gallimore v. Commission*, 241 N.C. 350, 355, 85 S.E.2d 392, 396 (1955)).[1] Defendant is not entitled to additional compensation, beyond the diminution in value as provided in N.C. Gen. Stat. §40A-64, based on the loss of the right to develop the property in a certain way.[2] Therefore, where the Town has filed a complaint which will entitle Defendant to compensation based on the diminution in value of the Wayne Tracts caused by the taking of the Easement, an inverse condemnation action by Defendant seeking additional damages resulting in the loss of its vested rights cannot be sustained.

3: Expert Witness Opinion Testimony

[3] The Town argues that the trial court erred in relying upon the speculative opinion testimony of Richard Flowe, Defendant's expert witness, in concluding that the Town's taking of the Easement resulted in a regulatory taking of the Wayne Tracts in their entirety. Specifically, the Town argues that Mr. Flowe's testimony was based on a map

1. The other cases cited by Defendant regarding a regulatory taking are inapposite. For instance, Defendant cites *Raleigh v. Hollingsworth* in which a property owner filed a counterclaim for inverse condemnation. 96 N.C. App. 260, 385 S.E.2d 513 (1989). Our Court sustained a finding that an inverse condemnation had occurred; however, the property owner did not allege that the condemnor had taken additional rights in the property the condemnor had not identified in its notice of taking. Rather, the property owner alleged that the condemnor took another separate tract in addition to the tract identified in the notice of taking. *Id.*

2. Based on our holding, it is not necessary for us to decide whether Defendant's right to develop the Wayne Tracts in accordance with the 1997 Plan constitutes a "vested right."

showing a hypothetical development plan and not on a review of the 1997 Plan. However, our decision in subsection 2 above renders this argument moot.

B: Defendant's Cross-Appeal

1: Unity of Ownership

[4] In Defendant's sole argument on cross-appeal, he contends the trial court erred by concluding that no unity of ownership existed between Park Creek, LLC, and Defendant. We disagree.

Pursuant to N.C. Gen. Stat. § 40A-67, "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." *Id.*

In this case, the facts are not in dispute. Mr. Wayne testified that he was the majority shareholder of Park Creek, LLC, owning 75% of its property. Mr. Wayne also testified that he is the record owner of the Wayne Tracts as Trustee of the Darryl Keith Wayne Trust. Our Supreme Court has held that "[a]bsent unity of ownership . . . two parcels of land cannot be regarded as a single tract for purposes of determining a condemnation award." *Board of Transp. v. Martin*, 296 N.C. 20, 26, 249 S.E.2d 390, 395 (1978) (emphasis added). Further, the *Martin* Court held that "a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages." *Id.* at 28, 249 S.E.2d at 396. Based on *Martin*, we conclude the trial court did not err in finding and concluding that there was no unity of ownership between the Wayne Tracts owned by Mr. Wayne and the tract owned by a separate limited liability company.

Defendant argues that *Martin* is not controlling because it is a limited liability company and not a corporation, citing *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994); *D.O.T. v. Nelson Co.*, 127 N.C. App. 365, 489 S.E.2d 449 (1997); and *D.O.T. v. Fernwood Hill Townhome Homeowners' Ass'n*, 185 N.C. App. 663, 649 S.E.2d 433 (2007). However, none of these cases involve a situation in which a limited liability company owns one tract and one of its members has ownership in an adjacent tract.

In *Yarbrough*, *supra*, we found that there was unity of ownership between a tract owned by a husband and an adjacent tract owned by his wife. We based this holding on the wife's inchoate right of dower in the

husband's land; and, accordingly, the wife held "some quality" of interest in both tracts. *Yarbrough*, *supra*.

In *Nelson Co.*, *supra*, we held unity of ownership may exist between two adjacent tracts owned by separate partnerships where some of the general partners were the same. In so holding, we stated that "each general partner has an ownership interest in partnership property along with the other partners[,]" relying on N.C. Gen. Stat. § 59-55(a) (1996). *Id.* at 367, 489 S.E.2d at 450.

Finally, in *Fernwood Hill Townhome Homeowners' Ass'n*, *supra*, we held that there was unity of ownership between the common areas owned by a homeowner's association and the individual townhomes. In so holding, we noted that the owners of the individual townhomes also each possessed an easement over the common areas, thus creating a unity of ownership. *Id.* at 640, 649 S.E.2d at 438.

However, unlike the individuals in *Yarbrough*, *Nelson Co.*, and *Fernwood Hill Townhome Homeowners' Ass'n*, Mr. Wayne, *individually*, has no interest in the tract owned by Park Creek, LLC. Rather, he merely owns an interest in the limited liability company which owns the tract. The *Martin* Court reasoned that a corporation and its shareholders are to be treated differently for purposes of determining whether unity of ownership exists based on the fact that a "corporation is an entity distinct from its shareholders which own it. . . . Where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is in their benefit to do so." *Id.* at 28-29, 249 S.E.2d at 395 (citations omitted). We believe that this reasoning equally applies to the relationship between a limited liability partner and its members. Unlike a general partnership, a corporation and a limited liability company are each established by its owners, in part, "to secure [the] advantage[]" of a shield from the liabilities of the entity. Defendant cannot now ask this Court to disregard the entity. Defendant argues, however, that we should treat a limited liability company like a general partnership, rather than like a corporation, for purposes of determining unity of ownership because both entities are taxed similarly. However, this argument is unconvincing; subchapter S corporations and partnerships are also taxed similarly.

III: Conclusion

For the foregoing reasons, we conclude the trial court did not err in ruling there was an inverse taking with regard the parking of construction

vehicles and the temporary construction of a road on the Wayne Tracts outside of the Easement condemned by the Town's contractor. However, we hold that the trial court erred in concluding that there was a regulatory taking of the Wayne Tracts in their entirety. Lastly, regarding Defendant's cross-appeal, we affirm the trial court's ruling concerning the question of unity of ownership. Accordingly, we remand this matter to the trial court for a determination of damages with respect to both the Town's taking as described in its notice of taking to be calculated pursuant to N.C. Gen. Stat. §40A-46 and the temporary taking of portions of the Wayne Tracts outside the Easement by the Town's contractor.

AFFIRMED, in part; REVERSED and REMANDED, in part.

Judge CALABRIA and Judge ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 SEPTEMBER 2013)

ABC ROOFING, INC. v. SAWYER No. 13-241	Guilford (11CVD8527)	Affirmed
BOST CONSTR. CO. v. BLONDY No. 12-1454	Chatham (09CVS79)	Reversed and Remanded in Part; Vacated in Part
CULBRETH v. IRONMEN OF FAYETTEVILLE, INC. No. 13-14	N.C. Industrial Commission (999981)	Affirmed
IN RE A.H.L. No. 13-172	Haywood (07JA93-95)	Affirmed in Part; Reversed in Part
IN RE C.L.Y. No. 12-1570	Mecklenburg (11JB664)	Affirmed
MINTZ v. KELLEY No. 13-36	Columbus (11CVS500)	Dismissed
MOOREFIELD v. MOOREFIELD No. 13-91	Guilford (09CVD11346)	Affirmed
NC STATE BAR v. SMALL No. 12-1545	Disciplinary Hearing Commission (11DHC13)	Affirmed
PUGH OIL CO., INC. v. ACE TRANSP., LTD No. 12-1438	Randolph (10CVS2485)	Affirmed
STATE v. BOYD No. 10-1072-3	Orange (09CRS51487-89) (09CRS543)	No Error
STATE v. BROWN No. 13-77	Cleveland (11CRS53699)	Dismissed
STATE v. BRYANT No. 13-62	Craven (11CRS53338)	No Error
STATE v. CHRISTIAN No. 13-162	Guilford (11CRS91498-99) (12CRS24062)	No Error

STATE v. MALACHI No. 13-45	Mecklenburg (11CRS252097)	No Error
STATE v. ROBY No. 13-61	Rowan (07CRS56055)	No Error
STATE v. WEISS No. 12-1566	Catawba (11CRS8038)	No Error
STATE v. WILLIAMS No. 13-193	Cumberland (09CRS64038)	No Error
STATE v. WILSON No. 13-70	Person (09CRS51021-23) (12CRS64)	No Error
STATE v. BIVENS No. 12-1462	Union (08CRS52528-29) (08CRS7494)	No error in part; vacated and remanded in part
STATE v. CATES No. 12-1055	Durham (11CRS1848-49)	No Error
STATE v. EVANS No. 12-1423	Wake (11CRS202639)	No Error
STATE v. HARRIS No. 12-1532	Guilford (11CRS93955) (12CRS24011-12)	No Error
STATE v. HELMS No. 12-1436	Hoke (10CRS50554-56) (10CRS50557-58) (10CRS50559-62) (10CRS50565) (10CRS50566) (10CRS50567) (10CRS50568) (10CRS50569) (10CRS50571-72) (10CRS50603) (10CRS50613) (10CRS50614-15) (10CRS50616-20) (10CRS934) (10CRS937-39) (10CRS941-42)	Reversed in part; Vacated in part; Remanded for resentencing

STATE v. NIEVES No. 12-1277	Guilford (11CRS24775-76) (11CRS24779-780) (11CRS83730-734) (11CRS83740-44) (12CRS24093-94) (12CRS24097-98)	No Error
STATE v. NIXON No. 12-1439	Gaston (11CRS56276)	Affirmed
WEBER, HODGES, & GODWIN COM. REAL EST. SERVS. v. HARTLEY No. 13-207	Watauga (11CVS610)	Affirmed

DAVIS v. DAVIS

[229 N.C. App. 494 (2013)]

ROBIN E. DAVIS, PLAINTIFF
v.
CHARLES D. DAVIS, III, DEFENDANT

No. COA13-113

Filed 17 September 2013

1. Child Custody and Support—modification of order—no findings of changed circumstances

Portions of a child custody order modifying visitation and ordering defendant to attend anger management classes were vacated where none of the trial court's modifications of the prior order were supported by a finding of a substantial change in circumstances that affected the welfare of the children.

2. Contempt—civil—withholding child visitation

The trial court correctly denied defendant's motion for contempt in a dispute over withheld child visitation. Even if the evidence could have supported a contrary finding, there was at least some evidence to support the trial court's finding that plaintiff's actions were justified under the circumstances.

Appeal by defendant from Order entered 13 May 2012 by Judge Stephen V. Higdon in District Court, Union County. Heard in the Court of Appeals 15 August 2013.

Stepp Lehnhardt Law Group, P.C. by Donna B. Stepp and Mallory A. Willink, for plaintiff-appellee.

Krusch & Sellers, P.A. by Rebecca K. Watts, for defendant-appellant.

STROUD, Judge.

Charles D. Davis, III ("defendant") appeals from an order granting two motions in the cause brought by plaintiff Robin E. Davis ("plaintiff"), denying his motion to modify custody, and denying his motion to hold plaintiff in contempt of court. For the following reasons, we vacate in part and affirm in part.

I. Background

Plaintiff and defendant were married 12 December 1993, separated 13 August 2001, and divorced sometime in 2003.[1] The couple had two children—Mary, born 6 July 1995, and Sarah, born 29 November 1996.[2] After protracted custody litigation following the parties' separation, on 20 October 2003 Judge Lisa Thacker of the Union County District Court entered an order providing for joint legal custody of Mary and Sarah ("the 2003 order"). Plaintiff was granted primary custody of the children, and defendant was granted visitation on alternate weekends. Holidays, birthdays, and summers were split evenly. A special provision was added to accommodate defendant's National Guard schedule, providing for make-up visitation whenever drill weekends fell during defendant's regularly-scheduled visitation. Since the entry of the 2003 order, the parties have been embroiled in continual litigation over custody of their two daughters.

Their latest dispute, the subject of this appeal, was precipitated by an altercation between defendant and daughter Mary on 18 January 2009. On that evening, Mary and Sarah were at defendant's house during their regularly-scheduled weekend visitation. Defendant and Mary got into a heated argument when Defendant informed Mary that they had an additional day of visitation that weekend, but Mary believed that she and Sarah were supposed to return to Plaintiff's home that day. Mary demanded that defendant "show me the order" to prove that he had the additional day of visitation, and defendant physically disciplined Mary "in an inappropriate manner"—as described in further detail below.

As a result of the incident, a report was filed with the Union County Department of Social Services (DSS), and plaintiff, concerned for the safety of her daughters, unilaterally and without benefit of any court order cut off defendant's weekend visitation. Her concerns were amplified by past allegations of domestic violence involving plaintiff and defendant, as well as a separate domestic violence incident involving defendant and another previous wife. Plaintiff demanded defendant obtain anger management counseling before she would agree to resume defendant's visitation. In the meantime, plaintiff permitted her daughters to visit their father only on the condition that other family members were present.

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1. The exact date of the parties' divorce is not clear from the record.

2. To protect the privacy of the children to the extent possible, and for ease of reading, we will refer to them by pseudonym.

In February, March, and April of 2009, several e-mails and letters were exchanged between the parties and their respective attorneys, apparently in an attempt to resolve the issue out of court, but neither party took any formal legal action. Plaintiff never pressed charges against defendant for assaulting Mary, never sought a domestic violence protective order under or moved for temporary custody under N.C. Gen. Stat. §§ 50B-3(a)(4) or 50-13.5(d)(2), (3) (2009) in response to the January incident. On 17 April 2009, DSS concluded its investigation, finding that any claims of child abuse arising from the incident were unsubstantiated.

On 8 May 2009 plaintiff filed a motion in the cause, asking the court to order defendant to attend anger management counseling as a result of the January incident and to formally suspend his visitation until further notice. On the same day, she filed what was styled as a "motion in the cause for modification/clarification of a prior custody order." Her motion asked the court to clarify certain "ambiguities" in the holiday and birthday provisions of the 2003 order and provide more guidance on how to schedule make-up visitation when defendant was away on drill weekend. Plaintiff alleged the parties' disagreements in interpreting the order had risen to the level of "a substantial and material change in circumstances affecting the best interest and general welfare of the minor children."

On 3 June 2009 defendant responded with a motion to modify custody, arguing he should be awarded primary custody because plaintiff had suspended his visitation in violation of the 2003 order, made false claims of abuse, and actively "instill[ed] alienation of the minor children from the Defendant/Father." Defendant amended this motion on 17 August 2009, but made nearly identical claims. The next day, 18 August 2009, defendant filed a motion to hold plaintiff in contempt for denying defendant's visitation in violation of the 2003 order. The district court entered a show cause order the same day, ordering plaintiff's appearance in court. At that time, it had been eight months since defendant had had any of his court-ordered visitation with his daughters.

These matters were first set for hearing on 22 September 2009 and then continued to 21 October 2009. On 19 May 2010, the trial court granted a motion for peremptory setting for 21 May 2010, which the parties had consented to because "certain witnesses live outside of the State of North Carolina and need to make work and travel arrangements in advance. In addition, this matter has been continued several times and Defendant and the minor children in this matter are in need of a resolution as soon as possible." The record does not reveal why

the peremptory setting for 21 May 2010 did not result in a hearing,[3] but it did not, and nearly a year later, on 30 March 2011, defendant filed a Motion for Change of Venue,[4] asking that the case be transferred to Mecklenburg County due to his inability to have a hearing in Union County, alleging that

> 7. This matter has been scheduled by this Court at least five (5) times. The latest setting was for Monday, March 21, 2011. Over the objection of the Defendant/Father, this Court granted another motion to continue this matter filed by the Plaintiff/Mother. The basis of the request was so the Plaintiff/Mother could take the minor child to a pageant.[5]
>
> 8. Defendant/Father contends that he cannot get a hearing, let alone a fair hearing before this tribunal, and therefore respectfully requests this Court to transfer the venue of this matter out of Union County to Mecklenburg County.
>
> 9. Otherwise, the Defendant/Father will continue to have no visitation with the minor children and the poisonous ways of the Plaintiff/Mother will forever preclude a reconciliation with the minor children.

The long-awaited hearing finally started on 8 August 2011: 2 years, 6 months, and 21 days after the incident for which plaintiff unilaterally stopped defendant's visitation. Three days of hearing were held in

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3. The purpose of peremptory setting is "to permit just and prompt consideration and determination" of cases that might otherwise be inappropriately delayed. Gen. R. Prac. Super. and Dist. Ct. 1, 2010 Ann. R. N.C.; *see Willoughby v. Kenneth W. Wilkins, M.D., P.A.*, 65 N.C. App. 626, 642, 310 S.E.2d 90, 100 (1983) (connecting the use of peremptory settings with this philosophy of the general rules of practice), *disc. rev. denied*, 310 N.C. 631, 631, 315 S.E.2d 697, 697-98 (1984). It is unclear why the peremptory setting here failed to result in prompt consideration and determination even after the district court decided that there was good reason to peremptorily set this case. *See* Union Cty. Local R. 3.13 ("Requests for peremptory settings will be granted at the discretion of the assigned judge but only for good cause.").

4. Although the issue raised by this motion is not a subject of this appeal, and we make no comment upon the legal sufficiency of the motion, we mention it only because it sheds some light upon the reasons for the protracted delay in the hearing of the pending motions.

5. In all fairness, we will quote plaintiff's response to this allegation verbatim: "The Plaintiff admits that she filed a Request to Continue as the parties' daughter was selected for Charleston Fashion Week (a regional fashion event) as a *model* for emerging designers—not a *pageant*. The parties' daughter has been involved in modeling for many years and had competed for and prepared for this event since October 2010 when the March court date had not even been set, and that the Court granted said Request; the remaining allegations are denied." (emphasis in original).

August and the final day was on 20 September 2011. On 11 August 2011, defendant voluntarily dismissed his motion for change of venue.

Eight months after the conclusion of the hearing, or 3 years, 3 months, and 22 days after the incident, on 10 May 2012, the trial court finally entered an order disposing of the parties' various motions.[6] The trial court denied defendant's motion to modify custody; denied defendant's motion for contempt; appended several "clarifications" to the 2003 order's visitation provisions; and ordered defendant to attend anger management counseling. Defendant filed written notice of appeal on 4 June 2012.

II. Analysis

On appeal, defendant argues that (1) the trial court abused its discretion by modifying the 2003 order and ordering defendant to attend anger management counseling without expressly finding a substantial change in circumstances that affected the children's welfare; and (2) the trial court erred in failing to find plaintiff in contempt for her violations of the custody order. Because the trial court's findings are insufficient to support its modification of the custody order, we vacate those modifications. We affirm the trial court's denial of defendant's motion for contempt.

A. Standard of Review

"[T]he presiding judge, who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with broad discretion in cases concerning the custody of children." *In re Custody of Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982) (citations omitted). On review of a trial court's order in such matters,

> the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . [S]hould we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary. . . . [T]his Court must [then] determine if

6. Plaintiff also filed a motion for judicial assistance on 4 June 2009 and a motion in the cause for modification of child support on 26 May 2010. While the trial court addressed the parties' child support disputes in its 10 May 2012 order, appellant does not challenge the trial court's disposition of these motions on appeal.

> the trial court's factual findings support its conclusions of law. . . . If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child[ren] and that modification was in the [children's] best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003) (citations and quotation marks omitted).

B. Modifying the 2003 Custody Order

[1] This Court has consistently held that "the trial court commit[s] reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation, quotation marks, and ellipses omitted); *see also* N.C. Gen. Stat. § 50-13.7(a) (2011) (providing that "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause *and a showing of changed circumstances* by either party or anyone interested." (emphasis added)). The term "custody" includes visitation as well. *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978); N.C. Gen. Stat. § 50-13.1(a) ("Unless a contrary intent is clear, the word custody shall be deemed to include custody or visitation or both.").

"Conclusory statements regarding parental behavior" and "bare observations of plaintiff's or defendant's actions" are by themselves insufficient to support the modification of an existing custody order. *Garrett v. Garrett*, 121 N.C. App. 192, 196–97, 464 S.E.2d 716, 719 (1995), *disapproved on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). Instead, trial courts should "pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests." *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257. "It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. The trial court is required to make specific findings of fact with respect to factors listed in the statute." *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (citations omitted). Moreover, "[t]he trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order." *Lewis v. Lewis*, 181 N.C. App. 114, 119, 638 S.E.2d 628, 631 (2007).

Our Supreme Court has explained why it is essential for trial courts to include a specific finding of a substantial change in circumstances affecting the welfare of the child prior to modifying a custody order:

> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). Requiring this specific finding also ensures the modification is truly "necessary to make [a custody order] conform to changed conditions when they occur." *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965). Finally, "[s]uch findings are required in order for the appellate court to determine whether the trial court gave 'due regard' to the factors" expressly listed in N.C. Gen. Stat. § 50-13.7. *Greer*, 101 N.C. App. at 355, 399 S.E.2d at 402.

In the case at bar, the trial court made the following findings of fact in its 10 May 2012 order:

> 14. The Defendant failed to prove a substantial change in circumstances requiring the modification of the custody Order and as such, his Motion to Modify the same is hereby denied.
>
> 15. During the week of January 2009, the two minor children were having their scheduled weekend visitation with the Defendant, per the court Order under which the parties were operating.
>
> 16. The Defendant expressed to the minor child [Mary] his interest in her and her sister remaining with him for an extra day, as the next day was a school holiday.
>
> 17. The minor child [Mary] expressed doubts to the Defendant that such an arrangement was in compliance with the Court Order and demanded to see where in the Court Order it allowed for such an extension of visitation.

> 18. An argument ensued, during which [Mary] raised her voice and was disrespectful to both the Defendant and [his present wife].
>
> 19. In response to this, the Defendant lost his temper. The Defendant picked up [Mary] by the collar of her jacket and subsequently physically disciplined her in an inappropriate manner.
>
> 20. The Defendant physically manhandled [Mary] in an inappropriate fashion, given their relative size, strength, and age.
>
> 21. [Mary] had never seen Defendant exhibit a loss of temper in this fashion prior to this incident.
>
> 22. The Plaintiff took [Mary] to a doctor the next day because she was complaining of soreness and had a bruise on her neck as a result of the incident with the Defendant.
>
> 23. The best interests of the minor children would be served by the Defendant obtaining an anger management assessment.
>
> 24. The Defendant does not pose an immediate threat to the minor children and as such, the court-ordered visitation between the Defendant and the children should resume with the conditions outlined herein below.

The trial court also made a sole conclusion of law relevant to custody modification: "5. The Defendant's Motion to Modify Custody is hereby denied."

The order only twice mentioned a "substantial and material change of circumstances affecting the best interest and general welfare of the minor children": one was expressly limited to the trial court's disposition of a child support issue that is not challenged on appeal, and the other was in finding that defendant *failed* to prove a substantial change of circumstances sufficient for the court to grant his motion to modify custody.

Based on these factual findings and its conclusion of law, the trial court (1) ordered defendant to obtain an anger management assessment, follow through with any recommended treatment, and furnish documentation of the assessment and any treatments to plaintiff's counsel; (2) ordered the immediate resumption of defendant's visitation with his children, but limited it to "weekend daytime visits for several

weeks;" (3) appended several "clarifications" to the 2003 order's provisions covering Easter, spring break, birthday visits, and scheduling conflicts related to defendant's drill weekends; (4) added a requirement that plaintiff and the children must have telephone access to each other at all times in all future visits with defendant; and (5) prohibited defendant from physically disciplining his children in the future.

None of the trial court's modifications of the 2003 order were supported by a finding of a substantial change in circumstances that affected the welfare of the children. Our case law is clear that before a trial court may modify an existing custody order the trial court must determine that a substantial change of circumstances has occurred and that the change has affected the children's welfare. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("If the trial court concludes . . . that a substantial change has not occurred . . . the court's examination ends, and no modification can be ordered.").

Yet, plaintiff insists that (1) the trial court had the authority to order defendant to seek anger management treatment under Chapter 50B; (2) the trial court acted within the broad discretion granted to it to require a party to submit to a mental health evaluation; (3) the trial court has authority to "clarify" any "ambiguities" in an existing custody order that cause conflict among the parties, and that the trial court did not modify, but merely clarified, the 2003 order; and (4) the trial court is not required to expressly include a finding of a substantial change in circumstances affecting the welfare of the children when such a change can be inferred from the trial court's findings of fact. None of these arguments have merit.

First, plaintiff's argument about the trial court's authority under Chapter 50B is easily dismissed. Plaintiff never filed any pleadings under Chapter 50B. Whether the trial court would *have* had the authority *if* it had been considering a 50B action is entirely irrelevant to the issue of whether the trial court can do so under a motion in the cause in a Chapter 50 custody action.

Second, plaintiff cites our recent opinion in *Maxwell v. Maxwell*, ___ N.C. App. ___, 713 S.E.2d 489 (2011) for the sweeping proposition that "The trial court has broad discretion in child custody proceedings to require a party to submit to a mental health evaluation." Her recitation of the proposition is not incorrect; it is simply incomplete. The trial court has the discretion to require a party to submit to a mental health evaluation, or anger management, only if there is a legal basis for this requirement. In *Maxwell*, this Court indeed held that the trial court did

not abuse its discretion by ordering the father to obtain a mental health evaluation before resuming visitation with his children. *See id.* at ___, 713 S.E.2d at 494. But the trial court's modification of the existing custody order was supported by its express finding that the father had committed acts of domestic violence against the mother and that the abusive behavior constituted "a substantial change in circumstances affecting the Minor Children."[7]

In support of her third argument, plaintiff relies on this Court's statement that a "trial court is not constrained to using 'certain and specific 'buzz' words or phrases in its order.' " *Karger v. Wood*, 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005) (quoting *Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L.Ed. 2d 811 (2002)). She argues that the trial court was therefore not required to find a substantial change of circumstances to support its modification of visitation or its order requiring defendant to attend anger management assessment and treatment.

A finding of a substantial change in circumstances affecting the interests of the child is not just a "buzz word"— it is a legal requirement for modification of custody, and even if the "magic words" are not used, the factual findings must still make the substantial change of circumstances and its effect upon the children clear. The findings in this order do no such thing. The findings in this order simply express that the parties have many disagreements regarding many issues, including visitation, and they have done so for many years, and that, unfortunately, is a circumstance which is far from changed.

The case at bar is easily distinguished from both *Karger* and *Carlton*. In the latter two cases, the trial court expressly concluded there was a substantial change in circumstances to justify modifying the existing custody order, but simply failed to make a specific conclusion of law as to whether that change affected the welfare of the child. *See Karger*, 174 N.C. App. at 708, 622 S.E.2d at 201; *Carlton*, 145 N.C. App. at 255,

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7. Although we did not mention this finding in our opinion in *Maxwell*, we take judicial notice that the finding was in the trial court's order. "[O]ur appellate courts may take judicial notice of their own records. . . ." *Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 190, 323 S.E.2d 735, 737 (1984). This omission was likely due to the fact that the issue was not relevant on appeal: the appellant there was challenging the mental health evaluation on grounds that it was ordered "without a proper motion or sufficient notice pursuant to N.C. Gen. Stat. §1A-1, Rule 35;" *not* on grounds that it was ordered with insufficient findings to justify a custody modification. *Maxwell*, ___ N.C. App. at ___, 713 S.E.2d at 493.

549 S.E.2d at 919. In each case, the reviewing court held that the "nexus" between a substantial change in circumstances and an effect on the children involved was actually stated in, *see Karger*, 174 N.C. App. at 709–10, 622 S.E.2d at 202, or was plainly evident from, *see Carlton*, 145 N.C. App. at 263, 549 S.E.2d at 923–24, other parts of the order.

Here, on the other hand, the trial court did not conclude that there was a substantial change in circumstances, let alone that those changes affected the welfare of the children. Actually, the trial court found just the opposite as to defendant's motion and was silent as to plaintiff's motion. Moreover, it is not "self-evident" that a single incident where a father disciplines his child "in an inappropriate manner" constitutes a substantial change in circumstances affecting the welfare of his children, especially when the trial court also finds defendant "does not pose an immediate threat to the minor children" and orders visitation to resume immediately. *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. This is not a case in which defendant was accused of a pattern of inappropriate discipline; plaintiff's allegation, and the court's finding, was of an isolated incident. In fact, the trial court found that "[Mary] had never seen Defendant exhibit a loss of temper in this fashion prior to this incident." Nor is it "self-evident" that conflicts over custody and visitation schedules constitute a substantial change in circumstances.

In order to require defendant to attend anger management treatment and modify the visitation schedule, the trial court had to conclude that there was a substantial change of circumstances affecting the welfare of the children. *Jones v. Patience*, 121 N.C. App. 434, 443, 466 S.E.2d 720, 725, ("[A]ssuming custody of the child has been adjudicated by the trial court, and in the absence of any pending motion in the cause [to modify custody], we do not believe court-ordered counseling for defendant or the child is supportable under Rule 35 or in the exercise of the trial court's inherent authority."), *app. dismissed and disc. rev. denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Shipman*, 357 N.C. at 473–74, 586 S.E.2d at 253; N.C. Gen. Stat. § 50-13.7(a). It did not do so here.

Finally, plaintiff argues that the trial court was not required to make the findings necessary to support a modification because the changes to the visitation schedule here were mere "clarifications" rather than modifications. Plaintiff simply misstates the law when she claims trial courts may "clarify" orders without finding a substantial change in circumstances affecting the welfare of the children. The controlling authority is to the contrary: to justify any changes to an existing custody order, beyond those fixing mere clerical errors, *see* N.C. Gen. Stat. § 1A-1, Rule 60, North Carolina courts have required a showing of a substantial

change in circumstances affecting the welfare of the children, *see, e.g.*, *Hibshman*, 212 N.C. App. at 124, 710 S.E.2d at 445 ("*There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.*" (citation omitted)). To depart from this rule—that is, to allow parties to seek "clarification" from a court any time a custody order could be clearer or any time the parties disagree over its interpretation—would undermine the very purpose of the "changed circumstances" requirement: checking the tendency towards continuous, acrimonious litigation and providing stability for the minor children caught in the middle of such disputes. *See id.* at 123, 710 S.E.2d at 444.[8]

The trial court's changes also may not be properly characterized as corrections to "clerical mistakes" as contemplated by Rule 60 of the North Carolina Rules of Civil Procedure. With the possible exception of the changes to the Easter/Spring Break provision, none of the changes were needed as a result of an "oversight or omission" on the part of the original trial court that entered the 2003 order, *see* N.C. Gen. Stat. § 1A-1, Rule 60, and each change affects substantive rights and "alters the effect of the original order," *Pratt v. Staton*, 147 N.C. App. 771, 774, 556 S.E.2d 621, 624 (2001) (citation and quotation marks omitted).

As to the Easter/Spring Break provision, plaintiff did not provide any evidence, and the trial court did not find, that this provision would actually conflict in 2012, 2013, or 2014—the years that were remaining at the time of the hearing until both children are eighteen. The existence of a conflict would depend upon the children's actual school holiday schedules, and we have no evidence of those schedules in the record. Plaintiff simply testified that they could sometimes conflict. Additionally, plaintiff did not move for relief under Rule 60 or argue at the hearing that these changes were needed to correct "mere clerical errors."

The trial court did not find that defendant's "inappropriate[] discipline[]" of his daughter rose to the level of a substantial change in circumstances affecting the welfare of the children.[9] The trial court also

8. If the scheduling disputes were so difficult to resolve that they were affecting the welfare of the children, this would seem to be an appropriate case for appointment of a parenting coordinator. *See* N.C. Gen. Stat. § 50-91 (2011) (authorizing the trial court to appoint a parenting coordinator at any time during child custody proceedings either with the consent of the parties or without their consent after making the required findings).

9. On the contrary, the trial court found that "Defendant does not pose an immediate threat to the minor children." Indeed, in her motion requesting that the trial court order defendant to attend anger management classes, plaintiff did not even argue that the January incident constituted a substantial change of circumstances.

did not find that the scheduling disputes constitute a substantial change of circumstances. Therefore, the findings of fact and conclusions of law are insufficient to support its requirement that defendant obtain anger management counseling and its modifications of visitation. Accordingly, we vacate those portions of the trial court's order modifying visitation and ordering defendant to attend anger management classes and we reinstate the visitation schedule set out in the 2003 custody order.[10]

C. Defendant's Motion for Contempt

[2] In its 10 May 2012 order, the trial court made these further findings of fact:

> 13. The Plaintiff is not in willful contempt of court for her failure to comply with the [2003] visitation Order. The Plaintiff's failure to comply with said Order was justified under the circumstances.
>
> . . . .
>
> 25. Defendant/Father has not had his regular scheduled visitation since January 18, 2009.

Based upon these findings and the findings of fact detailed in the previous section, the trial court denied defendant's motion for contempt. On appeal, defendant principally argues that plaintiff's actions—suspending defendant's visitation over his objections and without any authority from a court—were not "justified" and thus constituted willful noncompliance with the 2003 order. Although there is some merit in this argument, we nevertheless affirm the trial court's denial of defendant's motion for contempt.

Under North Carolina law, "[a]n order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt . . . ." N.C. Gen. Stat. § 50-13.3(a). "The line of demarcation between civil and criminal contempts is hazy at best," *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 507, 169 S.E.2d 867, 869 (1969),

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10. With respect to the "phase in" of defendant's visitation for "several weeks," plaintiff further argues that defendant's objection to this change is now moot because the phase-in period has already passed. Although not perfectly clear from the record, it does appear that this issue is now moot. *See Robinson v. Robinson*, 210 N.C. App. 319, 335-36, 707 S.E.2d 785, 797 (2011) (holding that the visitation provisions of a custody order are moot because the child reached the age of majority). In any event, we need not address it because we have vacated the trial court's modifications to the prior custody order and we think this issue is unlikely to recur.

but in either case "a failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful," *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966); *see also* N.C. Gen. Stat. § 5A-11(a)(3) (2011) (defining criminal contempt as, *inter alia*, the "*Willful* disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." (emphasis added)); N.C. Gen. Stat. § 5A-21(a)(2a) (2011) (noting a "[f]ailure to comply with an order of a court" is "a continuing civil contempt" only when "[t]he noncompliance by the person to whom the order is directed is *willful*" (emphasis added)).[11]

Willful disobedience is "disobedience which imports knowledge and a stubborn resistance" and which "imports a bad faith disregard for authority and the law." *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (citations and quotation marks omitted). "Willful[ness] [may also be] defined as the wrongful doing of an act without justification or excuse." *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation and quotation marks omitted).

Defendant argues the trial court's position—that plaintiff's failure to comply with the 2003 order was not willful because it was "justified under the circumstances"—is internally inconsistent: if the trial court found defendant "does not pose an immediate threat to the minor children" and did not condition the resumption of his visitation on obtaining an anger management assessment, then how could plaintiff be "justified" in unilaterally imposing that same condition on defendant for over two years, until the case was actually heard (and apparently for 8 more months after, while awaiting the trial court's ruling)?

Defendant's argument is strengthened by the fact that plaintiff opted to pursue self-help in this matter. North Carolina law provides concerned parents with ample means to address incidents like the one that occurred in January 2009 through fair and orderly procedures that are designed to deal with the problem promptly and not to separate a parent from his children for an extended period of time without sufficient reason to do. *See*, *e.g.*, N.C. Gen. Stat. § 50-13.5(d)(3) (allowing for entry of an ex parte order that changes custody where there is "a substantial risk of bodily injury" to the child), N.C. Gen. Stat. §§ 50B-2, 50B-3(a)(4)

11. Although defendant's argument on appeal focuses exclusively on civil contempt, the motion itself requested an order holding plaintiff "in civil and/or criminal contempt" of court. Regardless, because the trial court denied defendant's motion on grounds that plaintiff's disobedience was not willful, and because a lack of willfulness is dispositive of the issue under either standard, we need not decide whether plaintiff's disobedience is properly addressed under a criminal or civil contempt standard in this case.

(granting authority for courts to "[a]ward temporary custody of minor children and establish temporary visitation rights" *ex parte* where a court "finds that an act of domestic violence has occurred"). Yet plaintiff chose to ignore these procedures: at no time did she press charges against defendant for assault, seek a domestic violence protective order for the safety of her minor children or move for an ex parte order temporarily altering custody under N.C. Gen. Stat. § 50-13.5(d)(2) and (3). She "simply decided that she would allow Defendant to see the children but not have his scheduled visitation until he complied with her requests because she decided that obtaining anger management counseling should be prerequisite for him continuing to exercise visitation."

In a remarkably similar case, this Court affirmed a trial court's decision to hold a mother in contempt for unilaterally suspending a father's court-ordered visitation. In *Lee v. Lee*, 37 N.C. App. 371, 246 S.E.2d 49 (1978), the mother claimed the father "was in no condition to take care of" the child because the father was on medical disability for anxiety and had a chronically "dirty and unkempt" apartment, and because the mother had one disturbing incident where she brought the child for visitation and found the father's apartment "in a state of disarray, and the [father] looked disheveled, had bloodshot eyes, slurred speech and alcohol on his breath" and was "depressed, upset and crying." *Id.* at 373–74, 246 S.E.2d at 50–51. Taking matters into her own hands, the mother suspended the father's visitation and only allowed her daughter to visit the father "for a few hours at a time and not overnight," during which she "waited in her car for the child." *Id.* at 373, 246 S.E.2d at 50. Despite the mother's concerns, the trial court held her in contempt for violating the parties' custody order. *Id.* at 374, 246 S.E.2d at 51. Affirming this decision on appeal, this Court concluded:

> A review of the record on appeal indicates that the [mother's] own testimony was that, since September of 1976, she had not complied with the order of 3 September 1975. She made no attempt to petition the court for a modification of the 1975 order so as to require the [father] to keep his premises clean and refrain from the use of alcohol or drugs when exercising visitation rights. Instead, she chose to continue to ignore the 1975 order with regard to the [father's] visitation rights. This violation of the 1975 order was not justified.

Id. at 375, 246 S.E.2d at 51 (citation omitted).

Nevertheless, "[i]t is not the role of this Court to substitute its judgment for that of the trial court." *Scott v. Scott*, 157 N.C. App. 382, 388,

579 S.E.2d 431, 435 (2003). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark*, 294 N.C. at 571, 243 S.E.2d at 139 (citations omitted).

Here, there was competent evidence presented at trial to support the trial court's finding that "[t]he Plaintiff's failure to comply with [the 2003 order] was justified under the circumstances." Defendant "manhandled" Mary and "physically disciplined her in an inappropriate manner" during the girls' visitation at his home on 18 January 2009. The girls returned to plaintiff's home later that night visibly shaken and upset, and plaintiff took Mary to the doctor the next day because Mary was complaining of soreness in her back and a bruise on her neck. DSS officials were asked to intervene based upon a report that defendant had inappropriately disciplined Mary. Nevertheless, after speaking with defendant and informing him that such forms of discipline were inappropriate, DSS ultimately decided that claims of child abuse were unsubstantiated and that the children were not in immediate danger of serious harm.

Despite DSS's investigation and failure to substantiate abuse, plaintiff testified she still feared for the safety of her daughters, and her fears were amplified by past allegations of domestic violence involving defendant. Mary and Sarah both testified they did not feel safe attending regularly-scheduled visitation with defendant until he acknowledged the January 2009 incident and sought an anger management assessment, in part because Plaintiff had also informed them about "things that happened when [they] were younger.[12] Plaintiff, in several e-mails and letters exchanged with defendant and among the parties' attorneys, made it clear that she would allow defendant's visitation to resume as soon as defendant sought professional help for what she perceived to be a pattern of anger issues,[13] but defendant refused to apologize for

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12. In addition to informing the children of the prior allegations of domestic violence, plaintiff also took it upon herself to inform the children about counseling options available for anger management, according to their testimony, as well as informing them of details of the 2003 court order. Indeed, it is sadly ironic that the argument between defendant and Mary arose during a weekend visit when she demanded that defendant "show me proof" that the 2003 court order provided for an additional day of visitation on that particular weekend. Plaintiff had previously shown the children the 2003 court order and they wanted to make sure that defendant was following it—yet another irony, given plaintiff's own failure to follow the order's provisions for visitation.

13. The trial court did not find that defendant had a "pattern of anger issues": this is simply plaintiff's evidence.

or acknowledge the January 2009 incident, exacerbating the uneasiness felt by plaintiff and her daughters. Defendant largely ignored plaintiff's communications on this point and dismissed his daughters' concerns about the January incident. Additionally, there was some evidence that plaintiff attempted to arrange or at least agreed to non-regularly-scheduled visitation at school and sporting events.

Even though the trial court ultimately concluded that defendant was not a threat to his daughters, it is not entirely inconsistent for the trial court to consider plaintiff's fears and actions justified under the circumstances. The trial court's finding that plaintiff's actions were "justified under the circumstances" is adequate to support its denial of defendant's motion for contempt. Moreover, unlike the mother in *Lee*, plaintiff did eventually move to modify custody and require defendant to attend anger management treatment.

Here, the parties first sought to resolve the matter by negotiations through their attorneys and by waiting for the results of the DSS investigation, and when these efforts failed, plaintiff did seek modification of the custody order; the ensuing delay in disposition of the motions, with the continuing denial of visitation during this time, cannot be attributed solely to plaintiff. A party does not act willfully or with "a bad faith disregard for authority and the law" when their actions are justified. *See Hancock*, 122 N.C. App. at 523, 471 S.E.2d at 418; *Ramos*, 363 N.C. at 355, 678 S.E.2d at 226. The trial court may have been reluctant to hold plaintiff in contempt for acting on what it considered justifiable concerns for her children's safety.

Even if the evidence could have supported a contrary finding—and certainly it could have—there was at least some evidence to support the trial court's finding that plaintiff's actions were "justified under the circumstances." As there is sufficient evidence to support the trial court's finding as to contempt, *see Clark*, 294 N.C. at 571, 243 S.E.2d at 139, we must affirm the trial court's denial of defendant's motion for contempt.

In affirming the trial court's findings on contempt we do not mean to condone unilateral denial of visitation or other refusal to comply with a court order. As mentioned above, the law provides a parent in the midst of a custody dispute with a variety of options to resolve concerns over the safety of their children that do not involve consciously disregarding a court order. *See*, *e.g.*, N.C. Gen. Stat. § 50B-3(a)(4), N.C. Gen. Stat. § 50-13.5(d)(2)-(3). Self-help is not one of them. The damage caused by plaintiff's unilateral decision to stop defendant's court-ordered visitation was only exacerbated by the inexplicable three year delay in resolution

of these issues. We cannot fully discern from the record before us who is to blame for this inordinate delay, at least beyond the first few months, but the fault for at least a substantial portion of this delay seems to fall upon the trial court, given the allegations of defendant's motion for change of venue and plaintiff's response to the motion. We hope that there is another explanation which is not revealed by the record before us.

III. Conclusion

For the reasons discussed above, the trial court erred in modifying the 2003 order without finding a substantial change in circumstances affecting the welfare of the children and we vacate those provisions of the 2012 order modifying the prior custody and visitation arrangement and ordering defendant to attend an anger management assessment. Because the trial court's findings of fact as to contempt are supported by competent evidence, and because those findings are adequate to support its conclusion of law, we affirm the trial court's denial of defendant's motion to hold plaintiff in contempt.

VACATED IN PART and AFFIRMED IN PART.

Judges CALABRIA and DAVIS concur.

CHARLES JEFFREY HILL, Plaintiff
v.
DAWN SANDERSON HILL, Defendant

No. COA12-1155

Filed 17 September 2013

1. Divorce—equitable distribution—mortgage payment—no credit—no abuse of discretion

The trial court did not abuse its discretion in an equitable distribution case by not awarding any credit to plaintiff for his payment of mortgage debt from the date of separation to the date of distribution.

2. Divorce—equitable distribution—classification of asset—distribution of asset

The trial court erred in an equitable distribution case by failing to determine whether a company was a marital asset and to distribute money from that corporation based on this determination.

3. Divorce—equitable distribution—post-separation payments —divisible property

The trial court did not err in an equitable distribution case by failing to find that plaintiff's post-separation payments on the marital home were divisible property. The payments were ordered pursuant to a post-separation support order.

4. Divorce—equitable distribution—classification of debt—distribution of debt

The trial court erred in an equitable distribution case by failing to find an equity line of credit debt was a marital debt, a separate debt, or partially marital and partially separate and to distribute it accordingly. The issue was remanded for further proceedings.

5. Divorce—equitable distribution—credit card debt—distribution

The trial court erred in an equitable distribution case by failing to properly distribute certain credit card debt. The issue was remanded further proceedings.

6. Divorce—equitable distribution—classification of vehicles —distribution

The trial court erred in an equitable distribution case by distributing several vehicles and the parties' bank accounts, without classifying them as marital or separate property. The issue was remanded for further proceedings.

7. Divorce—equitable distribution—unequal distribution—determination of parties' income

The trial court erred in an equitable distribution case by making an unequal distribution to defendant. The determination of the parties' incomes was not made at the time of equitable distribution. The issue was remanded for further proceedings.

8. Divorce—equitable distribution—valuation of property

The trial court erred in an equitable distribution case in the valuation of certain undeveloped lots owned by the parties and in the valuation of the parties' primary residence. The listing price for each of the undeveloped lots was not an indication of their fair market value. Further, the trial court's consideration of expenses of sale of the primary residence went beyond what was permitted in determining its value. The issue was remanded for further proceedings.

9. Divorce—equitable distribution—delayed issuance of judgment—no prejudice

Plaintiff in an equitable distribution case failed to show actual prejudice as a result of a six-month delay from the conclusion of the trial court's hearings to the issuance of the trial court's equitable distribution judgment.

Appeal by plaintiff from judgment entered 5 March 2012 by Judge Julie M. Kepple in Buncombe County District Court. Heard in the Court of Appeals 14 March 2013.

Mary Elizabeth Arrowood for plaintiff-appellant.

No appellee brief filed.

STEELMAN, Judge.

The trial court erred in failing to classify property, in the valuation of property, and in considering a distributional factor that was based on an erroneous finding. Portions of the trial court's order are vacated, and this matter is remanded to the trial court.

I. Factual and Procedural History

Charles Jeffrey Hill (plaintiff) and Dawn S. Hill (defendant) were married on 3 August 1996. Two children were born of the marriage. The parties separated on 6 July 2009. On 18 August 2009 plaintiff filed a complaint seeking custody of the children and equitable distribution of marital property.

On 5 March 2012, the trial court filed its judgment on equitable distribution. The trial court recited the parties' stipulations concerning five tracts of real estate that were marital property, and one tract that was the separate property of plaintiff. The stipulations did not encompass the values of the real estate, but did list the liens on each property, and the amounts of each lien. The parties also stipulated as to the locations and amounts of their retirement accounts. There were further stipulations as to items of personal property, the values of that property, and to which party the items should be distributed. The trial court cited a number of distributional factors, and determined that an unequal distribution of marital property to defendant was equitable. Two tracts of real estate were distributed to defendant. Four tracts of real estate were distributed to plaintiff. The bulk of the assets in retirement accounts were

distributed to defendant. Tangible personal property was distributed in accordance with the stipulations of the parties.

Plaintiff appeals.

II. Observations Concerning This Appeal

This case appears to embody all of the flaws that could possibly create an abominable appeal of an equitable distribution judgment. The defendant filed no brief. The hearings before the district court took place on 27 June 2011, 28 June 2011, 1 July 2011, and 1 September 2011. As to the 1 July 2011 hearing, there is no transcript for that date, only a cursory narrative of plaintiff's testimony, which is written from plaintiff's point of view. Defendant never objected to this narrative.

The transcripts of the remaining hearings were filed in paper and not electronically, as mandated by the provisions of Rule 7(b)(2) of the North Carolina Rules of Appellate Procedure. The transcripts reveal that the parties submitted in excess of 70 exhibits to the trial court, none of which were submitted to this Court pursuant to Rule 9(d) of the Rules of Appellate Procedure. However, plaintiff freely makes references to the exhibits in his brief, without submitting them in an appendix to his brief or including them in a supplement to the record.

The order of the trial court combines evidentiary findings of fact, ultimate findings of fact, and conclusions of law, without any attempt to make them separate portions of the order. The brief of appellant is replete with inaccurate references to the record and transcript. In many instances there are no references to where the factual assertions are to be found in the record or transcript, in violation of Rule 28(e) of the Rules of Appellate Procedure.

While these rules violations are substantial, and come very close to meriting dismissal of the appeal, we conclude that this appeal should not be dismissed. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008) (holding that "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate."). However, the manner in which this appeal has been presented fundamentally hampers our review. The Court of Appeals sits as a reviewer of the actions of the trial court. In that role, we must be impartial to all parties. It is not our role to advocate for a party that has failed to file a brief, nor is it our role to supplement and expand upon poorly made arguments of a party filing a brief. "It is not the role of the appellate courts ... to create an appeal for an appellant. ... [T]he Rules of Appellate Procedure must be consistently

applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 48, 627 S.E.2d 482, 484-85 (2006) (citations omitted). We address only those issues which are clearly and understandably presented to us. On issues that require remand to the trial court, we will attempt to be clear and concise as to the perceived defect, and what the trial court needs to do upon remand to correct these defects.

We acknowledge that our trial courts are overworked and understaffed. However, it is ultimately the responsibility of the trial judge to insure that any judgment or order is properly drafted, and disposes of all issues presented to the court before the judge affixes his or her signature to the judgment or order. This is particularly true in a complex case, such as one involving the equitable distribution of marital property.

III. Standard of Review

> 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, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Although this is a "generous standard of review," *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011), the trial court must still comply with the requirements of N.C. Gen. Stat. § 50-20(c), which sets out a three step analysis:

> First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Smith v. Smith, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03 (1993) (citations omitted), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation.* In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Robinson, 210 N.C. App. at 323, 707 S.E.2d at 789 (citations and quotations omitted) (emphasis in original).

IV. Failure to Classify Property

In his first, second and sixth arguments, plaintiff contends that the trial court erred by not making findings of fact regarding divisible property, by not distributing divisible property, and by not classifying assets as marital or separate property. We agree as to some of plaintiff's arguments, but disagree as to others.

A. Reduction of Debt by Plaintiff Following Separation

[1] First, plaintiff contends that the trial court made no findings with regard to the appreciation in the value of the marital home based on plaintiff's payment of mortgage debt from the date of separation to the date of distribution, and that the trial court did not distribute this appreciation as divisible property, as required by N.C. Gen. Stat. § 50-20(b)(4)(d). We disagree.

The trial court made several findings as to the value of the marital home and the mortgage thereupon, and determined that

> the home at this point and in the current market has no equity and therefore no monies would be realized at the point of sale. The reduction of principal is primarily due to the payments made by Defendant and the loan modifications. Plaintiff's payments were made pursuant to a court order in lieu of postseparation support and were in fact

> an award of support to Defendant. *Sloan v[.] Sloan*[,] 151 N[.]C[.] App[.] 399, [407,] 566 S[.]E[.] 2d 97, [103] (2002).

The trial court made several additional findings about plaintiff's payments of the two mortgages on the marital home, and noted that "[p]laintiff did not provide sufficient evidence of which payments he made and in what amount, and the court is unable to determine what if any credit should be given for payments made on this debt." The trial court noted that plaintiff made the ordered payments "sporadically and then ceased making payments[,]" and held that it would "determine later what amounts were paid and what amounts may still be due[.]" We hold that this finding was supported by evidence in the record. The trial court's decision not to award any credit to plaintiff was not an abuse of the trial court's discretion.[1]

B. The Corporation

[2] Second, plaintiff contends that there were post-separation distributions made from a corporation, "Speaking of, Inc.," that the trial court failed to classify and distribute as marital property. We agree.

With respect to this issue, we are hampered by the fact that the numerous exhibits pertaining to the corporation are not before us. These include the articles of incorporation, amendments to the articles, stock certificates, and corporate tax returns, admitted as plaintiff's exhibits 25 through 29; and the expert valuation of the corporation by Foster Shriner, admitted as defendant's exhibit 16.

In August of 2001, the parties incorporated "Speaking of, Inc." which was the corporate vehicle by which defendant performed services as a speech pathologist. At trial, there was testimony that the articles of incorporation and the tax returns through 2008 showed plaintiff and defendant to be equal owners of the business. The corporation operated under Subchapter S (Sections 1361 through 1379 of the Internal Revenue Code).

The trial court failed to determine whether the corporation was marital property, but then distributed the corporation to defendant. Based upon Mr. Shriner's testimony, the court found that the fair market value of the corporation was $0.00, but failed to state whether that value was as of the date of the parties' separation. Plaintiff does not contest the value or distribution of the corporation on appeal.

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1. The trial court's valuation of the marital residence is discussed in part VI B of this opinion.

Rather, plaintiff complains that the trial court erred by not holding that two distributions from the corporation in 2009 and 2010, totaling about $35,000, were marital property. Income for the corporation was created by the work of defendant as a speech pathologist. This income was distributed by the corporation in two ways. First, defendant was paid a salary. Second, there were non-salary distributions to the shareholders. Defendant's expert testified that frequently Subchapter S corporations pay out low salaries to shareholders, followed by a large shareholder distribution that is not subject to withholding taxes for Social Security and Medicare.

As to the stock ownership of the corporation, the testimony was that the articles of incorporation indicated that there was equal ownership of the stock. Defendant contended that no stock was ever issued. There was testimony that defendant filed a document on 21 May 2009 stating that plaintiff had transferred his entire interest in the corporation to defendant. Plaintiff contended that the stock was issued, but the certificates could not be found following the separation of the parties. Subsequently, plaintiff, as treasurer of the corporation, issued "replacement shares." The trial court held that "on the date of separation no stock had been issued." Where there is any competent evidence to support such a finding, that finding is binding upon appeal. *See Brackney v. Brackney*, 199 N.C. App. 375, 388-89, 682 S.E.2d 401, 409 (2009) (quoting *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986)).

However, this is not dispositive of whether the corporation was a marital asset. Title is not controlling in determining whether an asset is marital property, and shares of stock represent "title" to the property. One of the purposes of the Equitable Distribution Act was "to alleviate the unfairness of the common law [title theory] rule" and to base property distribution upon "the idea that marriage is a partnership enterprise to which both spouses make vital contributions. . ." *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 510, 507 S.E.2d 900, 902 (1998); *see also White v. White*, 312 N.C. 770, 774-75, 324 S.E.2d 829, 831-32 (1985). If the corporation was created during the marriage, and it was owned and operated by the parties, it is a marital asset regardless of the stock ownership. *See* N.C. Gen. Stat. § 50-20(b)(1).

As to the $35,000 in post-separation, non-salary distributions made to plaintiff, the trial court found:

> Although certain distributions are shown on the corporation's tax returns, these are not dividends but merely reflect the corporation's method of paying a salary to the

> officer of the corporation. Defendant received a small amount of income as wages, and the balance as a distribution to her without tax withholding.

In the event that the corporation was a marital asset, we hold that this finding was in error. The trial court recharacterized a shareholder distribution as salary to defendant. The parties set up the corporation as a Subchapter S corporation, and then used the shareholder distributions to avoid payment of federal withholding taxes for Social Security and Medicare. The parties are bound by their established methods of operating the corporation. The retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property. *See Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005). The $35,000 in distributions would be marital property, if the corporation was marital property. However, the trial court can consider how this income was generated as a distributional factor under N.C. Gen. Stat. §§ 50-20(c)(1) and (12).

The portion of the trial court's equitable distribution judgment pertaining to the corporation is vacated. Upon remand, the trial court shall determine whether the corporation was marital property, and if so, distribute the corporation and the $35,000 in accordance with the holdings of this opinion.

C. Post-Separation Support Payments

[3] Third, plaintiff contends that the trial court erred in failing to find that his post-separation payments on the marital home were divisible property. We disagree.

Pursuant to a prior post-separation support order, plaintiff was to pay $505.00 per month towards the first mortgage on the marital residence. The trial court found that these payments were made pursuant to a post-separation support order "in lieu of postseparation support[,]" and were an award of support to defendant. The trial court further found that it would "determine later what amounts were paid and what amounts may still be due under the order at the time of the trial of the alimony claim and the court may take into consideration any payments paid by Plaintiff after the separation." Plaintiff contends that this was error.

We have previously held that monies paid pursuant to an alimony obligation are not included in an equitable distribution of the parties' debts. *See Robinson*, 210 N.C. App. at 335, 707 S.E.2d at 796; *see also* N.C. Gen. Stat. § 50-20(f). In the instant case, the payments were ordered pursuant to a post-separation support order, and it further appears that the

trial court intended to address these payments at a later hearing. Because these were support payments, they were not divisible property and the trial court did not err in failing to find them to be divisible property.

D. Equity Line Debt

[4] Fourth, plaintiff contends that the trial court erred in failing to find that his payments on an equity line of credit debt were divisible property. We agree.

The parties had stipulated that there was a Wachovia (now Wells Fargo) equity line debt, secured by plaintiff's separate real property, of $42,505.10 on the date of separation. The parties did not stipulate to the classification of this debt. The trial court found that:

> Prior to the marriage, Plaintiff used the credit line to purchase a vehicle for $25,000. The parties made interest payments on the equity line throughout the marriage. The debt was never entirely paid off and on date of separation the balance was $42,505.10[.]

In another portion of the order, the trial court found that:

> The Wachovia Equity Line was linked as an overdraft protection account to the Speaking of Inc. account. Plaintiff managed all of the bank accounts and transferred funds between accounts as needed. The corporate funds were used for marital purposes from time to time, and the equity line was used for corporate purposes from time to time. There was no evidence provided showing an accounting for these funds. Plaintiff maintains that the corporation owes the parties $7400 but that was not substantiated.

The trial court's findings seem to indicate that to some extent the equity line debt was incurred as plaintiff's separate debt (for the vehicle purchase prior to the marriage), and to some extent for marital purposes. Indeed, as the value of the debt at separation, $42,505.10, exceeded the original pre-marital debt of $25,000.00, it is clear that some portion of the increase in the debt occurred during the marriage. While we note that N.C. Gen. Stat. § 50-20(b)(2) provides that the "increase in the value of separate property . . . shall be considered separate property[,]" we have previously held that:

> Increases in value to separate property attributable to the financial, managerial, and other contributions of the marital estate are "acquired" by the marital estate. When

> the increase in value to separate property is attributable to both the marital and separate estates, each estate is entitled to an interest in the "acquired" increase consistent with its contribution. Accordingly, the marital estate shares in the increase in value of separate property "it has proportionately 'acquired' in its own right" through financial, managerial, and other contributions, but does not share in the increase in value of separate property acquired through passive appreciation, such as inflation.

Ciobanu v. Ciobanu, 104 N.C. App. 461, 465, 409 S.E.2d 749, 751-52 (1991) (citations omitted). On remand, the trial court should clarify whether and in what proportion this debt is separate or marital.

Plaintiff contends that the payments on this debt should have been classified as divisible property pursuant to N.C. Gen. Stat. § 50-20(b)(4)(d). The trial court found that the amount of this debt at separation was $42,505.10, based upon the parties' stipulation. Plaintiff asserts in his brief that he made post-separation payments of $3,883.00 towards the equity line debt. However, there is no citation to the record or transcript supporting this assertion. Further, there is no finding in the trial court's order as to the value of the equity line debt as of the date of distribution.

In *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006), we held:

> [N.C. Gen. Stat. § 50-20(b)(4)] authorizes the court to classify postseparation payments of marital debt as divisible property. Whether these payments reduce the principal of the debt, the finance charges related to the debt, or interest related to the debt, the court should consider the postseparation payments as divisible property. If the post-separation reduction of the marital debt increases the net value of the marital property, the court may classify the increase as divisible property.

Warren at 517, 623 S.E.2d at 805 (citations omitted).

We vacate the portion of the trial court's order pertaining to the equity line debt. Upon remand, the trial court shall determine whether this was a marital debt, a separate debt, or partially marital and partially separate. If it finds that any portion of the debt is marital, it shall determine the amount of the debt at the date of distribution, and shall distribute the increase or decrease as divisible property. Finally, it shall determine the amount of post-separation payments on the debt by

the parties, and treat those payments as divisible property in accordance with *Warren*.

E. Credit Card Debt

[5] Next, plaintiff contends that the trial court erred in failing to properly distribute certain credit card debt. We agree.

The evidence presented at trial was that just prior to separation, defendant's car needed a new transmission. Plaintiff paid this debt with a credit card. The trial court made the following finding of fact:

> Plaintiff made a car repair payment on his credit card in the amount of $3,287.19. This debt was incurred prior to the date of separation and was for a marital purpose.

We hold that this finding is tantamount to finding that this was a marital debt.

However, in the distributional portion of the order, the trial court held that "[p]laintiff's credit card debts totaling $3,287.19 is not distributed to the Plaintiff." The judgment did not distribute the debt to defendant. We are at a loss to understand this holding which appears to contradict the trial court's finding of fact. We vacate the distributional portion of the equitable distribution judgment pertaining to the credit card debt, and remand this issue to the trial court. The trial court shall distribute this debt to one of the parties.

F. Other Assets

[6] Finally, plaintiff contends that the trial court erred in distributing several vehicles and the parties' bank accounts, without classifying them as marital or separate property. We agree.

The trial court made findings concerning a Nissan Pathfinder, a Ford Expedition, a Harley Davidson motorcycle, and a Haulmark trailer, as well as the parties' bank accounts. The trial court distributed the Nissan Pathfinder to defendant, and distributed the Ford Expedition, the Harley Davidson, and the trailer to plaintiff. The trial court also distributed the bank accounts to plaintiff. The trial court, in its distribution, did not classify any of these as marital or separate assets.

N.C. Gen. Stat. § 50-20, which governs the distribution of marital and divisible property by the court, is quite clear, stating that:

> Upon application of a party, the court *shall determine what is the marital property and divisible property* and

> shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

N.C. Gen. Stat. § 50-20(a) (2011) (emphasis added). The trial court failed to comply with N.C. Gen. Stat. § 50-20 when it failed to "determine what is the marital property and divisible property" before distributing assets and debts. "A distribution order failing to list all the marital property is fatally defective, and, further, marital property may not be identified by implication." *Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007) (quoting *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987)). Accordingly, the equitable distribution order as to this property is vacated, and this matter remanded to the trial court, with instructions to classify each asset as marital, divisible, or separate before distribution.

Plaintiff also contends that, on the date of separation, defendant had bank accounts in the amount of $150.00 and $765.81. Plaintiff contends that the trial court erred in failing to classify and distribute these assets. Plaintiff cites to no evidence in the record which would support the existence of these assets, nor do we find any among the admittedly limited transcripts and trial court's order. Accordingly, we hold that the trial court did not err in failing to classify and distribute these alleged assets.

V. Unequal Distribution Factors

[7] In his third argument, plaintiff contends that the trial court erred in making an unequal distribution to defendant. We agree.

N.C. Gen. Stat. § 50-20(c) mandates that equitable distribution be made equally between the spouses, unless the court examines an explicit list of factors and determines equal distribution to be inequitable. N.C. Gen. Stat. § 50-20(c) (2011). The trial court is required to make findings of fact as to any factors upon which evidence has been presented, but the trial court determines what evidence is credible and the weight to be given to each factor. *Plummer v. Plummer*, 198 N.C. App. 538, 545, 680 S.E.2d 746, 751 (2009); *Brackney v. Brackney*, 199 N.C. App. 375, 391, 682 S.E.2d 401, 411 (2009); *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010).

The trial court found the following statutory factors in favor of unequal distribution: (1) that plaintiff earned almost twice defendant's income; (2) that both parties were in good health and of similar age; (3) that the parties had been married for 13 years prior to separation; (4) the liabilities of the parties, including their lack of equity in the home,

the high payments required on the debt, and the purpose for which debt was acquired; (5) plaintiff's separate property; (6) both parties' efforts to maintain and preserve the marital estate; (7) pre-existing debts of both parties; (8) the existence or lack thereof of pension, retirement, or similar compensation packages; (9) the non-liquid character of several pieces of real property which have proven difficult to market; (10) defendant's efforts to refinance the residence; (11) plaintiff's support of defendant's education; and (12) potential tax consequences of the distribution of retirement accounts.

First, plaintiff contends that the trial court's finding of the parties' relative incomes was not supported by the evidence. The trial court found that plaintiff earned about twice the income of defendant. Consideration of the relative incomes of the parties is entirely appropriate and indeed required, if the parties have presented evidence on this issue and requested an unequal distribution based upon this factor. *See Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994).

The trial court based its finding upon a prior order for post-separation support, in which defendant's income had been found to be $1,782.00 per month. According to N.C. Gen. Stat. § 50-20(c)(1), the determination of relative incomes must be made at the time of equitable distribution. To the extent that this finding was based solely upon the prior post-separation support order, and not evidence of the parties' incomes at the time of distribution, the amount of defendant's income found by the trial court was not supported by the evidence. This was error.

Second, plaintiff contends that the trial court's finding as to the liabilities of the parties was in error. The trial court found that, at the date of separation, the parties had liabilities of $366,513.30. We hold that the trial court correctly considered the liabilities of the parties pursuant to N.C. Gen. Stat. § 50-20(c)(1). This was not error. However, on remand, the trial court may be required to revise its findings as to this factor consistent with the other directives contained in this opinion.

Third, plaintiff takes issue with several other findings made by the trial court, with regard to "the amount of equity in the home, the high monthly payments and the reason the debt was incurred[,]" arguing that these were not proper factors to be considered. Even assuming *arguendo* that these factors are not factors explicitly enumerated in the statute, the statute does allow for the court to consider "[a]ny other factor which the court finds to be just and proper[,]" N.C. Gen. Stat. § 50-20(c)(12), so long as that factor relates to the economics of the

marriage. *See Smith v. Smith*, 314 N.C. 80, 81, 331 S.E.2d 682, 683 (1985) (holding that misconduct that does not affect the value of marital assets is not a "just an proper factor" under N.C. Gen. Stat. § 50-20(c)(12)). The trial court was entitled to consider these additional factors which related to the financial circumstances of the marriage, and did not abuse its discretion in doing so. This was not error.

Fourth, plaintiff contends that the trial court erred by failing to consider distributional arguments made at trial by plaintiff. Specifically, plaintiff contends that he presented evidence of: plaintiff's contributions to defendant's career; plaintiff's contributions of separate funds to the marriage and defendant's lack thereof; defendant's exclusive use of the marital home from the date of separation; the non-liquid character of the undeveloped real estate parcels as investment property; plaintiff's post-separation payment of debts; the difficulty in evaluating the value of defendant's corporation; plaintiff's reduction in credit rating; the use of equity line debt to finance the corporation; alleged dividends from the corporation; defendant's use of plaintiff's savings funds; and defendant's separately-filed income tax return.

The trial court is required to consider each of the factors enumerated in N.C. Gen. Stat. § 50-20(c), including "[a]ny other factor which the court finds to be just and proper[,]" to the extent that evidence is presented as to each factor. N.C. Gen. Stat. § 50-20(c)(12). However, this statute does not require the trial court to consider additional factors beyond those enumerated in the statute. Consideration of factors beyond those enumerated, as previously stated, is within the trial court's discretion. The trial court considered the arguments and proposed factors of both sides, and, in its discretion, did not find all of the facts argued by plaintiff. The trial court did consider each of the relevant statutory factors under N.C. Gen. Stat. § 50-20(c), and in doing so, did not abuse its discretion. This was not error.

We hold that the trial court committed error with regard to its determination of defendant's income at the date of distribution. As the trial court must weigh all of the distributional factors together and determine the weight to be given to each factor, we vacate the portions of the trial court's order regarding the unequal distribution of marital property, and remand for the trial court to reweigh all of the factors that it finds appropriate in light of all of the holdings in this opinion, and then determine whether an unequal distribution would be equitable and the proper amount of any unequal distribution.

VI. Valuation of Real Estate

[8] In his fourth and fifth arguments, plaintiff contends that the trial court erred in the valuation of certain undeveloped lots owned by the parties and in the valuation of the parties' primary residence. We agree.

There were four undeveloped lots owned by the parties; one lot on Fairway View Drive in Weaverville, and three lots in Gaston Mountain. As to the Fairway View Drive lot, the trial court found that the fair market value of the lot was $35,000, and that the fair market value of the lot at separation was also $35,000. Defendant paid part of the 2009 taxes, plaintiff paid the 2010 taxes, and the 2011 taxes were unpaid. Plaintiff paid the homeowner's fees in 2009 and 2010. There was no finding concerning any debt on the property. This property was distributed to defendant, with defendant to be responsible for the taxes and homeowner's fees.

As to the three Gaston Mountain lots, they were initially purchased by the parties together with Robert Carignan. Thus, the parties originally owned a one-half interest in each of the lots.

As to lot 33 of the Gaston Mountain lots, the trial court found that the parties' one-half interest had a fair market value of $44,500, both at the date of separation and the date of distribution. This value was apparently arrived at by dividing the listing price of the property in half. The trial court also found that lot 33 was pledged as collateral for a debt of Carignan in the amount of $45,552.25 as of the date of separation, but that the parties were not liable for that debt. This lot was distributed to plaintiff. Plaintiff was charged with paying any outstanding taxes and homeowner's association dues.

As to lot 27 of the Gaston Mountain lots, the trial court found that the parties had listed the lot for sale at a price of $35,000. The court found that this reflected their opinion of the value of the property. The trial court found that their one-half interest had a fair market value of $17,500 on the date of separation. However, following the separation of the parties, Carignan conveyed his one-half interest to the parties for no consideration. Lot 27 was pledged as collateral for a debt of Carignan in the amount of $45,852.25. The trial court found that the parties were not liable for that debt. This debt was also secured by a lien upon lot 28. Based upon the debt owed on the Carignan half-interest, the trial court found it to have no value. This lot was distributed to plaintiff. Plaintiff was charged with paying any outstanding taxes and homeowner's association dues.

As to lot 28 of the Gaston Mountain lots, the trial court found that the parties had listed the lot for sale at a price of $79,000.00. The trial

court found that this reflected their opinion of the value of the property, and found that their one-half interest had a fair market value of $39,500 on the date of separation. Following separation, Carignan conveyed his one-half interest to the parties for no consideration. Lot 28 was pledged as collateral for the debt of Carignan in the amount of $45,852.25. The trial court found that the parties were not liable for that debt. This is the same lien that secures lot 27. Based upon the debt on the Carignan half-interest, the trial court found it to have no value. This lot was distributed to plaintiff. Plaintiff was charged with paying any outstanding taxes and homeowner's association dues.

The trial court further found that the parties' one-half interests in the three Gaston Mountain lots were financed with a loan in the original amount of $89,500 secured by an equity line loan on the parties' residence.

On appeal, plaintiff contends that due to market conditions, none of these lots are currently saleable, and therefore have no value. This assertion is based upon the fact that the lots have been listed for sale for a number of years with no buyers. Plaintiff further contends that there is no competent evidence to support the trial court's valuation of the lots, based upon the listing price.

The trial court valued all four undeveloped lots based upon their respective listing prices. However, the uncontroverted evidence was that the Fairway View Drive lot had been listed for sale since 2006, and the three Gaston Mountain lots had been listed for sale since 2007. We hold that the listing price for real property is nothing more than the amount for which the parties would like to sell the property. It has no bearing upon the fair market value of the property, which is the amount that the trial court is required to determine for equitable distribution. "Fair market value has been defined as 'the price which a willing buyer would pay to purchase the asset on the open market from a willing seller, with neither party being under any compulsion to complete the transaction.' " *Becker v. Becker*, 127 N.C. App. 409, 414, 489 S.E.2d 909, 913 (1997) (quoting *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786 (1997)). Our Supreme Court has further observed that:

> An owner may and frequently does place a higher price on his property than it will bring in the market. It is not until a voluntary buyer is willing to take the property at the stated price that the transaction becomes an indication of market value. A mere offer to buy or sell property is incompetent to prove its market value. The figure named is only the

> opinion of one who is not bound by his statement and it is [too] unreliable to be accepted as a correct test of value.

N.C. State Highway Comm'n v. Helderman, 285 N.C. 645, 654-55, 207 S.E.2d 720, 727 (1974) (citations omitted). Since the properties have been for sale since 2006 and 2007, with no buyers, it is clear that the listing price was not indicative of the fair market value of the property. The portion of the equitable distribution judgment valuing the undeveloped lots is vacated, and this matter is remanded to the trial court for further findings.

Upon remand, the trial court shall determine the fair market value of each of the four lots as of the date of separation and as of the date of distribution. The trial court shall take additional evidence upon which to base its determination of fair market value.

B. Residence of the Parties

The trial court found that the parties' residence had a fair market value as of the date of separation of $375,000. As of the date of separation, there were two mortgages on the property, securing debt in the amount of $366,513.30. The debt was restructured following separation, and as of the date of distribution the debt was $358,495.21. The trial court found that the net fair market value of the property was $16,504.79. The trial court then found that "the home at this point and in the current market has no equity and therefore no income would be realized at the point of sale." The trial court distributed this property to defendant upon the condition that defendant have plaintiff's name removed from the indebtedness within three months. It appears that the import of this order was that defendant was to receive the property subject to both mortgages. No credits were awarded to either party for post-separation payment of debt.

Plaintiff contends that in valuing this asset, the trial court considered market conditions, whereas it did not do so in the valuation of the undeveloped lots.

It appears that the trial court's analysis was that if the residence was sold, the expenses of sale, primarily the real estate commission, would consume any proceeds which might be realized at the sale. This analysis was erroneous.

We have held that "the net value for marital property is ascertained by calculating the fair market value of each asset, and subtracting the value of any debt or encumbrance on the property." *Crowder v. Crowder*,

147 N.C. App. 677, 681, 556 S.E.2d 639, 642 (2001); *see also Cochran v. Cochran*, 198 N.C. App. 224, 227, 679 S.E.2d 469, 472 (2009); *Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007); *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520 (2003). An abundance of case law supports the calculation of the net value of an asset as fair market value reduced by encumbrances. The trial court's consideration of expenses of sale went beyond what was permitted. The portion of the equitable distribution judgment valuing the marital residence is vacated, and this matter is remanded to the trial court for further findings.

Upon remand, the trial court shall determine the fair market value of the residence as of the date of separation and as of the date of distribution. The trial court shall then reduce this amount by the encumbrances on the property to determine its net value, but may not consider additional costs, such as the expenses of a hypothetical future sale.

VII. Prejudice in Delay

[9] In his seventh argument, plaintiff contends that he was prejudiced by the delay from the conclusion of the trial court's hearings on 1 September 2011 to the issuance of the trial court's equitable distribution judgment on 5 March 2012. We disagree.

The equitable distribution proceeding began on 27 June 2011, and concluded on 1 September 2011. The trial court did not enter its equitable distribution order until 5 March 2012, about 6 months after the conclusion of the trial. Plaintiff contends that he was prejudiced by the delay due to the issues of valuation of the real property and his ongoing payment of marital debt, and that "he was prejudiced by the many errors he contends have been made but which could have been contributed to due to the 8 month delay."

The burden on appeal is upon plaintiff to show that he has been actually prejudiced by the court's delay in entering its order. *See Wright v. Wright*, ___ N.C. App. ___, ___, 730 S.E.2d 218, 222 (2012). Plaintiff has failed to identify any specific prejudice, aside from the delay that is inherent in any contested equitable distribution case, from the delay in entry of the order. Since we are remanding this matter for further findings, both parties will have the opportunity to address any changes that may have occurred since the original order, including those which occurred as a consequence not only of delay in entry of the order but also from the delay which is a necessary consequence of this appeal.

This argument is without merit.

VIII. Conclusion

As discussed above, we vacate portions of the equitable distribution order, and remand. We first note that, on remand, the trial court must receive additional evidence as to matters which must be considered as of the time that the distribution of marital property is to become effective. *See* N.C. Gen. Stat. § 50-20(b)(4) and (c)(1).

With regard to the corporation, the trial court is instructed to classify the corporation as marital or separate property, and if it is marital, to distribute the corporation (which has been valued at $0) and the $35,000 distribution from the corporation.

With regard to the equity line debt, the trial court is instructed to determine whether this was a marital debt, a separate debt, or partially marital and partially separate. The trial court shall also make findings as to the amount of the marital portion of the debt, if any, at the date of distribution, and shall distribute the increase or decrease as divisible property. Finally, it shall determine the amount of post-separation payments on the debt by the parties, and treat those payments as divisible property in accordance with the holding in *Warren*.

With regard to the credit card debt, the trial court is instructed to distribute this debt to one of the parties. With regard to the vehicles and bank accounts, the trial court is instructed to classify, value, and distribute each of these assets. With regard to distributional factors, the trial court is instructed to properly determine the income of the parties as of the date of distribution, reweigh all of the factors that it finds appropriate, and determine whether an unequal distribution is equitable, and if so, the amount of the unequal distribution.

With regard to the undeveloped lots, the trial court is to determine the fair market value of each of the four lots as of the date of separation and as of the date of distribution. The trial court shall take additional evidence upon which to base its determination of fair market value as of the date of separation. With regard to the marital residence, the trial court is instructed to determine the fair market value of the residence as of the date of separation and as of the date of distribution. The trial court shall then reduce this amount by the encumbrances on the property to determine its net value. Based upon its revised findings and conclusions, the trial court shall then determine the total net value of the marital estate and the percentages distributed to each party and clearly allocate each item of property or debt to the parties.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE and STROUD concur.

BERNARD MANCUSO, JR., AND WIFE, FRANCES W. MANCUSO, CHRISTOPHER L. BURRIS, AND WIFE, LINDA BURRIS AND MANCUSO DEVELOPMENT, INC., PLAINTIFFS

v.

BURTON FARM DEVELOPMENT COMPANY LLC AND BODDIE-NOELL ENTERPRISES, INC., DEFENDANTS

No. COA13-38

Filed 17 September 2013

1. Contracts—breach of implied contract—express contract precludes implied contract

The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiffs' claim for breach of an implied contract. The parties executed an express contract that explicitly absolved defendants from any obligation to build a marina and an express contract precludes an implied contract with reference to the same matter.

2. Fraud—failure to construct marina—no guarantee—failure to show obligation

The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiffs' fraud claims based on defendants' failure to construct a marina. The relevant documents stated that there was no guarantee that any marina would ever be built, and plaintiffs failed to cite any legal support for their assertion that defendants had an obligation to provide express notice of any changes in their development plans.

3. Unfair Trade Practices—failure to construct marina—expressly disavowed any reliance on oral statements or marketing materials

The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiffs' unfair or deceptive trade practices claim based on defendants' failure to construct a marina. Plaintiffs expressly disavowed any reliance upon oral

statements or non-contractual marketing materials when they purchased property in Arlington Place.

4. Corporations—piercing corporate veil—dependent on viability of underlying claims

The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiffs' attempt to assert a claim against Boddie-Noell by piercing Burton Farm's corporate veil. Plaintiffs' claim was dependent on the viability of their underlying claims against Burton Farm, and the Court of Appeals affirmed summary judgment in defendants' favor on those claims. Thus, plaintiffs' appeal from the order denying plaintiffs' motion to compel discovery was dismissed as moot.

Appeal by plaintiffs from orders entered 22 May 2012 by Judge Benjamin T. Alford and 7 September 2012 by Judge Paul L. Jones in Pamlico County Superior Court. Heard in the Court of Appeals 4 June 2013.

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

Poyner Spruill LLP, by J. Nicholas Ellis, for Defendant-appellees.

ERVIN, Judge.

Plaintiffs Bernard and Frances Mancuso, Christopher and Linda Burris, and Mancuso Development, Inc., appeal from an order granting summary judgment in favor of Defendants Burton Farm Development Company, LLC, and Boddie-Noell Enterprises, Inc., and from an order denying their motion to compel discovery. On appeal, Plaintiffs argue that (1) Judge Jones erred by granting summary judgment in favor of Defendants with respect to their claims for breach of implied contract, fraud, and unfair or deceptive trade practices and with respect to their request to pierce Burton Farm's corporate veil so as to reach Boddie-Noell and that (2) Judge Alford erred by denying their motion to compel the production of certain documents during the course of the discovery process. After careful consideration of Plaintiffs' challenges to the trial courts' orders in light of the record and the applicable law, we conclude that Judge Jones' summary judgment order should be affirmed and that Plaintiff's appeal from Judge Alford's discovery order should be dismissed as moot.

I. Factual Background

A. Substantive Facts

This appeal arises from the development of approximately 900 acres of real property located in Pamlico County known as Arlington Place and revolves around a dispute over the extent to which Defendants failed to comply with an alleged obligation to construct a deep water marina in the course of developing the property. Boddie-Noell is the majority owner of Burton Farm, with both entities having been involved in the development of Arlington Place. Plaintiff Mancuso Development, Inc., is a real estate development and construction company. Plaintiffs Bernard Mancuso, Jr., and his wife, Frances Mancuso, were Mancuso Development's officers and sole shareholders. In addition, Plaintiffs Christopher Burris and Linda Burris served as Mancuso Development's Construction Supervisor and Office Manager, respectively.

Defendants purchased the land for Arlington Place in October 2005. According to the marketing materials distributed to potential buyers and the statements made by Defendants' employees, Defendants' plans for the development of Arlington Place included the construction of various recreational facilities, including a clubhouse, a swimming pool, a tennis court, and a marina. Plaintiffs became involved with Arlington Place in 2006, at which time Mr. Mancuso spoke with a Boddie-Noell representative about the extent to which Mancuso Development should participate in Arlington Place's "Signature Builder" program. After discussing the matter among themselves, Plaintiffs decided to buy a certain number of lots in Arlington Place and to participate in the Signature Builders program.

In early October 2006, Arlington Place held a "Phase 1 launch" and began selling lots in the development. Plaintiffs attended the launch, at which time they were provided with various marketing materials, had an opportunity to view the proposed development on land and by means of a helicopter ride, and had the chance to speak with Defendants' representatives. At that point, Defendants' intention to construct a marina was indicated in the marketing materials which they disseminated in a variety of ways. On 3 October 2006, Plaintiffs executed contracts for the purchase of five lots, three of which were deeded to both the Burrises and the Mancusos, one of which was deeded to the Mancusos, and one of which was deeded to the Burrises. At that time, Plaintiffs were provided with a HUD property report in a CD format.

On 5 October 2006, a plat for Phase 1 of Arlington Place was filed in the office of the Pamlico County Register of Deeds. The plat for Phase 1 did

not reflect the construction of a marina. A declaration of restrictive covenants, which was recorded on 31 October 2006, states that Defendants were developing Arlington Place "pursuant to a master plan on file with the Town of Minnesott Beach" and that the "Master Plan [was] subject to continuous revision and change by Declarant, in its discretion."

Although construction had not yet begun, Defendants continued to indicate during 2005 and 2006 that a marina was planned as part of Arlington Place. In May 2008, Mancuso Development contracted with Defendants to serve as the project manager for Arlington Place. Acting in this capacity, Mr. Mancuso attended staff meetings at which Defendants continued to suggest that they would eventually build a marina in Arlington Place. In February 2010, a model home that Plaintiffs built on Lot 139 in Arlington Place was sold to the owner of Lot 117. As part of that transaction, Plaintiffs agreed to accept Lot 117 in trade and to give the buyers a $100,000.00 credit towards the purchase price of the model home. In March 2010, Plaintiffs entered into an agreement with Burton Farm and Douglas Anderson, an executive with Boddie-Noell, in which Mancuso Development agreed to build a house on another lot in Arlington Place.

In December 2010, Mancuso Development's contract as project manager for Arlington Place was canceled, subject to a thirty day notice period. In January 2011, Mr. Mancuso attended a management meeting at which he was told that Defendants had no binding legal obligation to build a marina and that constructing a marina made "no sense" given the current economic situation.

B. Procedural History

On 29 April 2011, Plaintiffs filed a complaint against Defendants in which they asserted claims sounding in breach of implied contract, fraud, unfair or deceptive trade practices, and piercing Burton Farm's corporate veil and sought both compensatory and punitive damages. On 23 May 2011, Defendants filed a motion seeking the dismissal of Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and a motion seeking the imposition of sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. Defendants' motions were denied on 13 June 2011 by means of an order entered by Judge John E. Nobles, Jr.

On 20 July 2011, Defendants filed an answer in which they denied the material allegations of Plaintiff's complaint and in which Burton Farm asserted a counterclaim against Mancuso Development. Mancuso Development filed a reply to Burton Farm's counterclaim on 14 September 2011. On 14 February 2012, Plaintiffs filed a motion

seeking the entry of an order compelling Defendants to respond to certain requests for the provision of financial and corporate information relating to Boddie-Noell. Plaintiffs' motion to compel was denied by Judge Alford on 22 May 2012.

On 30 July 2012, Defendants filed a motion seeking the entry of summary judgment in their favor. On 7 September 2012, Judge Jones entered an order granting summary judgment in favor of Defendants. Plaintiffs noted an appeal to this Court from the trial court's summary judgment order and from the denial of their motion to compel. On 15 October 2012, Burton Farm voluntarily dismissed its counterclaim against Mancuso Development without prejudice.

II. Legal Analysis

A. Validity of Summary Judgment Order

1. Standard of Review

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2012). " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). "A genuine issue of material fact arises when the 'facts alleged . . . are of such nature as to affect the result of the action.' " *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)) (omission in original); *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (stating that an "issue is material if, as alleged, facts 'would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action' ") (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)).

The moving party has the burden of "show[ing] the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (citing *Oestreicher v. Am. Nat'l Stores*, 290 N.C. 118, 131, 225 S.E.2d 797, 806 (1976)). "A party moving for summary judgment may

prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

"Our standard of review of a trial court's order granting or denying summary judgment is *de novo*." *Bryson v. Coastal Plain League, LLC*, __ N.C. App __, __, 729 S.E.2d 107, 109 (2012) (citing *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig*, 363 N.C. at 337, 678 S.E.2d at 354 (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

2. Viability of Plaintiffs' Claims

a. Breach of Implied Contract

[1] As an initial matter, Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendants with respect to their claim for breach of an implied contract. According to Plaintiffs, Defendants had a legal and contractual obligation to construct a marina given that "the written contractual documents" "incorporate the Restrictive Covenants which reference the Master Plan showing a marina on file with the Town." In addition, Plaintiff's assert that, despite the fact that the parties had entered into an express contract, they are entitled to pursue a claim for breach of an implied contract on the grounds that applicable "case law establishes [that] parol evidence and verbal statements may be used to establish a developer's implied promise to provide an amenity in a subdivision." We do not find Plaintiffs' arguments persuasive.

A claim for breach of an implied contract "is generally cognizable under North Carolina law," *In re Proposed Foreclosure of Claim of Lien Filed Against Johnson*, 366 N.C. 252, 259, 741 S.E.2d 308, 312 (2012), and "rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of another." *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 346, 634 S.E.2d 548, 556 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 167, 639 S.E.2d 651 (2006) (citations omitted). However, "[it] is a well established principle that an express contract precludes an implied contract with reference to the same matter," *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962)

(citing *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 765, 102 S.E.2d 257, 259 (1958)) (other citations omitted), so that, if "there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citing *Vetco Concrete Co.*, 256 N.C. at 713-14, 124 S.E.2d at 908). In addition, since "[t]here cannot be an express and an implied contract for the same thing existing at the same time," "[n]o agreement can be implied where there is an express one existing." *Vetco*, 256 N.C. at 713-14, 124 S.E.2d at 908. We also note the "familiar principle that the interpretation of a contract which is free from ambiguity involves a matter of law for the decision of the court and not a matter of fact for the determination of the jury." *Drake v. City of Asheville*, 194 N.C. 6, 9, 138 S.E. 343, 344 (1927).

In the present case, the parties executed an express contract that addressed Defendants' obligations relating to the provision of recreational facilities such as a marina, a fact which precludes any consideration of evidence which contradicts the terms of that express agreement and tends to show the existence of an "implied contract." A careful analysis of the documents that embody the express contract between the parties, which include the Purchase Agreements and the United States Department of Housing and Urban Development property report, which was expressly incorporated into each Purchase Agreement,[1] establishes that Defendants were entitled to summary judgment in their favor.

The Purchase Agreements between the parties specifically provide that:

> BY THE EXECUTION HEREOF YOU ACKNOWLEDGE THAT EXCEPT AS SET FORTH HEREIN OR IN THE PROPERTY REPORT GIVEN TO YOU, NO REPRESENTATION, WARRANTY, GUARANTEE OR

1. In their brief, Plaintiffs note that, even though 15 U.S.C. § 1703(a)(1)(B) refers to a "printed property report," the HUD report was provided to them in CD rather than hard copy format. Assuming, without in any way deciding, that Defendants' decision to provide the HUD report in CD rather than hard copy format was improper, Plaintiffs have neither alleged nor shown any prejudice resulted from the format in which the HUD report was provided to Plaintiffs. In addition, even though Plaintiffs may have signed the Purchase Agreements before reading the HUD report, the Purchase Agreements provide a seven day cancellation period. Plaintiffs have not claimed that any of them lacked access to a computer or printer, had difficulty printing a copy, made an unsuccessful effort to obtain a hard copy of the HUD report from Plaintiffs, or were otherwise prejudiced by the form in which the HUD report was provided to them. As a result, we conclude that the fact that Plaintiffs received the HUD in CD rather than hard copy format does not entitle Plaintiffs to relief.

> PROMISE, EXPRESS OR IMPLIED, HAS BEEN MADE TO OR RELIED UPON BY YOU IN MAKING THE DECISION TO EXECUTE THIS AGREEMENT AND PURCHASE THE HOMESITE, AND THAT YOU HAVE RELIED UPON YOUR OWN JUDGMENT IN MAKING SUCH DECISIONS AND NOT UPON ANY STATEMENT OR STATEMENTS MADE BY SELLER, ITS AGENTS, EMPLOYEES OR REPRESENTATIVES, EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT OR IN THE PROPERTY REPORT.

In addition, the Purchase Agreements include a merger clause which provides that the "Agreement represents the entire agreement between the parties and may not be modified or amended except as agreed between the parties in writing." Thus, the Purchase Agreements specifically disclaim the right of any purchaser to rely on any representation not contained in the relevant contractual documents and provide that the entire agreement is contained in the Purchase Agreement and the HUD report.

The HUD report contains numerous warnings concerning the risks inherent in a decision to purchase an unimproved lot in Arlington Place and states in the clearest possible terms that Defendants had not obligated themselves to complete various proposed improvements, such as the marina. For example, the first page of the HUD report states, in large bold-faced capital letters, **"READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING."** The opening section of the HUD report, which is titled "Risks of Buying Land," begins by stating that:

> RISKS OF BUYING LAND
>
> The future value of any land is uncertain and dependent upon many factors. DO NOT expect all land to increase in value.
>
> Any value that your homesite may have will be affected if the roads, utilities and all proposed improvements are not completed.

After the section addressing the "Risks of Buying Land," another warning appears which states that:

> THROUGHOUT THIS PROPERTY REPORT THERE ARE SPECIFIC WARNINGS CONCERNING THE DEVELOPER, THE SUBDIVISION OR INDIVIDUAL HOMESITES. BE

SURE TO READ ALL WARNINGS CAREFULLY BEFORE SIGNING ANY CONTRACT OR AGREEMENT.

The next portion of the HUD Report addresses matters of "General Information," including an explicit warning that the "Developer may change its plans for this Subdivision from time to time in its sole discretion." After this general introductory information, the HUD Report contains sections addressing specific issues, such as water and sewer availability, easements, the filing of plats, and proposed private roads. Each of these report sections contain separate warnings printed in all capital letters advising prospective purchasers (1) that there was no guarantee or promise by Defendants that they would not default on the deed of trust applicable to the entire development before obtaining a release from that overall deed of trust relating to the purchaser's homesite, in which case the purchaser would lose his or her lot; (2) that regulatory authorities had not approved the proposed plats and might "require significant alterations before they will approve them" or refrain from "allow[ing] the land to be used for the purpose for which it is being sold;" (3) that no funds had been set aside to guarantee completion of subdivision roads; and (4) that the use of an on-site septic system had not been approved for individual homesites and that "there are no assurances that permits can be obtained for the installation and use of an individual on-site system." As a result, the HUD report warned prospective purchasers that, because Arlington Place was in the early stages of development, Defendants did not guarantee the successful completion of even the most basic aspects of the project, such as obtaining authorization to build residences on particular homesites, obtaining permission to construct an on-site septic system, or completing subdivision roads.

The "Recreational Facilities" section, which addresses the extent of Defendants' obligations regarding the provision of amenities, such as a marina, contains additional disclaimers. At the beginning of this section, the HUD report states that "[w]e currently plan to construct the facilities listed in the chart below; however our plans have not been finalized and are subject to change." Significantly, the "chart below" included only two items: parks and walking trails. In other words, the marina upon which Plaintiffs' claims rest is not even listed among the recreational facilities that were "currently plan[ned]." In addition, the following statement appears immediately after the "chart below:"

> We are not contractually obligated to provide or complete the above-referenced amenities and there is therefore no assurance that they will ever be provided or

> completed. Our plans are subject to change from time to time in our sole discretion.

At the conclusion of the "Recreational Facilities" section is a subsection entitled "Other Facilities" that discusses the possible creation of private clubs, including a yacht club that would be appurtenant to a proposed marina, and that provides, in pertinent part, that:

> A private membership club is being established to own and operate a swimming pool, clubhouse and tennis courts[.] . . . Plans for these facilities and dues have not been established at this time; however, the Developer is building these amenities in conjunction with the development of the Phase 1 lots. . . .
>
> A second club is being contemplated by the Developer that is contingent upon the [developer's] ability to construct a marina at the Subdivision. The Developer is pursuing plans and permits for a marina facility at this time; however, the plans are in the formative stages only and there is no assurance that the marina will ever come to fruition. If developed, the developer intends to create another club to be the Arlington Place Yacht Club that will include amenities to be determined by the Developer[.] . . . The Yacht Club is proposed only and may never be built or operated.
>
> We are not contractually obligated to provide or complete the Swim and Tennis Club or the Arlington Place Yacht Club and there is therefore no assurance that they will ever be provided or completed.

Although Plaintiffs contend that this "language is consistent with Plaintiffs' understanding, based on Defendants' representations, [that] construction of the marina was contingent on obtaining a permit and would begin once the permit was obtained," we do not find this logic persuasive.

As an initial matter, given the explicit merger clause contained in the Purchase Agreement, Plaintiffs may not properly rely on "Defendants' representations" except as contained in the written documents. Moreover, Plaintiffs' "understanding" is inconsistent, rather than consistent, with the language quoted above, which states explicitly that the developers' "plans [for the construction of a marina and associated yacht club] are in the formative stages only and there is no assurance

that the marina will ever come to fruition." We find it difficult to imagine language that would more clearly inform prospective buyers that Defendants were not contractually obligated to build any recreational facilities, including the marina. The inclusion of the phrase "contingent upon the [developer's] ability" in the relevant report language does not, despite Plaintiffs' assertion to the contrary, suffice to create any material issue of fact given that "ability" is a generalized term that allows for the consideration of a wide variety of factors, including economic feasibility, the ability to obtain any necessary permits, and other potential difficulties. As a result, we have no hesitation in concluding that the language contained in the "Recreational Facilities" section of the HUD report is clear, that none of its terms are ambiguous, and that it unequivocally establishes that Defendants had not assumed any contractual duty to actually construct a marina in Arlington Place.

To summarize the result of our analysis of the relevant contractual documents, the Purchase Agreements incorporate the HUD report and expressly bar the signatories from asserting that their decision to enter into the underlying contract rested, even in part, on information not contained in the relevant contractual documents, including oral statements, marketing brochures, or other written materials outside the contents of the Purchase Agreement and the HUD report. For that reason, we further conclude that, by executing the Purchase Agreements, Plaintiffs explicitly acknowledged that their decision to purchase lots in Arlington Place rested solely on the representations made by and conditions set out in the Purchase Agreement and the HUD report. In addition, we conclude that the unambiguous provisions of the HUD report establish that Defendants were not under any legal obligation to construct a marina and that, given the language of the Purchase Agreements, no such obligation could be inferred from marketing materials, oral representations, or similar sources of information. As a result, given that the record establishes the existence of an express contract between the parties and the fact that this express contract explicitly absolves Defendants from any obligation to build a marina in the event that they elected not to do so, the trial court did not err by granting summary judgment in favor of Defendants with respect to Plaintiffs' implied contract claim.

In seeking to persuade us to reach a different result, Plaintiffs argue that the existence of an implied contract requiring the construction of a marina is shown by provisions in the recorded plats and covenants. On 5 October 2006, a plat for Arlington Place Phase 1 was filed in the office of the Pamlico County Register of Deeds. However, the 5 October 2006 plat does not depict the construction of a marina, given that this facility

was proposed for a later part of the development process designated as "Phase 3." The restrictive covenants incorporated into the parties' deeds did state that Defendants were developing Arlington Place "pursuant to a master plan on file with the Town of Minnesott Beach," which was "subject to continuous revision and change by Declarant, in its discretion." As Plaintiffs correctly note, the Master Plan references the proposed marina, describing it as "currently planned." However, given that the applicable restrictive covenants explicitly state that the Master Plan was "subject to continuous revision and change by Declarant, in its discretion," the fact that a discussion of the proposed marina was contained in that document did not create any sort of legally enforceable obligation on Defendants' part to build the marina. As a result, the fact that "the written contractual documents . . . incorporate the Restrictive Covenants which reference the Master Plan showing a marina on file with the Town" does not support a decision to overturn Judge Jones' order.

In addition, Plaintiffs argue that "case law establishes [that] parol evidence and verbal statements may be used to establish a developer's implied promise to provide an amenity in a subdivision." According to well-established North Carolina law, however, "[t]he parol evidence rule is a rule of substantive law, though it is often expressed as if it were a rule of evidence." *Phelps v. Spivey*, 126 N.C. App. 693, 697, 486 S.E.2d 226, 229 (1997).

> Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract. Thus, it is assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]

Drake v. Hance, 195 N.C. App. 588, 673 S.E.2d 411, (2009) (quoting *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002) (internal citations and quotations omitted), *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), and *Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980)). "[M]erger clauses were designed to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing" and "create a rebuttable presumption that the writing represents the final agreement between the parties." *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988). As we have already established, the Purchase

Agreements and the HUD report are devoid of any unclear or ambiguous terms that need clarification based upon the consideration of parol evidence. Moreover, instead of clarifying the meaning of ambiguities in the documents embodying the parties' contract, the evidence concerning oral statements by Defendants' agents and the language contained in various marketing materials upon which Plaintiffs rely flatly contradict the parties' express contract. To the extent that Plaintiffs are attempting to utilize this evidence to establish the existence of a separate implied contract rather than to explain the proper interpretation of an express contract, that effort runs afoul of the legal principle that an implied contract will not be recognized in an instance covered by an express contract. As a result, Judge Jones correctly rejected Plaintiffs' attempt to establish the existence of an obligation on the part of Defendants to construct the marina based upon parol evidence.

Although Plaintiffs have cited a number of decisions in support of their effort to persuade us to give legal effect to the statements and other materials upon which they rely, we do not believe that these decisions support the decision that Plaintiffs wish us to make. For example, Plaintiffs describe *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E.2d 254 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987), as the "seminal case addressing implied promises to construct amenities in a development[.]" The *Lyerly* plaintiffs had purchased lots in the Inlet Point subdivision from the defendants, who had developed that subdivision. According to the plaintiffs, the defendants had pledged to build a boat basin, to provide an aquatic connection to the Intracoastal Waterway, and to pave an access road. More specifically,

> [a]ccording to the subdivision plats filed with New Hanover County, this subdivision was to include a boat basin with a channel for access to the Intracoastal Waterway. The channel was to be approximately 250 feet long, thirty feet wide and a minimum of six feet deep at mean low tide. . . . Also shown on the recorded plat was Inlet Point Drive, a private road providing the subdivision with access to U.S. Highway 421. The plat stated that the street was "to be built to North Carolina Department of Transportation specifications."

Lyerly, 82 N.C. App at 226, 346 S.E.2d at 256. As a result, in *Lyerly*, unlike in the present situation, the recorded plats and restrictive covenants included a commitment to construct the disputed amenities. In addition, nothing in our opinion in *Lyerly* indicates that the relevant contractual documents contained an explicit disclaimer of specific obligations or language precluding reliance on external representations, both of which

are present here. As a result, given the absence of any indication that the contractual documents precluded consideration of oral statements and other non-contractual representations, *Lyerly* does not justify a decision in Plaintiffs' favor.

We reach a similar conclusion after analyzing the other decisions upon which Plaintiffs rely. For example, Plaintiffs cite *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), for the proposition that "[p]arol assurances made by a developer to prospective buyers regarding the general scheme or plans of development that the developer intends to pursue are admissible to establish the existence of such a scheme" and that such "parol evidence may be in the form of a field map, sales brochures, maps, advertising or oral statements on which purchasers relied." 326 N.C. at 127, 388 S.E.2d at 553 (citing *Warren v. Detlefsen*, 281 Ark. 196, 199, 663 S.W.2d 710, 711-12 (1984)). However, a careful review of *River Birch* reveals that it affirms, rather than rejects or undermines, the rule that such evidence may not be admitted for the purpose of contradicting the applicable contractual documents. The primary issue in *River Birch* was the extent to which the City of Raleigh had the authority under a municipal ordinance to require a developer to convey land depicted as a common area on preliminary plats to the homeowners' association. In considering the manner in which a subsidiary issue relating to the proper location of the common area should be resolved, the Supreme Court stated that:

> We do not suggest the affidavits are competent to identify the boundaries of the common area, for then the declarations would be used to alter the terms of the written agreement. However, where the declarations confirm that the parties intended certain documents to identify the boundaries of land referred to in other documents, then those declarations will be admitted for that limited purpose. . . . Where a contract to convey land that otherwise satisfies the statute of frauds is part oral and part written, parol evidence is admissible so long as it does not conflict with the writing.

Id. at 127, 388 S.E.2d at 554 (citing *Boone v. Boone*, 217 N.C. 722, 729, 9 S.E.2d 383, 387 (1940)). As a result, a careful review of *River Birch* reveals that it affirms, rather than rejects or undermines, the rule that parol evidence may not be admitted for the purpose of contradicting binding contractual documents. The same is true of *Wall v. Fry*, 162 N.C. App. 73, 590 S.E.2d 283 (2004), another case cited by Plaintiffs, which undercuts the general rule discussed above. As a result, Plaintiffs have

not cited any authority, and we know of none, which stands for the proposition that parol evidence may be considered for the purpose of contradicting the terms of a written contract or establishing the existence of an implied contract in a situation which would otherwise be governed by an express agreement.

As further support for their position, Plaintiffs direct our attention to the term "other property" as found in the restrictive covenants. "Other property" is defined in the restrictive covenants as:

> any real property, other than a Homesite, Townhome Lot, Residential Condominium Unit, Unimproved Tract or Common Elements, that is located within the Community and has been subjected to this Master Declaration pursuant to an amendment hereto or supplemental declaration referring to the Master Declaration, made in accordance with the provisions hereof and recorded in the land records for Pamlico County, North Carolina. Other Property may include, but shall not be limited to: boat slips, dry storage units and/or other marina facilities, private club facilities, commercial tracts, buildings and/or units; and assisted living facilities.

As a result of the fact that the covenants afford Defendants the right to "convey or lease other property, or an interest therein, to the Association for use as Common Elements," in which event the homeowners' association was required to "accept all such conveyances and immediately become responsible for the operation and maintenance of all such properties," Plaintiffs contend that there is "a genuine issue of material fact as to whether the covenants at issue implied the construction of a marina[.]" We conclude, however, that the covenant language upon which Plaintiffs' argument rests does not suggest that Defendants had a contractual obligation to build a marina. Instead, the language in question simply provides that, if Defendants chose to construct the facility in question, it would be classified as "other property" subject to subsequent conveyance to the homeowner's association. As a result, the covenant language upon which Plaintiffs rely does not suffice to create a genuine issue of material fact concerning the extent to which Defendants were obligated to build a marina.

For all of the reasons set forth above, we conclude that (1) the disclaimers in the HUD report, when taken in conjunction with the provisions of the Purchase Agreement, including the merger and integration clauses, establish that Defendants did not assume any legal obligation

to construct a marina; (2) the plat and Master Plan that were recorded with the office of the Pamlico County Register of Deeds do not support Plaintiffs' assertion that Defendants were legally obligated to build the marina; and (3) the parties' decision to execute an express written contract precludes Plaintiffs from prevailing upon an implied contract theory or from attempting to introduce evidence that contradicts the express contract. As a result, the trial court did not err by granting summary judgment in favor of Defendants with respect to Plaintiffs' implied contract claim.

b. Fraud Claim

[2] Secondly, Plaintiffs claim that they forecast sufficient evidence to support the denial of Defendants' summary judgment motion with respect to their fraud claim, which rests upon two transactions occurring in 2010. In one of these instances, Plaintiffs sold a model home to the owner of another lot in Arlington Place, accepted the buyer's lot in trade, and gave the buyer a $100,000.00 credit towards the purchase of the model home. In the other transaction, Plaintiffs "agreed to build a second model home with an option to purchase the lot." However, according to Plaintiffs, Defendants no longer intended to build a marina immediately upon obtaining a permit to do so at the time at which these transactions occurred. In support of this contention, Plaintiffs cite various emails addressing Defendants' concerns about the economic viability of the Arlington Place development and expressing a recognition that, for some period of time, the development of Arlington Place could not be pursued in an aggressive manner. In other words, Plaintiffs are essentially arguing that Defendants are liable to them in fraud because they failed to keep Plaintiffs apprised about their assessment of the economic landscape and the extent to which their plans relating to the construction of the marina were likely to change. For that reason, Plaintiffs' fraud claim rests upon a presumption that Defendants had a legal duty to keep them apprised of any change in their plans for the development of Arlington Place and that Defendants' failure to "disclose" their change of plan regarding the construction of the marina constituted a breach of that duty.

"While actual fraud 'has no all-embracing definition,' the following essential elements of actual fraud are well established: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' Additionally, any reliance on the allegedly false representations must be reasonable. The reasonableness of a party's reliance is a question for the jury, unless the facts are

so clear that they support only one conclusion." *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387, (2007) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974), and citing *Johnson v. Owens*, 263 N.C. 754, 757, 140 S.E.2d 311, 313 (1965), and citing *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999)) (citations omitted). As we have already discussed, the relevant documents, including the Purchase Agreements, HUD report, the recorded plat and the restrictive covenants, all uniformly provide that Defendants reserved a right to make changes to their plans for the development of Arlington Place; that Defendants had declined to promise that even the most basic issues, such as the need for a septic system permit, would be favorably addressed in the event that anyone purchased property in Arlington Place; and that there was absolutely no assurance that any marina would ever be constructed. As a result of the fact that the relevant documents clearly state that there was no guarantee that any marina would ever be built at Arlington Place and the fact that Plaintiffs have failed to cite any legal support for their assertion that Defendants had an obligation to provide express notice of any changes in their development plans, Plaintiffs' fraud claim necessarily fails.

The cases upon which Plaintiffs rely in support of their fraud claim do not suggest the appropriateness of reaching a different result. In both of the cases cited by Plaintiffs in support of this aspect of their challenge to Judge Jones' order, the defendant failed to disclose a "fact" rather than a change in his or her own internal thinking. *Sutton v. Driver*, __ N.C. App. __, __, 712 S.E.2d 318, 324-25 (2011) (holding that a representation that a particular tract of property near the property that the plaintiffs were considering purchasing would likely not be sold when the owners of that tract had, in fact, accepted a bid and entered into a sale contract precluded an award of summary judgment); *Brown v. Roth*, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999) (holding that a failure to disclose the heated square footage of a residence precluded an award of summary judgment). In other words, neither of the decisions upon which Plaintiffs place principal reliance hold that, in a situation in which the relevant documents clearly state that a developer's plans are tentative, the defendant has a legally enforceable duty to keep a plaintiff apprised about changes in development plans or to inform a plaintiff about ongoing adjustments in development plans in light of changing economic conditions.[2] Thus, as a result of the fact that Plaintiffs failed

2. Although Plaintiffs also argue that Defendants committed a breach of fiduciary duty arising from the fact that a real estate broker failed to disclose Defendants' intentions

to forecast evidence sufficient to establish that Defendants breached a legal duty that they owed to Plaintiffs by failing to "disclose" that, as of 2010, they had decided, consistently with their contractual rights, to postpone construction of the marina, Judge Jones did not err by determining that summary judgment should be entered in Defendants' favor with respect to the fraud claim.

c. Unfair or Deceptive Trade Practices

[3] Thirdly, Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendants with respect to their unfair or deceptive trade practices claim. In support of this contention, Plaintiffs essentially reiterate their contention that Defendants' oral representations and marketing materials demonstrated an intention to build a marina and that Defendants' "actions in marketing Arlington Place on the basis of a marina, which they then claimed no obligation to provide, is an unfair and deceptive practice." We do not find Plaintiffs' argument persuasive.

As we have already indicated, Plaintiffs executed legally binding contracts that (1) explicitly stated that the Purchase Agreement and the HUD report constituted the entire agreement between the parties and contained the only representations upon which a purchaser was entitled to rely in making a lot purchase decision and (2) explicitly indicated that Defendants had provided no assurance that the marina would ever be built. In seeking to persuade us that Judge Jones should have refrained from granting summary judgment in favor of Defendants with respect to this claim, Plaintiffs have failed to address the legal significance of these documents or to articulate any legal basis for a determination that their unfair and deceptive trade practices claim remained viable in light of the existence of these clear and unambiguous contractual provisions. As a result, given that Plaintiffs expressly disavowed any reliance upon oral statements or non-contractual marketing materials when they purchased property in Arlington Place, Judge Jones did not err by granting summary judgment in favor of Defendants with respect to Plaintiffs' unfair and deceptive trade practices claim.

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concerning the construction of the marina to Plaintiffs at the time of the transactions discussed in the text, the record contains no evidence that the broker upon whose activities Plaintiffs rely had any knowledge of the lot trade involved and the purchase price credit given in connection with the first of these two transactions or that the broker in question had any involvement of any nature in the second of these two transactions. As a result, wholly aside from the fact that Plaintiffs did not plead a breach of fiduciary duty claim of the nature asserted in their brief, we conclude that the evidence forecast by Plaintiffs did not suffice to establish the viability of Plaintiffs' breach of fiduciary duty claim.

d. Piercing the Corporate Veil

[4] Fourthly, Plaintiffs contend that the trial court erred by granting summary judgment in favor of Defendants with respect to their attempt to assert a claim against Boddie-Noell by piercing Burton Farm's corporate veil. "It is well recognized that courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted). For that reason, Plaintiffs' veil-piercing claim is, as their counsel candidly admitted during oral argument, dependent on the viability of their underlying claims against Burton Farm. In view of the fact that we have decided to affirm Judge Jones' decision to grant summary judgment in favor of Defendants with respect to Plaintiffs' substantive claims, we need not address Plaintiff's arguments in support of their veil-piercing claim. As a result, Judge Jones did not err by granting summary judgment in Defendants' favor with respect to Plaintiff's veil-piercing claim.

B. Validity of Discovery Order

[5] Finally, Plaintiffs contend that Judge Alford erred by denying their motion to compel discovery relating to certain Boddie-Noell financial records. As Plaintiffs acknowledge in their brief, we only need to address this contention "if Plaintiffs' claims for piercing and punitive damages survive summary judgment." As a result of our determination that Judge Jones' order granting summary judgment in Defendants' favor should be affirmed, we need not reach the merits of Judge Alford's discovery order and decline to address it.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Judge Jones did not err by granting summary judgment in Defendants' favor. As a result, Judge Jones' order granting summary judgment in Defendants' favor should be, and hereby is, affirmed and Plaintiffs' appeal from Judge Alford's order denying Plaintiffs' motion to compel discovery should be, and hereby is, dismissed as moot.

AFFIRMED IN PART AND DISMISSED AS MOOT IN PART.

Judges McGEE and STEELMAN concur.

THE ROBERT K. WARD LIVING TRUST, BY AND THROUGH BRADLEY N. SCHULZ, SUCCESSOR TRUSTEE, PLAINTIFF

v.

JOHN J. PECK, INDIVIDUALLY, AND AS PRIOR TRUSTEE OF THE ROBERT K. WARD LIVING TRUST; SETERUS, INC.; AND FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE), DEFENDANTS

No. COA13-125

Filed 17 September 2013

Trusts—wrongful acts—individual capacity—trustee—after tenure as trustee—expiration of statute of limitations

The trial court did not err by dismissing plaintiff's claims for alleged wrongful acts relating to a trust based on expiration of the five year statute of limitations under N.C.G.S. § 36C-10-1005. The complaint did not state any valid claims against defendant Peck as an individual, in his capacity as trustee or for his actions prior to his resignation as trustee, or after his tenure as trustee.

Appeal by plaintiff from order entered 20 July 2012 by Judge Jack W. Jenkins in Superior Court, Onslow County. Heard in the Court of Appeals 8 May 2013.

Schulz Stephenson Law, by Bradley N. Schulz, for plaintiff-appellant.

William Norton Mason, for defendant-appellee John J. Peck.

STROUD, Judge.

Plaintiff appeals order dismissing its action as "barred by the statute of limitations[.]" For the following reasons, we affirm.

I. Background

Plaintiff, the Robert K. Ward Living Trust ("plaintiff" or "the trust"), alleged in its complaint that defendant John J. Peck is an attorney who prepared various estate planning documents for Mr. Robert K. Ward, including the trust at issue. Mr. Ward was both the grantor and beneficiary of the trust which owned various properties that included real estate and businesses. On 10 December 2005, Mr. Ward died intestate, and under the terms of the trust, defendant Peck began serving as trustee from that time until he resigned as trustee on 7 June 2006. Mr. Bradley N. Schultz became the successor trustee and during his tenure,

on 12 July 2011, plaintiff filed a complaint against defendant Peck for improperly encumbering trust properties both before and after his resignation as trustee.

On 16 February 2012, plaintiff filed a motion for partial summary judgment, claiming "that based upon the pleadings and discovery, there is no genuine issue of any material fact" as to two of its claims. On or about 23 March 2012, plaintiff filed an amended complaint. Plaintiff alleged that during defendant Peck's tenure as trustee, defendant Peck "in violation of Court Orders, and after notice of his alleged contempt,"[1] recorded several deeds of trust against various properties owned by the trust; the last of this series of recordations occurred on 12 February 2007. Plaintiff also alleged that "[a]fter his resignation as Trustee, defendant Peck caused" several more documents to be recorded, including "an Assignment of the Lease Rents and Profits[,]" "Substitution[s] of Trustee" appointing defendant's wife as the substitute, "an Irrevocable Assignment . . . [of] interest[,]" deeds of trust, and cancellations of deeds of trust; the most recent of this series of recordations occurred on 2 December 2009. Based upon the alleged wrongful actions of defendant Peck, plaintiff made claims for (1) constructive fraud; (2) breach of fiduciary duty and unjust enrichment; (3) fraud; (4) accounting and production of all files on loans, transactions, and payments; (5) quiet title and cancellation of deeds of trust and assignments; and (6) temporary restraining orders and injunctions.

On or about 17 April 2012, defendant Peck answered and made motions to dismiss plaintiff's complaint for "fail[ure] to state a claim upon which relief can be granted" pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and as barred by the "applicable Statute of Limitations." On 20 July 2012, the trial court entered an order allowing defendant Peck's motion to dismiss based upon the five year statute of limitations provided in North Carolina General Statute § 36C-10-1005 and dismissing plaintiff's action upon finding that "Plaintiff's action was filed more than five years after the Defendant resigned as successor Trustee and more than five years after Plaintiff, his predecessors in interest,

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1. In January of 2006, in an action filed by Ms. Lynn P. Ward, Mr. Ward's widow, against defendant Peck for "a Temporary Restraining Order as an injunction[,]" the trial court entered "an injunction . . . restraining John Peck as Trustee . . . 'from intentionally damaging, or otherwise encumbering, transferring or disposing of any property belonging to the Robert K. Ward Living Trust . . . except for those transfers, transactions, and activities that are reasonably necessary and customary in the ordinary course of business[.]' " In March of 2006, "a Motion and Order had been filed . . . for the alleged contempt of Mr. Peck as Trustee, alleging that he was disposing and encumbering property[;]" however, before the trial court heard the motion, Mr. Peck resigned as trustee.

knew or should have known of the alleged violations of Defendant's duties, the breaches of trust alleged in the Complaint." The trial court also dismissed the remaining motions, including plaintiff's motion for partial summary judgment, as moot. Plaintiff appeals.

II. Statute of Limitations

Plaintiff contends that the trial court erred in dismissing its action. We review a trial court's decision to dismiss a complaint *de novo*. *Horne v. Cumberland County Hosp. System, Inc.*, ___ N.C. App. ___, ___ 746 S.E.2d 13, 16 (2013) ("An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6)."); *Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179, 184, 668 S.E.2d 923, 926 (2008) ("We review a trial court's decision to dismiss an action based on the statute of limitations *de novo*."). In conducting our *de novo* review, we note that plaintiff is suing defendant in essentially three separate capacities: as an individual; as trustee during his time as trustee of the trust; and as a former trustee of the trust. We will address each of these separately.

A. Defendant Peck as an Individual

While plaintiff's complaint asserts that it is suing defendant Peck in both his individual capacity as well as his capacity as trustee, based on the allegations in the complaint, only one of plaintiff's claims can be construed as an individual claim against defendant Peck. Plaintiff's first claim for relief is for constructive fraud wherein plaintiff alleges that "[a]t all relevant times, the Defendant John Peck had a confidential relationship and fiduciary relationship with Mr. Ward and the Trust at issue." Thus, the first claim was based upon defendant Peck's actions as a trustee or former trustee since defendant Peck as an "individual" was not in any other sort of "confidential" or "fiduciary relationship" with plaintiff. Plaintiff's second and fourth claims are also clearly against defendant Peck as a trustee as they are claims for "breach of fiduciary duty and unjust enrichment" and "accounting and production of all files on loans, transactions, and payments[.]" (Original in all caps.) Plaintiff's fifth claim for quiet title does not specifically implicate defendant Peck and plaintiff's sixth claim requesting a "temporary restraining order and injunction[,]" (original in all caps), as to defendant Peck are based upon allegations for "trust account records[,]" again, implicating defendant Peck only in his capacity as trustee or former trustee.

The only remaining claim which could be considered as a claim against defendant Peck in his individual capacity is plaintiff's third claim for fraud, but the allegations of this claim do not meet the required

elements of a fraud claim. *See Whisnant v. Carolina Farm Credit*, ACA, 204 N.C. App. 84, 94, 693 S.E.2d 149, 156-57 (2010) ("The essential elements of fraud are: (1) False representation or concealment of a past or existing material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party[.]"), *disc. review denied*, 365 N.C. 73, 705 S.E .2d 745 (2011). Plaintiff's claim for fraud incorporated the factual allegations included in the other claims, which, as we have already noted, were against him as trustee, and also alleged that defendant Peck's "fraudulent" conduct includes Peck's failure to "provide[] original notes for inspection, . . . advise[] the name of the holders of those notes[,]" and violation of court orders. While defendant Peck may have committed wrongful conduct or even contempt of a court order entered in another lawsuit which is not before us in this appeal, these assertions alone do not meet the elements of fraud. *See id.* Merely reciting that defendant Peck made "material omissions . . . [and] intentional misrepresentations" without any indication of what those omissions and misrepresentations are will not support a claim for fraud. *See id.* Accordingly, the complaint does not state any valid claims against defendant Peck as an individual.

B. Claims against Defendant Peck During His Time as Trustee

Plaintiff also alleges that defendant took wrongful actions as trustee of the trust before his resignation. North Carolina General Statute § 36C-10-1005, the statute upon which the trial court allowed defendant Peck's motion to dismiss, provides that

> (a) No proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.
>
> (b) Except as provided in subsection (a) of this section, Chapter 1 of the General Statutes governs the limitations of actions on judicial proceedings involving trusts.

N.C. Gen. Stat. § 36C-10-1005 (2005). It is undisputed that defendant Peck resigned as trustee in June of 2006, but plaintiff did not file its complaint until July of 2011, more than five years after "the removal, resignation, or death of the trustee[.]" *Id.*

Plaintiff makes various creative arguments as to why the trial court should not have applied the statute of limitations in North Carolina

General Statute § 36C-10-1005, including that the continuing wrong doctrine applies and that certain claims such as breach of fiduciary duty and constructive fraud are subject to their own separate statutes of limitations.

> Our Supreme Court has recognized the continuing wrong doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises. When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases. Our Supreme Court also stated that a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation. In order to determine whether a continuing violation exists, we examine the particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged, as set out in *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971).

Babb v. Graham, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008) (citations, quotation marks, and brackets omitted).

Plaintiff does not cite, nor can we find a case, which has applied the continuing wrong doctrine to permit a claim against a trustee for "breach of trust" more than five years after his/her resignation or any other event as provided by North Carolina General Statute § 36-10-1005. *See* N.C. Gen. Stat. § 36-10-1005. In fact, the plain language of North Carolina General Statute § 36-10-1005 indicates that the continuing wrong doctrine does not apply; as here, defendant Peck's acts as trustee ended upon his resignation, and at that point the statute of limitations in North Carolina General Statute § 36C-10-1005 began to run. *See id.* From the time of his resignation, plaintiff had five years to bring any claims for breach of trust. *See id.* Whatever defendant Peck did after the date that his tenure as trustee ended, wrongful or not, was not an act by him as trustee, and thus it was not a continuation of any conduct he may have begun as trustee. In other words, defendant Peck no longer had legal authority to act under the trust and could not engage in a continuing course of wrongful conduct as trustee, although he could engage in wrongful conduct of a different sort.

Furthermore, while a trustee could obviously engage in breach of fiduciary duty and constructive fraud, the factual allegations in plaintiff's complaint are based upon defendant's breach of his duties as trustee and for this reason all plaintiff's claims, as pled here, no matter their heading, are causes of action for breach of trust. Accordingly, the trial

court did not err in concluding that plaintiff was barred from bringing an action against defendant Peck in his capacity as trustee for his actions prior to his resignation as trustee.

C. Claims against Defendant Peck After His Tenure As Trustee

A slightly different question arises as to defendant Peck's actions of filing various documents which encumbered various trust assets after his resignation in June of 2006, since if these acts could be considered as claims "against a trustee for breach of trust[,]" some of the acts would fall within the statute of limitations. *Id.* The problem is that these actions are not claims "against a trustee for breach of trust[,]" since defendant Peck was not a trustee after June 2006 when these acts were allegedly committed, and thus any actions he took, no matter how wrongful, were not breaches of his duties as trustee. *Id.* Instead, these are claims against a former trustee. As noted above, plaintiff may have claims for various torts against defendant Peck as an individual based upon the actions he took after his resignation as trustee, but based upon the complaint here, those claims have not been properly pled against defendant Peck as an individual rather than as a trustee. Accordingly, the trial court did not err in granting defendant Peck's motion to dismiss.[2]

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HUNTER, Robert C. and ERVIN concur.

2. Plaintiff also contends that the trial court erred in granting the motion to dismiss as matters outside the pleadings were considered. However, we note that the trial court was determining both a motion to dismiss and a motion for partial summary judgment at the same time, so consideration of matters outside the pleadings was proper. But in any event, the determination regarding the statute of limitations can be made from the pleadings alone, and plaintiff does not direct our attention to anything outside the pleadings that the trial court may have considered that would have raised any question as to the material facts on the issues we have addressed, so the trial court did not err in granting defendant Peck's motion to dismiss.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER L. BARNES

No. COA13-76

Filed 17 September 2013

1. Prisons and Prisoners—possession of marijuana in facility—knowing possession sufficient

The trial court did not err by refusing to dismiss a charge of possession of contraband in a local confinement facility pursuant to N.C.G.S. § 90-95(e)(9), a felony, where defendant was arrested for driving while impaired and a misdemeanor amount of marijuana was discovered at the county jail while defendant was awaiting a breath test. The evidence presented at trial clearly supported a finding that defendant knowingly possessed a controlled substance and that this knowing possession occurred in a local confinement facility.

2. Prisons and Prisoners—possession of marijuana—involuntary presence in facility sufficient

The trial court correctly denied defendant's motion to dismiss a charge of possession of a controlled substance in a local confinement facility where a package of marijuana fell out of defendant's pants while he was waiting for a DWI breath test. A defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility.

3. Drugs—possession of controlled substance in jail—simple possession—lesser offense

Defendant should not have been separately convicted for both possession of a controlled substance in a confinement facility and simple possession of the same controlled substance.

McGEE, Judge, dissenting.

Appeal by defendant from judgments entered 17 February 2012 by Judge W. Allen Cobb, Jr., in Wayne County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Associate Attorney General Erica Garner, for the State.

Anna S. Lucas for Defendant.

ERVIN, Judge.

Defendant Christopher L. Barnes appeals from a judgment sentencing him to a term of six to eight months imprisonment based upon his convictions for simple possession of a controlled substance and possession of a controlled substance in a penal institution or local confinement facility. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the possession of a controlled substance in a local confinement facility on the grounds that the evidence did not support his conviction for committing that offense or, alternatively, that the trial court erred by entering judgment against him based upon both his convictions for possession of a controlled substance in a confinement facility and simple possession of the same controlled substance. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that, while the trial court correctly denied Defendant's motion to dismiss the possession of a controlled substance in a local confinement facility charge, it erred by entering judgment based on Defendant's convictions for both possession of a controlled substance in a local confinement facility and simple possession of marijuana, so that Defendant's conviction for simple possession of a controlled substance must be vacated and this case must be remanded to the Wayne County Superior Court for resentencing.

I. Factual Background

A. Substantive Facts

At approximately 2:00 a.m. on 21 January 2011, Officer Melvin Smith of the Goldsboro Police Department observed Defendant drive his vehicle onto Ash Street in Goldsboro without operating his headlights. As a result, Officer Smith stopped Defendant's vehicle. Upon approaching Defendant, Officer Smith noticed a strong smell of alcohol about his person. After observing that Defendant's speech was slurred and after hearing Defendant state that he was "not that drunk," Officer Smith requested that Defendant exit his vehicle and perform certain field sobriety tests. As a result of Defendant's performance on these field sobriety tests, the smell of alcohol about Defendant's person, and Defendant's red and glassy eyes, Officer Smith determined that Defendant was "appreciably impaired" as the result of his consumption of alcohol and arrested him for driving while subject to an impairing substance.

After being placed under arrest, Defendant was handcuffed with his hands behind his back, searched for weapons, and transported to the Wayne County jail. Upon his arrival at the jail, Defendant requested to use the restroom. As part of his attempt to honor Defendant's request, Officer Smith changed the positioning of Defendant's handcuffs so as to place Defendant's hands in front of his body. In addition, Officer Smith placed himself in a position to observe Defendant's effort to use the restroom without seeing his private parts.

While in the restroom, Defendant urinated on himself, accused Officer Smith of being responsible for this mishap, and refused to cooperate with Officer Smith any further. As a result, Officer Smith was required to enlist help from other officers in returning Defendant to the location at which breath samples were taken from individuals who had been placed under arrest for driving while impaired. After Defendant was seated in a chair at that location, a bag containing a substance ultimately determined to be marijuana fell from his pants leg.

B. Procedural Facts

On 3 October 2011, the Wayne County grand jury returned bills of indictment charging Defendant with possession of methylenedioxyamphetamine, possession of the same substance in a penal institution or local confinement facility,[1] possession of marijuana with the intent to sell or deliver, and possession of marijuana in a penal institution or local confinement facility. The charges against Defendant came on for trial before the trial court and a jury at the 13 February 2012 criminal session of the Wayne County Superior Court. At the conclusion of the State's evidence, the trial court dismissed the possession of marijuana with the intent to sell or deliver charge while allowing the jury to consider the issue of Defendant's guilt of the lesser included offense of simple possession of marijuana. On 16 February 2012, the jury returned verdicts convicting Defendant of simple possession of marijuana and possession of marijuana in a penal institution or local confinement facility. On 17 February 2012, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a term of six to eight months

1. All of the charges relating to Defendant's possession of methylenedioxamphetamine were voluntarily dismissed by the State based upon a determination that methylenedioxyamphetamine had not been statutorily defined as a controlled substance as of the date upon which Defendant was arrested for driving while impaired and brought to the Wayne County jail.

imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.[2]

II. Legal Analysis

A. Possession of a Controlled Substance in a Local Confinement Facility Charge

In his initial challenge to the trial court's judgment, Defendant argues that the trial court erred by denying his motion to dismiss the possession of a controlled substance in a local confinement facility charge. More specifically, Defendant contends that the record evidence was not sufficient to support the jury's decision to convict him of committing this offense given that the record did not contain evidence tending to show that he intended to possess a controlled substance in a local confinement facility. Defendant's contention lacks merit.

1. Standard of Review

In considering whether to grant a motion to dismiss for insufficiency of the evidence, the trial court must determine " 'whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.' " *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* In conducting the required analysis, the "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Id.* at 92, 728 S.E.2d at 347 (quoting *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009)) (internal quotation marks omitted). "All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* at 93, 728 S.E.2d at 347. We review the trial court's denial of a motion to dismiss for insufficiency of the evidence using a *de novo* standard of review. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

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2. In addition to the offenses discussed in the text, Defendant was also charged with and convicted of driving while impaired. We have not set forth the procedural facts relating to this charge in our opinion given that Defendant has not advanced any argument concerning this charge in his brief before this Court.

2. Defendant's Mental State

[1] In his brief, Defendant argues that N.C. Gen. Stat. § 90-95(e)(9), which prescribes the punishment for possession of a controlled substance in a local confinement facility, should not be construed as a strict liability statute and contends that, since the record is devoid of any evidence tending to show that Defendant specifically intended to bring a controlled substance into the jail, his motion to dismiss this charge should have been allowed. Although portions of Defendant's argument reflect a correct understanding of the applicable law, we are unable to agree with his ultimate conclusion that the trial court should have granted his dismissal motion.

The term *mens rea* refers to "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Black's Law Dictionary* 999 (7th ed. 1999). Although culpable or criminal negligence may suffice to support a defendant's conviction for committing a criminal offense in some instances, *see State v. Oakman*, 191 N.C. App. 796, 800, 663 S.E.2d 453, 457 (noting that "culpable negligence can satisfy the intent requirement for certain crimes"), *disc. review denied*, 362 N.C. 686, 671 S.E.2d 330 (2008), a conviction for committing many, if not most, crimes requires proof that the defendant acted with either general or specific intent. *But see*, *e.g.*, *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000) (stating that "[a]rson, as a 'malice' type crime, is neither a specific nor a general intent offense but requires '*willful* and malicious' conduct") (quoting *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982)). For example, "[f]irst degree murder, which has as an essential element the intention to kill, has been called a specific intent crime . . . [while] [s]econd degree murder, which does not have this element, has been called a general intent crime." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (quoting *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995)) (quotation marks omitted). The difference between these two categories of criminal offenses is that "[s]pecific-intent crimes are crimes which have as an essential element a specific intent that a result be reached," while "[g]eneral-intent crimes are crimes which only require the doing of some act." *Oakman*, 191 N.C. App. at 800, 663 S.E.2d at 457 (quoting *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997)) (citations and internal quotations omitted). A court determines whether a particular criminal offense constitutes a general or specific intent crime by examining the elements which must be proved in order to support a conviction for committing that offense. *See*, *e.g.*, *State v. Mize*, 315 N.C. 285, 293,

337 S.E.2d 562, 567 (1985) (stating that "[t]he *mens rea* or the criminal intent required for first degree murder is proven through the elements of premeditation and deliberation").

N.C. Gen. Stat. § 90-95(e)(9) provides that "[a]ny person who violates [N.C. Gen. Stat. §] 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." A careful examination of the relevant statutory language provides no indication that the General Assembly intended to create a specific intent crime by enacting N.C. Gen. Stat. § 90-95(a)(3), which simply punishes the possession of a controlled substance. "[A]n accused has possession of marijuana within the meaning of the Controlled Substances Act, G.S. Chapter 90, Art. V, when he has both the power and the intent to control its disposition or use . . . ." *State v. Baxter*, 285 N.C. 735, 737-38, 208 S.E.2d 696, 698 (1974). Although N.C. Gen. Stat. §§ 90-95(a)(1) and (a)(2) punish, among other things, the possession of either a controlled substance or a counterfeit controlled substance with the "intent to" manufacture, sell or deliver, N.C. Gen. Stat. § 90-95(a)(3) contains no reference to the necessity for proof that the defendant acted with any specific intent. Thus, guilt of possession of a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(3) simply requires proof of general intent coupled with the requisite knowledge. *See State v. Elliott*, 232 N.C. 377, 378-79, 61 S.E.2d 93, 95 (1950) (stating that lack of knowledge is a defense to a possession of intoxicating liquor charge). As a result, since a conviction for committing the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) involves a violation of N.C. Gen. Stat. § 90-95(a)(3) committed in a penal institution or local confinement facility, we agree with Defendant that the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) is not a strict liability statute.[3]

On other hand, however, we cannot agree that the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) is, as Defendant suggests in his brief, a specific intent crime.[4] Although N.C. Gen. Stat. § 90-95(e)(9) does provide for the punishment of violations of N.C. Gen. Stat. § 90-95(a)(3) committed on the premises of a penal institution or local confinement facility, nothing in the language of either N.C. Gen. Stat. § 90-95(a)(3) or N.C. Gen. Stat. § 90-95(e)(9) indicates that the defendant has to specifically intend to possess a controlled substance in such a

3. We do not understand the State to disagree with Defendant's contention that the crime made punishable by N.C. Gen. Stat. § 90-95(e)(9) is not a strict liability offense.

4. Defense counsel at trial candidly admitted to the court that he did not believe that the offense made punishable in N.C. Gen. Stat. § 90-95(e)(9) was a specific intent crime.

location as a prerequisite for a finding of guilt. Instead, N.C. Gen. Stat. § 90-95(e)(9) simply provides for an enhanced punishment for the knowing possession of a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(3) committed under a specific set of circumstances. *See* N.C. Gen. Stat. § 90-95(e) (providing that "[t]he prescribed punishment and degree of any offense under this Article shall be subject to the following conditions"); *see also State v. Alston*, 111 N.C. App. 416, 421, 432 S.E.2d 385, 388 (1993) (holding that the "sale [of a controlled substance] on school property constituted an aggravated sale pursuant to [N.C. Gen. Stat.] § 90-95(e)(8)"). The only effect of a determination that a defendant committed the offense punishable pursuant to N.C. Gen. Stat. § 90-95(e)(9) is to sanction conduct that would otherwise violate N.C. Gen. Stat. § 90-95(a)(3) more severely than would be the case pursuant to N.C. Gen. Stat. § 90-95(d). As a result, we are simply unable to agree with Defendant's contention that a conviction of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility.

The evidence presented at trial clearly supports a finding that Defendant knowingly possessed a controlled substance and that this knowing possession occurred in a local confinement facility. For that reason, the record contains ample support for Defendant's conviction for committing the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9). As a result, although Defendant's contention that the criminal offense specified in N.C. Gen. Stat. § 90-95(e)(9) is not a strict liability offense is certainly correct, the record does contain sufficient evidence to support a determination that Defendant committed the general intent plus knowledge crime made punishable by that statutory provision. Thus, the principal contention advanced in Defendant's brief does not justify an award of appellate relief.

3. Voluntariness

[2] In addition to arguing that the crime punishable by N.C. Gen. Stat. § 90-95(e)(9) is not a strict liability offense, Defendant argues that he did not "voluntarily enter the Wayne County Detention Center."[5] In essence,

5. Although Defendant never specifically mentions the term *actus reus* and describes his argument as resting upon the State's failure to show that he possessed the "intent" required for a finding of guilt, we believe that it is fair to interpret Defendant's argument as an assertion that he lacked the intent necessary to support a finding of guilt and that he did not act intentionally, *i.e.*, that he should be acquitted because he did not enter the Wayne County jail while possessing marijuana voluntarily.

Defendant argues that, even if he had the requisite mental state needed to support a conviction for committing the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9), his dismissal motion still should have been granted because he did not voluntarily bring controlled substances into a local confinement facility. According to the argument advanced by Defendant and accepted by our dissenting colleague, the offense of possession of less than a half ounce of marijuana, which would have otherwise been a Class 3 misdemeanor, *see* N.C. Gen. Stat. § 90-95(d)(4), cannot be transformed into a felony by the conduct of the officers who arrested him and brought him into a local confinement facility against his wishes. As a result, Defendant essentially contends, and our dissenting colleague agrees, that the record does not reflect the occurrence of the voluntary act necessary to support his conviction for committing a criminal offense.

As a general proposition, the term "*actus reus*" refers to "[t]he wrongful deed that comprises the physical components of a crime." *Black's Law Dictionary* 37 (7th ed. 1999). According to the *actus reus* requirement, guilt of a criminal offense ordinarily requires proof that the defendant voluntarily committed a physical act. *See State v. Fields*, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989) (explaining that "[t]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability") (citations and quotation marks omitted). As a result, regardless of "[w]hether the offense charged be a specific-intent or a general-intent crime, in order to convict the accused the State must prove that he voluntarily did the forbidden act." *State v. Caddell*, 287 N.C. 266, 296, 215 S.E.2d 348, 367 (1975). After considering the specific language of the statute under which Defendant was convicted and the decisions reached in the majority of jurisdictions which have considered this issue, however, we are convinced, contrary to Defendant's contention, that a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question.

The first problem with this aspect of Defendant's challenge to the trial court's decision to deny his dismissal motion is that it has no support in the relevant statutory language. The offense punishable by N.C. Gen. Stat. § 90-95(e)(9) revolves around the possession of a controlled substance in a penal institution or local confinement facility rather than around the intentional bringing or introduction of a controlled substance into such a facility. A reviewing court should, of course, take the statutory language defining the offense for which a defendant was convicted

and the purpose which the General Assembly sought to accomplish by enacting that language seriously in determining the showing necessary to support a finding of guilt. As we have already noted, nothing in the relevant statutory language requires proof that Defendant voluntarily introduced a controlled substance into the penal institution or confinement facility. In addition, given that the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) was obviously intended to assist in controlling the amount of controlled substances brought into and consumed in prisons or jails, we have difficulty seeing how the purpose underlying N.C. Gen. Stat. § 90-95(e)(9) is served by treating defendants who simply possess controlled substances at the time of their arrest and have those substances on their persons when taken into a jail or prison differently from defendants who consciously intend to bring controlled substances into such facilities. As a result, the position espoused by the Defendant is unsupported by the language of and contrary to the purpose underlying N.C. Gen. Stat. § 90-95(e)(9). *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (stating that "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent").

In addition, Defendant's position is inconsistent with the result reached in the majority of decisions from other jurisdictions that have addressed the issue of whether a defendant can be convicted of possessing a controlled substance in a confinement facility after having been involuntarily brought into the facility following an arrest.[6] *See State v. Canas*, 597 N.W.2d 488, 496 (Iowa 1999) (upholding the defendant's conviction because "the defendant in [that case] had the option of disclosing the presence of the drugs concealed in his person before he entered the jail and became guilty of the additional offense of introducing controlled substances into a detention facility"), *overruled on other grounds in State v. Turner*, 630 N.W.2d 601, 606, n.2 (Iowa 2001); *Brown v. State*, 89 S.W.3d 630, 632-33 (Tex. Crim. App. 2002) (*en banc*) (upholding the defendant's conviction on the grounds that the "voluntary act" requirement had no relation to the defendant's mental state and that the necessary "voluntary act" had occurred as long as the defendant's physical movements were not involuntary); *State v. Winsor*, 110 S.W.3d 882, 886 (Mo. Ct. App. 2003) (upholding the defendant's conviction on the grounds that the existence of the required "voluntary act" hinged upon the voluntariness of the defendant's possession of the controlled

6. In addition to the six opinions discussed in the text, Tennessee reached a similar conclusion in an unpublished decision. *State v. Carr*, 2008 Tenn. Crim. App. LEXIS 753 (Tenn. Crim. App. 2008).

substance rather than the voluntariness of his presence in the jail); *State v. Cargile*, 123 Ohio St. 3d 343, 345, 916 N.E.2d 775, 777 (2009) (upholding the defendant's conviction on the grounds that, even though the defendant "did not have any choice [about] whether to go to jail following his arrest, the fact that his entry into the jail was not of his volition [did] not make his conveyance of drugs into the detention facility an involuntary act" given that "he did not have to take the drugs with him");[7] *State v. Alvarado*, 219 Ariz. 540, 545, 200 P.3d 1037, 1042 (2008) (upholding the defendant's conviction on the grounds that the fact that the arresting officers had "informed defendant of the consequences of bringing contraband into the jail and gave him an opportunity to surrender any contraband beforehand highlight[ed] that defendant was performing a bodily movement 'consciously and as a result of effort and determination' when he carried the contraband into the jail" and that any suggestion that the defendant had to have a particular mindset at the time that he entered the jail confused the *mens rea* issue with the *actus reus* issue); *People v. Low*, 49 Cal. 4th 372, 385, 232 P.3d 635, 644, 110 Cal. Rptr. 3d 640, 651 (2010) (upholding the defendant's conviction on the grounds that "the officer gave defendant ample opportunity to avoid violating" the statute and that "nothing support[ed] defendant's suggestion that he was forced to bring drugs into jail, that commission of the act was engineered by the police, or that he had no choice but to violate" the statute); *but see State v. Tippetts*, 180 Ore. App. 350, 354, 43 P.3d 455, 457 (2002) (overturning the defendant's conviction on the grounds that he had not committed the required "voluntary act," which the court defined as an act "performed or initiated by the defendant");[8] *State v. Cole*, 142 N.M. 325, 328, 164 P.3d 1024, 1027 (2007) (overturning the defendant's conviction on the grounds that, rather than bringing

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7. We note that the Ohio Court of Appeals in *State v. Sowry*, 155 Ohio App. 3d 742, 803 N.E.2d 867 (2004), came to a contrary conclusion. However, it seems clear to us that that decision was implicitly overruled in *Cargile*.

8. Although our dissenting colleague argues that we have attempted to distinguish the language of the Oregon statute at issue in *Tippetts* from the language of N.C. Gen. Stat. § 90-95(e)(9), we readily acknowledge that the outcomes reached in the decisions from other jurisdictions discussed in the text of this opinion, including *Tippetts*, do not hinge on the literal language of the statutory provisions at issue in those cases and that, instead, those decisions focus directly on the issue of whether a finding that a defendant unlawfully possessed controlled substances in a prison or jail can be sustained when the defendant is brought into the confinement facility in the aftermath of a custodial arrest by investigating officers. We do, however, believe that the wording of the relevant statutory provision is important and have taken the language of N.C. Gen. Stat. §§ 90-95(a)(3) and 90-95(e)(9) into account in reaching the decision that Defendant's conviction for possession of a controlled substance in a local confinement facility should not be overturned.

contraband into the jail himself, "law enforcement brought him and the contraband in his possession into the facility");[9] *State v. Eaton*, 168 Wash. 2d 476, 485, 229 P.3d 704, 708-09 (2010) (overturning the defendant's conviction on the grounds that a finding of guilt requires that the defendant make "a choice [] free from the kind of authority the State exercises when it makes an arrest"). The majority of decisions which have addressed the issue before us in this case have essentially held that, while guilt of an offense stemming from possession of a controlled substance in a confinement facility does require the defendant to commit a voluntary act, the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance.[10] We find this logic convincing. As a result, we conclude that the voluntary act necessary for guilt of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) occurs when the defendant knowingly possesses a controlled substance and that the recognition of a requirement that a defendant make a decision to intentionally bring controlled substances into a confinement facility would be, in reality, the adoption of a specific intent or *mens rea* requirement rather than the effectuation of the *actus reus* requirement.[11]

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9. Interestingly, the New Mexico Court of Appeals has held in a number of unpublished decisions that, when a prisoner who has been granted work release brings unlawful controlled substances back to the facility after work, he can be convicted of bringing contraband into the prison facility despite having no alternative except to enter the unit in which he is confined because the defendant "was in prison where he knew the contraband was prohibited" and elected to return to the facility with forbidden substances anyway. *See State v. Rueda*, 2009 N.M. App. Unpub. LEXIS 360, at *5 (2009); *State v. Acosta*, 2009 N.M. App. Unpub. LEXIS 244, at *2-3, *cert. denied*, N.M. LEXIS 956 (July 14, 2009).

10. We recognize that, while certain voluntarily created states of impairment such as intoxication do not constitute a defense to a general intent crime, *see, e.g.*, *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992) (recognizing that "voluntary intoxication may only be considered as a defense to specific intent crimes"), unconsciousness and other factors, such as duress, may shield a defendant from any culpability. *E.g.*, *State v. Jerrett*, 309 N.C. 239, 264-65, 307 S.E.2d 339, 353 (1983) (quoting *State v. Mercer*, 275 N.C. 108, 116, 165 S.E.2d 328, 334 (1969), *overruled on other grounds in Caddell*, 287 N.C. at 290, 215 S.E.2d at 363) (recognizing that "[t]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability") (internal quotation marks omitted); *State v. Seahorn*, 166 N.C. 373, 377, 81 S.E. 687, 688 (1914) (noting, without making any explicit mention of the *actus reus* requirement, that "the law presumed that the wife acted under the compulsion of her husband, and the burden was upon the State to rebut this presumption). However, Defendant has not advanced any sort of unconsciousness or duress-related defense in this case.

11. Although certain of the opinions from other jurisdictions that uphold convictions resting on facts similar to those present here note that the defendant was warned that taking a controlled substance into the jail would constitute a separate offense, we do not believe that the absence of such a warning in this case is of any consequence given that

The ultimate logic underlying the position taken in the decisions from other courts that have refrained from adopting the majority view and the position espoused by Defendant and our dissenting colleague appears to rest upon a sense that it is simply unfair to punish a defendant who chooses to possess a controlled substance and is then arrested and taken into custody without voluntarily surrendering the controlled substances in his possession as severely as a defendant who deliberately chooses to introduce controlled substances into a penal institution or confinement facility. Although we understand the equitable appeal of such logic, we also believe that a defendant who is arrested with controlled substances in his possession has options other than simply taking the controlled substances with him into the confinement facility. For example, the defendant always has an opportunity to disclose the existence of these controlled substances to the arresting officer before he ever reaches the jail. As the Ohio Supreme Court has noted, while the defendant "was made to go to the detention facility, . . . he did not have to take the drugs with him." *Cargile*, 123 Ohio St. 3d at 345, 916 N.E.2d at 777. Similarly, we cannot agree with our colleagues on the Oregon Court of Appeals that "no reasonable juror could find that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it," *Tippetts*, 180 Ore. App. at 358-59, 354, 43 P.3d 455, 460, given that individuals may be placed under arrest for committing a variety of offenses which occur on the spur of the moment and are, for that reason, liable to be taken to a confinement facility while in the possession of controlled substances if their conduct warrants such action. Thus, we simply do not find the logic that appears to underlie the decisions requiring a finding that the defendant voluntarily decide to introduce controlled substances into a penal institution or local confinement facility as a precondition for a determination that the defendant committed an offense like that made punishable pursuant to N.C. Gen. Stat. § 90-95(e)(9) persuasive.[12]

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ignorance of the law is no excuse for a failure to comply with its terms, *e.g. State ex rel. Atkins v. Fortner*, 236 N.C. 264, 271, 72 S.E.2d 594, 598 (1952) (recognizing the "legal principle that ignorance of the law excuses no man"), and given that legislatures and courts do not, in most instances, make the criminality of specific instances of conduct dependent on the provision of information by law enforcement officers.

12. This Court is not oblivious to the fact that our decision may have the effect of requiring a defendant who is arrested while in possession of a controlled substance to admit to the commission of a criminal offense in order to avoid liability for committing a more serious one. However, aside from the fact that Defendant did not advance an argument in reliance upon Fifth Amendment principles in his brief, *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"), and the fact that the

As a result, for the reasons set forth above, we do not believe that the State is required to show that a defendant made a conscious decision to bring a controlled substance into a penal institution or local confinement facility in order to establish the defendant's guilt of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9). For that reason, the fact that Defendant was involuntarily brought to the Wayne County Jail at a time when he possessed marijuana does not preclude his conviction for possession of a controlled substance in a local confinement facility. Thus, for all of the reasons set forth above, we conclude that the trial court correctly denied Defendant's motion to dismiss the possession of a controlled substance in a local confinement facility charge.

B. Simple Possession

[3] Secondly, Defendant contends that, should this Court uphold his conviction for possession of a controlled substance in a local confinement facility, the trial court's judgment reflecting his conviction for simple possession of that same substance should be vacated. More specifically, Defendant argues that the trial court erred by entering judgment against him for both possession of a controlled substance in a confinement facility and simple possession of the same controlled substance because the latter is a lesser included offense of the former. Defendant's alternative contention has merit.

As we have previously noted, a defendant who has been found guilty of violating N.C. Gen. Stat. § 90-95(e)(9) has necessarily violated N.C. Gen. Stat. § 90-95(a)(3) as well. For that reason, the offense made punishable by N.C. Gen. Stat. § 90-95(a)(3) is a lesser included offense of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9). "It is well settled in North Carolina that when a defendant is indicted for a

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Supreme Court did not comment upon, much less question, the validity of this principle in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, n. 1, 657 S.E.2d 361, 363, n.1 (2008), we agree with the Supreme Court of California that effectively forcing such a choice upon the defendant does not violate the state and federal constitutional right against compulsory self-incrimination. *See Low*, 49 Cal. 4th at 391, 232 P.3d at 648-49, 110 Cal Rptr. 3d at 656 (rejecting a similar Fifth Amendment argument on that grounds that the "defendant in the present case, like his counterpart in the hypothetical case, was prosecuted and convicted . . . not because he gave or refused 'testimony' under official compulsion, but because he engaged in the nontestimonial criminal act of knowingly entering the jail in possession of a controlled substance;" that individuals like defendant [] have placed themselves in this unfortunate position by secreting illegal drugs on their persons before being arrested and jailed for committing other crimes; and that "[t]he Fifth Amendment privilege against self-incrimination does not remove every difficult choice of the guilty suspect's own making") (quoting *Brogan v. United States*, 522 U.S. 398, 404, 118 S. Ct. 805, 809-10, 139 L. Ed. 2d 830, 837 (1998)).

criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense." *State v. Snead*, 295 N.C. 615, 622, 247 S.E.2d 893, 897 (1978) (emphasis added). Moreover, "[i]n order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space." *State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470 (2008). As a result, as the State concedes, Defendant should not have been separately convicted for both possession of a controlled substance in a confinement facility and simple possession of the same controlled substance, so that judgment should have been arrested in connection with his conviction for simple possession of marijuana.[13]

III. Conclusion

Thus, for the reasons set forth above, we conclude that, while the trial court did not err by denying Defendant's motion to dismiss the possession of a controlled substance in a local confinement facility charge, it erred by entering judgment against Defendant based upon his convictions for both possession of a controlled substance in a local confinement facility and simple possession of the same controlled substance. As a result, we find no error in Defendant's conviction for possession of a controlled substance in a confinement facility, vacate Defendant's conviction for simple possession of a controlled substance, and remand this case to the Wayne County Superior Court for resentencing.

NO ERROR IN PART; VACATED AND REMANDED FOR RESENTENCING IN PART.

Judge STEELMAN concurs.

McGEE, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the trial court did not err in denying Defendant's motion to dismiss the charge of possession of marijuana in a confinement facility.

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13. Assuming, without deciding, that the State is correct in contending that Defendant failed to properly preserve this issue for appellate review, we elect, as we did in *Moncree*, to exercise our authority pursuant to N.C.R. App. P. 2 to reach the merits of Defendant's claim.

I. Relevant Facts

I submit that the relevant facts to the offense of possession of marijuana in a confinement facility are as follows:

Defendant was arrested for driving while impaired, handcuffed with his hands behind his back, and transported to the Wayne County Detention Center (confinement facility). At the confinement facility, Defendant asked to use the restroom. The officer moved the handcuffs from behind Defendant's back to the front of Defendant. Defendant became "combative[,]" and assistance from a jailer was required to move Defendant into the area where breath samples were taken. In "placing [Defendant] in the seat[,] a bag fell out of his pants leg." Testing revealed the bag contained approximately 4.05 grams, or one seventh of one ounce of marijuana.

II. *Actus Reus* Requirement

It is well-established that, to hold a defendant criminally liable for an offense, the State must show an actus reus. *See* 4 William Blackstone, Commentaries *19, *20-21.

> An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act.

Id. The common law is clearly in force in this State. *See* N.C. Gen. Stat. § 4-1 (2011).

> All such parts of the common law as were heretofore in force and use within this State . . . and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

Id.

Our Supreme Court has long recognized the rule that criminal liability requires a voluntary act. *See State v. Boyd*, 343 N.C. 699, 473 S.E.2d 327 (1996); *State v. Jerrett*, 309 N.C. 239, 264-65, 307 S.E.2d 339, 353 (1983); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969), *overruled in part on other grounds by State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975).

Boyd, *Jerrett*, and *Mercer* concerned the defense of unconsciousness. Unconsciousness is "often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness." Wayne R. LaFave, Substantive Criminal Law § 9.4, at 33 (2nd ed.). "Although this is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime, the better rationale is that the individual has not engaged in a voluntary act." *Id.*

As the majority notes, unconsciousness is not precisely the issue in the present case. The issue is more precisely whether a defendant who is brought to a confinement facility in handcuffs voluntarily possesses marijuana in the facility. Both the defense of unconsciousness and the present issue implicate the requirement to show a defendant's *actus reus*.

Our Supreme Court has also long recognized that a conscious defendant, who is either forced to or ordered to act, does not act voluntarily. In *State v. Seahorn*, 166 N.C. 373, 81 S.E. 687 (1914), the defendants, husband and wife, were convicted of selling intoxicating liquor. The trial court instructed that, if the jury found that the wife acted "under the constraint of her husband, and that he was exercising such power over her as to cause her to make sales of liquor, in his presence, so that it was not her own voluntary act, . . . you should acquit the wife and convict the husband." *Seahorn*, 166 N.C. at 376, 81 S.E. at 688. Our Supreme Court agreed with the premise that a defendant could be forced or ordered to act involuntarily. Ultimately, the Court concluded that the wife "did not claim to have acted under the constraint of her husband." *Seahorn*, 166 N.C. at 377, 81 S.E. at 688.

Chief Justice Clark observed that the "presumption of compulsion of the husband as to crimes committed by the wife in the presence of her husband . . . should be set aside in the same mode [as permitting a husband to use force towards his wife], since we have 'advanced from the barbarism' upon which it was based." *Seahorn*, 166 N.C. at 379, 81 S.E. at 689 (Clark, C.J., concurring) (quoting *State v. Oliver*, 70 N.C. 60, 61 (1874)). The relative infrequency of modern criminal cases analyzing the voluntariness of an act does not diminish the requirement to show an *actus reus*.

The requirement to show an *actus reus* is a well-settled principle. *See Boyd*, *Jerrett*, and *Mercer*, *supra*. Thus, the *actus reus* showing that is required to impose criminal liability and the fact that a defendant can

be made to act involuntarily where ordered or otherwise forced are well-settled issues of law in this State. "[W]here a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). The present issue must therefore be analyzed while bearing in mind these settled principles.

"[C]riminal liability requires that the activity in question be voluntary." Wayne R. LaFave, Substantive Criminal Law § 6.1, at 425 (2nd ed.). "The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred." *Id.* at 425-26. "In the overwhelming majority of criminal cases, the voluntary nature of defendant's acts is not at issue." *Id.* at 426, n.24. Where an officer transports a defendant into a confinement facility, the voluntary nature of the defendant's acts is at issue.

Defendant was initially handcuffed with his hands behind his back, and an officer transported Defendant to the confinement facility. A bag containing marijuana fell out of Defendant's pants while he was inside the facility. Defendant was convicted of possessing marijuana in a confinement facility. "Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 90-95(e)(9) (2011). N.C. Gen. Stat. § 90-95(a)(3) prohibits the possession of controlled substances.

The amount of marijuana found was approximately one seventh of one ounce. Possession of one seventh of one ounce of marijuana is a Class 3 misdemeanor. N.C.G.S. § 90-95(d)(4); N.C. Gen. Stat. § 15A-1340.23 (2011). The maximum sentence for a Class 3 misdemeanor for a Level II offender like Defendant is fifteen days of community or intermediate punishment. N.C.G.S. § 15A-1340.23. In contrast, possession of one seventh of one ounce of marijuana in a confinement facility is a Class H felony, for which Defendant was sentenced to six to eight months in prison. N.C.G.S. § 90-95(e)(9); N.C.G.S. § 15A-1340.17.

No case in this State analyzes the precise issue of whether a defendant who is brought to a confinement facility in handcuffs voluntarily possesses marijuana in the facility. Cases from other jurisdictions, including Oregon, Washington, and New Mexico, yield persuasive reasoning on similar facts.

In *State v. Tippetts*, 43 P.3d 455, 456 (Or. Ct. App. 2002), the defendant was charged with introducing "contraband into a correctional facility" in violation of Or. Rev. Stat. § 162.185. The majority argues that the Oregon statute is distinguishable from the statute in the present case.

However, violation of the Oregon statute "Supplying contraband" may be proven by showing that the defendant "knowingly introduces any contraband into a correctional facility" or, being confined in a correctional facility, "knowingly makes, obtains or possesses any contraband." Or. Rev. Stat. § 162.185. The defendant in *Tippetts* was found with marijuana in his pants pocket during a search inside the jail. Possession is thus the crux of the charge. For purposes of this analysis, the Oregon statute is indistinguishable from N.C.G.S. § 90-95(e)(9).

The State argued the "earlier voluntary act of possession" was sufficient to hold the defendant "criminally liable for the later involuntary act of introducing the marijuana into the jail." *Tippetts*, 43 P.3d at 459. The Court of Appeals of Oregon disagreed. The "[d]efendant, however, did not initiate the introduction of the contraband into the jail or cause it to be introduced in the jail. Rather, the contraband was introduced into the jail only because the police took [the] defendant (and the contraband) there against his will." *Tippetts*, 43 P.3d at 457.

In *State v. Eaton*, 229 P.3d 704, 705 (Wash. 2010) (en banc), the defendant received an enhanced sentence for possessing drugs in a jail. The Supreme Court of Washington stated that as "a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. Actus reus is defined as [t]he wrongful deed that comprises the physical components of a crime[.]" *Eaton*, 229 P.3d at 706 (internal quotations marks and citations omitted).

"Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law." *Eaton*, 229 P.3d at 707. "[T]he 'reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise." *Id.* (quoting O.W. Holmes, Jr., The Common Law 40 (Mark DeWolfe Howe ed., Harvard Univ. Press, 1967) (1881)).

"Once [the defendant] was arrested, he no longer had control over his location. From the time of arrest, his movement from street to jail became involuntary: involuntary not because he did not wish to enter the jail, but because he was forcibly taken there by State authority. He no longer had the ability to choose his own course of action." *Eaton*, 229 P.3d at 708. The Supreme Court of Washington concluded the defendant did not voluntarily possess the drugs in the jail and affirmed the decision of the Court of Appeals of Washington.

In *State v. Cole*, 164 P.3d 1024 (N.M. Ct. App. 2007), the defendant was charged with bringing contraband into a jail. As in the present case, the defendant was arrested and charged with driving under the influence. *Cole*, 164 P.3d at 1025. An officer at the jail found a "small bag of marijuana" in the defendant's pocket. *Id.* The Court of Appeals of New Mexico agreed with the reasoning in *Tippetts*.

"[T]o be found guilty of bringing contraband into a jail . . . a person must enter the jail voluntarily. In this case, the undisputed facts show that [the defendant] did not bring contraband into the [jail]; law enforcement brought him and the contraband in his possession into the facility." *Cole*, 164 P.3d at 1027. "The dispositive issue is that [the defendant] cannot be held liable for bringing contraband into a jail when he did not do so voluntarily." *Id.*

Cases from other jurisdictions are not binding on this Court and, likewise, the apparent majority or minority nature of a foreign rule is not binding either. Nevertheless, cases from other jurisdictions can be persuasive, and I find the reasoning in the above cases to be convincing. Most importantly, the reasoning comports with our State's long-established principle that criminal liability requires a voluntary act. *See, e.g.*, *State v. Bush*, 164 N.C. App. 254, 265, 595 S.E.2d 715, 722 (2004) (quoting *State v. Jerrett*, 309 N.C. 239, 264-65, 307 S.E.2d 339, 353 (1983) ("[T]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of *a voluntary act without which there can be no criminal liability*.") (emphasis added)).

In the present case, Defendant was handcuffed with his hands behind his back, and an officer transported Defendant to the confinement facility. Eventually, a bag containing marijuana fell out of Defendant's pants while Defendant was inside the facility. The facts demonstrate, and the majority does not disagree that, from the time Defendant was arrested, Defendant had no control over his location. Rather, the officer controlled Defendant's location. The officer took Defendant to the confinement facility. Defendant had no ability to choose his own course of action regarding his location. To hold Defendant criminally liable for possession of marijuana inside a confinement facility under these facts violates the common law requirement to show an *actus reus*.

III. Fifth Amendment Implications

The majority notes that Defendant had the "option" "to disclose" the marijuana to the arresting officer before reaching the confinement facility. To hold that Defendant should have told the officer about his possession before being taken inside the confinement facility violates

the Fifth Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of the State of North Carolina. *See*, *e.g.*, *Tippetts*, 43 P.3d at 457 n.2. The Fifth Amendment right against compelled self-incrimination "protects an individual from being compelled to give testimony which may incriminate him or which might subject him to fines, penalties, or forfeiture." *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 166 (1997).

The "claim of privilege should be liberally construed[.] The privilege applies not only to evidence which an individual reasonably believes could be used against him in a criminal prosecution, but also encompasses evidence that would furnish a link in the chain of evidence needed to prosecute the claimant[.]" *Pickens*, 346 N.C. at 637, 488 S.E.2d at 167 (internal quotation marks and citations omitted).

To reveal possession of marijuana to an officer before entering the facility would directly implicate Defendant in criminal conduct, namely, violation of N.C.G.S. 90-95(d)(4). Defendant had no duty to reveal the marijuana to the officer before entering the confinement facility. To hold otherwise is contrary to the federal and state constitutional prohibitions against compelled self-incrimination.

The majority's response to this constitutional problem, in a footnote, cites *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005). *Viar* does not stand for the proposition that this Court cannot note constitutional problems unless the appellant so argues. *Viar* is not a criminal case and did not analyze a constitutional issue. Rather, *Viar* concerned the Rules of Appellate Procedure and has itself been abrogated to an extent by *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

Further, in reaching its conclusion that "effectively forcing such a choice upon the defendant does not violate the state and federal constitutional right against compulsory self-incrimination[,]" the majority ignores the Fifth Amendment problem by quoting language that the defendant in the present case did not give or refuse testimony, but rather engaged in a nontestimonial act. The present facts, of course, present no Fifth Amendment problem. The problem arises when the Court implicitly holds that, to avoid being punished for a felony, a defendant must confess to a misdemeanor—a dilemma the majority does not address.

IV. Conclusion

The Fifth Amendment rights of Defendant remain intact, and the State is required to show that Defendant acted voluntarily. I would hold

that the State failed to offer evidence to show that Defendant acted voluntarily in bringing marijuana to the confinement facility and possessing marijuana inside. Without showing that Defendant acted voluntarily and thereby satisfying the common law requirement to show an *actus reus*, the State cannot hold Defendant criminally liable for possession of marijuana in a local confinement facility.

STATE OF NORTH CAROLINA
v.
BILLY BOYETT

No. COA12-222-2

Filed 17 September 2013

Rape—instructions—second-degree rape and attempted incest—evidence of penetration conflicting

On reconsideration following the Supreme Court's reversal of the decision upon which the Court of Appeals relied, there was no plain error where the evidence of penetration was conflicting and the trial court did not instruct the jury on attempted second-degree rape and attempted incest.

Appeal by Defendant from judgments entered 10 October 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Originally heard in the Court of Appeals 28 August 2012, with opinion filed 4 December 2012. Reconsidered pursuant to an order of the North Carolina Supreme Court, entered 12 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Meacham, for the State.

Russell J. Hollers III, for the Defendant.

DILLON, Judge.

The facts in this case are set forth in this Court's previous opinion, *State v. Boyett*, __ N.C. App. __, 735 S.E.2d 371 (2012), filed 4 December 2012. On 12 June 2013, our Supreme Court allowed the Attorney General's petition for writ of certiorari "for the limited purpose of remanding to

the North Carolina Court of Appeals for reconsideration in light of *State v. Carter*, __ N.C. __, 739 S.E.2d 548 (2013)."

In Defendant's appeal in this case, Defendant contended the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest when the evidence on the issue of whether penetration occurred was conflicting. The Court summarized the evidence as follows:

> The victim said Defendant "tr[ied] to get his penis to go inside my vagina." When asked how far Defendant was able to get his penis inside her vagina, the victim replied, "Not very far. If he could even get it in at all." According to the victim, this was because Defendant could not maintain an erection. When asked more specifically, in a police interview, about the degree of penetration, the victim affirmed that Defendant's penis went "past the lips." Defendant denies that he penetrated her, explaining that he could not maintain an erection.

Boyett, __ N.C. App. at __, 735 S.E.2d at 374-75. In its determination that the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest on the foregoing evidence, the Court relied on *State v. Carter*, __ N.C. App. __, 718 S.E.2d 687 (2011), stating that the "evidence on penetration in *Carter* . . . is remarkably similar to the evidence presented in this case, and, resultantly, we believe *Carter* is indistinguishable." *Boyett*, __ N.C. App. at __, 735 S.E.2d at 377. The Court further stated that "[l]ike this case, the victim's testimony in *Carter* could support both the proposition that the defendant penetrated her and that he did not." *Id.* However, the Court in *Boyett* noted that "[o]ur Supreme Court has granted discretionary review, and briefs have been submitted by the parties, on the question of whether this Court erred in concluding that the trial court in *Carter* committed plain error by failing to instruct the jury on attempted first degree sexual offense[,]" and "[u]ltimately, our Supreme Court's decision in Carter will be controlling on this issue. However, presently, this Court is bound by *Carter*." *Id.* at __, n.5, 735 S.E.2d at 377, n.5.

Subsequently, our Supreme Court held in *State v. Carter*, __ N.C. __, 739 S.E.2d 548 (2013) that "the Court of Appeals misconstrued the plain error standard." *Id.* at __, 739 S.E.2d at 551. The Court explained that "[t]he necessary examination is whether there was a '*probable* impact' on the verdict, not a *possible* one." *Id.* Our Supreme Court further held, upon an examination of the substantive question in *Carter* of whether

the error constituted plain error, that, upon the evidence in that case, the "[d]efendant has not shown that 'the jury probably would have returned a different verdict' if the trial court had provided the attempt instruction" because the defendant had not shown that "the jury would have disregarded any portions of the victim's testimony stating that he put his penis 'in' her anus in favor of those instances in which she said 'on.' " *Id.* Accordingly, our Supreme Court reversed this Court's decision in *Carter*, *supra*.

Based on the Supreme Court's reversal of the decision upon which this Court relied in the case *sub judice*, the Supreme Court ordered that this Court reconvene in this case for the limited purpose of reconsidering the question of whether the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest.

In our reconsideration, we reiterate that the evidence in this case "is remarkably similar to the evidence presented" in *Carter*. *Boyett*, __ N.C. App. at __, 735 S.E.2d at 377. Therefore, we must conclude that there was no plain error in the trial court's failure to instruct the jury on attempted second-degree rape and attempted incest, where, as in *Carter*, *supra*, the evidence on the issue of whether penetration actually occurred was conflicting. Here, as in *Carter*, Defendant has "not shown that the jury would have disregarded any portions of the victim's testimony stating that [penetration occurred] in favor of those instances in which she said [penetration did not occur]." *Carter*, __ N.C. at __, 739 S.E.2d at 551. Thus, Defendant has not shown a "probable impact" on the verdict.

Accordingly, this Court's holding in *Boyett*, __ N.C. App. at __, 735 S.E.2d at 377, that "Defendant must receive a new trial on his six second-degree rape convictions and his six incest convictions[,]" is superseded. There was no plain error on this issue in this case.

NO ERROR.

Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAMES ANTHONY CARR

No. COA13-259

Filed 17 September 2013

Jury—selection—denial of challenge for cause—no abuse of discretion

There was no abuse of discretion in the trial court's denial of defendant's challenge for cause of a prospective juror in a prosecution for first-degree murder and robbery where a friend of the prospective juror had been murdered in the 1980s and she was concerned about loopholes. She subsequently stated that she would vote in accordance with the facts presented at trial and the judge's instructions.

Appeal by Defendant from judgments entered 23 March 2012 by Judge James G. Bell in Cumberland County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace Smith, for the State.

Glenn Gerding for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 21 September 2009, Defendant James Anthony Carr was indicted for the first-degree murder of Sergio Sanchez, four counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The evidence at trial tended to show the following: In the early morning hours of 12 April 2008, Defendant, his girlfriend, and three male friends were driving around Fayetteville. Defendant's girlfriend told the men she needed money to pay her rent and knew where they could find people to rob. She drove the men to a club called Sharky's and parked just down the street. Sharky's shared a building with another club called Kagney's, and, because the shared parking lot was full, many patrons of the clubs had parked on the street in front of the building that night.

Defendant was armed with a pistol-grip shotgun, and one of the other men carried a handgun. Defendant and his three friends first approached Army Sergeant Ruben Prado and two friends as they returned to their car after leaving Sharky's. Defendant and his accomplices robbed the soldiers of their cell phones, wallets, money, and keys at gunpoint. During the robbery, Prado was hit in the face, and another soldier was knocked to the ground and kicked repeatedly.

As the robbers left, Prado saw them approaching Sanchez, also a sergeant in the United States Army, who was serving as the designated driver for several friends at Kagney's. Sanchez had stepped outside the club to call his girlfriend, Erika Olivares. While speaking with Olivares, Sanchez began laughing and told Olivares that someone was asking him for his wallet. Olivares could hear a man say, "Give me your wallet," twice, the man's voice growing louder the second time. She told Sanchez to get away, but Sanchez told her not to worry. Then the phone went dead. Olivares called Sanchez repeatedly, but he did not pick up. Worried, Olivares called one of the Army buddies who had gone to Kagney's with Sanchez. Sanchez's friends rushed outside only to discover emergency personnel on the scene. Sanchez had been shot once in the neck and died of his injuries a few days later. Prado testified to seeing Defendant point the shotgun at Sanchez, but turned away before he heard a gunshot. One of Prado's friends saw Defendant shoot Sanchez and testified that Defendant went through Sanchez's pockets as he lay mortally wounded on the sidewalk. Defendant's accomplices also testified against him, confirming both the robberies of Prado's group and Defendant's role in robbing and shooting Sanchez.

Defendant was tried non-capitally at the 12 March 2012 session of superior court in Cumberland County. The jury found Defendant guilty of second-degree murder and all of the remaining charges. The trial court consolidated the murder and robbery charge as to Sanchez and imposed a sentence of 220-273 months in prison. The court consolidated the remaining convictions and sentenced Defendant to a consecutive term of 103-133 months. Defendant gave notice of appeal in open court.

Discussion

Defendant's sole argument on appeal is that the trial court abused its discretion in denying Defendant's challenge for cause of Juror 4.[1] We disagree.

1. We refer to the prospective juror as "Juror 4" to protect her privacy.

A defendant who appeals from a trial court's denial of his motion to excuse a prospective juror for cause faces a steep challenge:

> The determination of whether excusal for cause is required for a prospective juror is vested in the trial court, and the standard of review of such determination is abuse of discretion. Such rulings by a trial court will not be overturned on appeal, unless an abuse of discretion is established. An abuse of discretion occurs where the trial judge's determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. With regard to a challenge for cause and the trial court's ruling thereon, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record.
>
> The trial court holds a distinct advantage over appellate courts in determining whether to allow a challenge for cause. . . .
>
> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.
>
> The standard for determining whether a prospective juror must be excluded for cause is whether the prospective juror's concern would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Whether this standard has been satisfied is also within the trial court's broad discretion. The standard does not require clarity in the printed record, but rather, with regard to the proper basis for excusal, rests on whether a trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.
>
> On appeal, reviewing courts are required to pay deference to the trial court's judgment concerning the juror's ability to follow the law impartially. To determine whether a

> prospective juror is capable of rendering a fair and impartial verdict, the trial court must reasonably conclude from the *voir dire* . . . that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence.

State v. Reed, 355 N.C. 150, 155-56, 558 S.E.2d 167, 171-72 (2002) (citations and quotation marks omitted). Further,

> even after a prospective juror initially voices sentiments that would normally make . . . her vulnerable to a challenge for cause, that prospective juror may nevertheless serve if the prospective juror later confirms that . . . she will put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the law applicable to the case.

State v. Rogers, 355 N.C. 420, 430, 562 S.E.2d 859, 867 (2002) (citation omitted). "A judge who observes the prospective juror's demeanor as . . . she responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause." *Id.*

During the State's *voir dire*, Juror 4 mentioned a friend who had been murdered in the early 1980s. Defense counsel later asked Juror 4 how that experience would affect her ability to sit on a jury in a murder case. Juror 4 replied, "The thing that affects me is there seems [sic] to be loopholes when a person is guilty and the loopholes allow them [sic] to get out of it, and I don't think that's justice." Defense counsel and Juror 4 continued to discuss the concept of legal "loopholes," and when defense counsel asked, "And that you would not be able to put [your feeling about loopholes] completely aside and, therefore, you don't think you could be fair and impartial in this case[,]" Juror 4 responded, "Correct."

During further questioning by counsel for Defendant and the State, Juror 4 repeated her concerns about loopholes and asserted that she would have to vote "her conscience" in regard to a defendant's guilt. However, as Defendant concedes, at the close of the *voir dire* of Juror 4, she stated that she would vote in accordance with the facts presented at trial and the judge's instructions on the law. The trial court denied Defendant's challenge of Juror 4 for cause, and Defendant exercised one of his peremptory challenges to excuse her. Later, after all three of his peremptory challenges were exhausted, Defendant requested an additional peremptory challenge as to Juror 10. The court denied this request

and also denied Defendant's subsequent renewal of his challenge for cause of Juror 4.

Defendant cites *State v. Leonard*, 296 N.C. 58, 248 S.E.2d 853 (1978), in support of his argument that the trial court abused its discretion in denying his challenge for cause as to Juror 4. However, *Leonard* is easily distinguishable. The jurors challenged for cause in that case stated that they would not acquit the defendant even if she "*introduced evidence that would satisfy [the jurors] that [the defendant] was insane*" at the time of the crime. *Id.* at 62, 248 S.E.2d at 855 (emphasis added). In other words, the *Leonard* jurors continued to assert that they could not "follow the law applicable to the case" and thus were never rehabilitated. *Rogers*, 355 N.C. at 430, 562 S.E.2d at 867. In contrast, Juror 4, after "initially voic[ing] sentiments that would normally make . . . her vulnerable to a challenge for cause, . . . later confirm[ed] that . . . she [would] put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the law applicable to the case." *Id.* Mindful that the trial court "judge who observes the prospective juror's demeanor as . . . she responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause[,]" *id.*, we are not persuaded that the court's determination that Juror 4 "would be []able to faithfully and impartially apply the law" was "manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *Reed*, 355 N.C. at 155-56, 558 S.E.2d at 171 (citations and quotation marks omitted). Accordingly, we see no abuse of discretion in the trial court's denial of Defendant's challenge for cause of Juror 4.

NO ERROR.

Judges BRYANT and DILLON concur.

STATE OF NORTH CAROLINA
v.
BOBBY LEE FISH, JR., DEFENDANT

No. COA13-11

Filed 17 September 2013

1. Larceny—value of property taken—evidence sufficient

The trial court properly denied defendant's motion to dismiss charges of felony larceny and conspiracy to commit felony larceny where defendant was caught in the act of stealing boat batteries from a marine dealer. The State provided sufficient evidence of the value of the batteries with testimony from the the owner of a marine store that the fair market value of the batteries was over $1,000 at the time they were taken.

2. Burglary and Unlawful Breaking or Entering—breaking or entering a boat—batteries stolen—functional part of boat

The trial court erred by denying defendant's motion to dismiss eighteen charges of breaking or entering a boat where defendant had stolen batteries from boats at a marine dealer. The larceny element of the breaking or entering must pertain to objects within the boat that are separate and distinct from the functioning boat.

3. Larceny—felonious—conspiracy—instructions—lesser included offense

The trial court did not err in a prosecution for conspiracy to commit felony larceny by refusing to instruct the jury on conspiracy to commit misdemeanor larceny. The only evidence presented as to value, even taken in the light most favorable to defendant, indicated that the total value of the batteries taken was well in excess of $1,000.

Appeal by defendant from Judgments entered 9 May 2012 by Judge Beverly T. Beal in Superior Court, Lincoln County. Heard in the Court of Appeals 15 August 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Amanda P. Little, for the State.

Kimberly P. Hoppin, defendant-appellant.

STROUD, Judge.

Bobby Lee Fish, Jr. ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of felony larceny, conspiracy to commit felony larceny, and breaking or entering a boat. We reverse defendant's convictions for breaking or entering a boat for insufficient evidence, but hold that there was otherwise no error.

I. Background

On 27 June 2011, defendant was indicted on one count of felony larceny, one count of conspiracy to commit felony larceny, and one count of injury to real property. On 6 September 2011, defendant was also indicted on eighteen counts of breaking or entering a boat. Defendant pled not guilty and the case proceeded to jury trial on 7 May 2012 in Superior Court, Lincoln County.

The State's evidence tended to show that defendant and Richard Champion agreed to steal boat batteries from Denver Marine, a boat and marine supply store in Denver, North Carolina, on 21 January 2011. In the early morning of 22 January 2011, they drove to Denver Marine, cut holes in the fence surrounding Denver Marine, and entered the property. Defendant and Mr. Champion then boarded eighteen boats and removed forty-eight batteries. Defendant removed the batteries and Mr. Champion piled them outside of the north fence. Defendant and Mr. Champion fled when they saw the police arrive, but were quickly apprehended on a nearby road. Soon after, Mr. Champion "started describing to [a police officer] how [the theft] was done." Mr. Champion then pointed out the boats from which he and defendant had stolen the batteries. At the magistrate's office, Mr. Champion gave a signed statement describing his account of the crime.

At trial, the owner of the marina, Danny McCall, testified that the batteries were worth about $6,600. He stated that "[s]tarter batteries are going to range anywhere from $99.00 to $150.00" and "[t]rawler motor batteries run anywhere from $120.00 to $350.00." At the close of the State's evidence, defendant moved to dismiss all charges for insufficient evidence. The trial court denied the motion.

Defendant then introduced testimony from one witness who stated that she drove defendant to the Denver Post Office, located next to Denver Marine and that he got into a car with Mr. Champion. After the defense presented its evidence, defendant renewed his motion to dismiss for insufficient evidence. Again, the trial court denied the motion.

During the jury charge conference, defendant requested an instruction on conspiracy to commit misdemeanor larceny as a lesser-included offense of conspiracy to commit felony larceny. The trial court rejected the request. The jury returned guilty verdicts on one count of felonious larceny, one count of conspiracy to commit felony larceny, one count of damage to real property, and eighteen counts of breaking or entering a boat.

Defendant was sentenced to eleven to fourteen months confinement for felonious larceny, a consecutive eight to ten months of confinement for conspiracy to commit larceny, and 120 days for misdemeanor injury to real property. Defendant was also sentenced to six to eight months confinement for each of the eighteen counts of breaking or entering a boat. The sentences for breaking or entering a boat were suspended and defendant was placed on supervised probation, to begin at defendant's release from custody, for a term of sixty months. Defendant was also ordered to pay restitution. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

[1] Defendant argues that the trial court improperly denied his motion to dismiss the charges of felony larceny, conspiracy to commit felony larceny, and breaking or entering a boat for insufficient evidence.

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

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

A. Felony Larceny

Defendant first contends that the trial court erred in denying his motion to dismiss the felony larceny charge. He argues that the State

failed to provide sufficient evidence that the value of the batteries exceeded $1,000 as required by N.C. Gen. Stat. § 14-72(a). We disagree.

To prove that defendant committed felonious larceny, the State must show that the value of the goods totaled over $1,000. N.C. Gen. Stat. § 14-72(a) (2011); *State v. Clark*, 208 N.C. App. 388, 396, 702 S.E.2d 324, 329 (2010), *disc. review denied*, 365 N.C. 84, 706 S.E.2d 244 (2011). The "value" indicated in N.C. Gen. Stat. § 14-72(a) is "the price which the subject of the larceny would bring in open market—its 'market value' or its 'reasonable selling price,' at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny." *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972) (citation and quotation marks omitted). Nevertheless, "[t]he State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to speculate as to the value of the item." *State v. Rahaman*, 202 N.C. App. 36, 47, 688 S.E.2d 58, 66 (citation, quotation marks, and ellipses omitted), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010), *abrogated in part by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010).

Here, Mr. McCall, the owner of Denver Marine, testified that the price of a starter battery ranges from $99.00 to $150.00 and the price of a trawler motor battery ranges from $120.00 to $350.00. Additionally, Mr. McCall estimated the total value of the batteries as $6,600.00.

Defendant contends that Mr. McCall testified to the replacement value of the batteries and not their fair market value. Defendant notes that Mr. McCall said thieves sell stolen battery cores for $15, while his estimates of greater value were based on the cost of new batteries.

First, although the relevant value for felonious larceny is the fair market value of the goods stolen, "the price received for stolen [goods] has no relevance to the 'market value' of those [goods]." *Dees*, 14 N.C. App. at 113, 187 S.E.2d at 435. Thus, it is immaterial that Mr. McCall testified that the value of a stolen battery core is $15.

Second, because Mr. McCall is a merchant who buys and sells boat batteries regularly, his testimony regarding the retail price of the stolen boat batteries constitutes evidence of fair market value of those batteries. *See State v. Williams*, 65 N.C. App. 373, 375, 309 S.E.2d 266, 267 (1983), *disc. review denied*, 310 N.C. 480, 312 S.E.2d 890 (1984); *see also Cudahy Foods Co. v. Holloway*, 55 N.C. App. 626, 627-28, 286 S.E.2d 606, 607 (1982) (observing that a " '[m]erchant' [is] 'a person who deals in

goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . . .' " (quoting N.C. Gen. Stat. § 25-2-104(1))).

Further, we note that

> [t]he general rule in North Carolina is that a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific personal property. It is not necessary that the witness be an expert; it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it.

Rahaman, 202 N.C. App. at 48, 688 S.E.2d at 67 (citation, quotation marks, and brackets omitted).

The defendant in *State v. Williams*, who had been convicted of felonious possession of stolen property, contended that the State failed to provide sufficient evidence of the value of the stolen goods. *Williams*, 65 N.C. App. at 374-75, 309 S.E.2d at 267. He argued that testimony from a Sears employee regarding the selling price of the stolen goods was insufficient evidence because the " 'value' for purposes of [N.C. Gen. Stat. § 14-72] means 'fair market value' and not 'selling price' . . . ." *Id.* We held that "where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss." *Id.* at 375, 309 S.E.2d at 267.

Similarly, we have held that testimony regarding the value of a stolen car at the time of theft from a law enforcement witness whose job required him to routinely value vehicles was sufficient to survive a motion to dismiss where the State also presented testimony from the property owner that his vehicle was in "good condition" when stolen. *Rahaman*, 202 N.C. App. at 48, 688 S.E.2d at 67.

Mr. McCall testified that as far as he knew, the batteries were in working order when stolen. Thus, there was evidence of the batteries' condition at the relevant time as well. The fact that Mr. McCall had "to replace some of them because [he] didn't know if they were good or bad" after defendant and Mr. Champion removed and possibly damaged them is irrelevant to their condition at the time they were taken.

While Mr. McCall's testimony as to the value and condition of the batteries was somewhat ambiguous, in reviewing the denial of a motion

to dismiss we consider the evidence in the light most favorable to the State. *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148. Mr. McCall estimated the value of the batteries based on his experience as someone who regularly buys and sells boat batteries. He testified that they were in working condition as far as he knew. With this testimony, "the jury [was] not left to speculate as to the value of the item." *Rahaman*, 202 N.C. App. at 47, 688 S.E.2d at 66. We hold that the State provided sufficient evidence that the fair market value of the batteries was over $1,000 at the time they were taken. Therefore, defendant's argument is overruled.

B. Conspiracy to Commit Felony Larceny

Defendant next contends that the trial court erred in denying his motion to dismiss the conspiracy to commit felony larceny charge. He again argues that the State failed to provide sufficient evidence that the batteries were valued over $1,000. Since we have already held that the State did provide sufficient evidence of the batteries' value, this argument is also overruled.

C. Breaking or Entering a Boat

[2] Lastly, defendant contends that the trial court erred in denying his motion to dismiss the eighteen charges of breaking or entering a boat. He argues that the State failed to prove that the boats contained items of value. We agree.

"Proving the crime of breaking or entering into a [boat] requires a showing of 1) a breaking or entering, 2) without consent 3) into [a boat] 4) containing goods, freight, or anything of value 5) with the intent to commit any felony or larceny therein." *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990) (citation omitted), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425 (1991); N.C. Gen. Stat. § 14-56 (2011). Defendant only challenges the lack of evidence as to the fourth element—that there was something of value in the boats.

Even items of trivial value can satisfy the fourth element. *State v. McLaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987). Items that have been found to be "of value" include a C.B. radio, *State v. Kirkpatrick*, 34 N.C. App. 452, 456, 238 S.E.2d 615, 618 (1977), papers, a shoe bag, cigarettes, *State v. Quick*, 20 N.C. App. 589, 591, 202 S.E.2d 299, 301 (1974), a hubcap key, and a registration card. *State v. Goodman*, 71 N.C. App. 343, 349, 350, 322 S.E.2d 409, 413 (1984), *disc. review denied*, 313 N.C. 333, 327 S.E.2d 894 (1985). When the record is devoid of any evidence of items of value, however, the fourth element is not satisfied. *McLaughlin*, 321 N.C. at 270, 362 S.E.2d at 282.

This Court has stated that N.C. Gen. Stat. § 14-56 "clearly requires that the larceny element of the breaking [or] entering pertain to objects within the vehicle, separate and distinct from the functioning vehicle." *State v. Jackson*, 162 N.C. App. 695, 699, 592 S.E.2d 575, 577 (2004). In *Jackson*, the State argued that the accoutrements of a vehicle's interior, such as the "seats, carpeting, visors, handles, knobs, cigarette lighters, and radios," satisfied the fourth element. *Id.* at 698, 592 S.E.2d at 577. We disagreed and held that the key and parts of the car were not sufficient evidence to support the fourth element. *Id.* at 699, 592 S.E.2d at 578. Similarly, we have held that the tape player and speakers of a truck were not "items of value" as they are part of a functioning truck. *State v. McDowell*, ___ N.C. App. ___, ___, 720 S.E.2d 423, 425 (2011).

Here, defendant argues that the boat batteries are not "items of value" because the batteries are part of functioning boats. We agree. The evidence shows that the batteries were installed in the boats, and were detached by removing a wing nut and unclipping the attached wires. The State argues that the trawling and accessory batteries are not part of the boat because "they are removable, mobile and interchangeable." We fail to see how batteries which are hooked into a boat's electrical systems are materially different from other items we have found to be part of the functioning vehicle, such as a tape player and speakers. *See McDowell*, ___ N.C. App. at ___, 720 S.E.2d at 425. Indeed, batteries are a necessary part of a functioning boat, as they are actually attached to a boat and it cannot function without a battery, while a truck can function without a tape player and speakers. The State has not argued that the boats contained any other items of value. Therefore, the State failed to present substantial evidence that the boats contained anything of value, an essential element of breaking or entering a motor vehicle, and the trial court erred in denying defendant's motion to dismiss all eighteen counts of that offense. Accordingly, we reverse defendant's convictions for breaking or entering a boat.

III. Jury Instruction

[3] Defendant also argues that the trial court erred in denying his request to instruct the jury on the lesser-included offense of conspiracy to commit misdemeanor larceny.

> This Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a lesser included offense . . . on a *de novo* basis. A judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there

> is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense. In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to the defendant. However, if the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense.

State v. Debiase, 211 N.C. App. 497, 503-04, 711 S.E.2d 436, 441 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). The State contends that there was no evidence to negate the element of value over $1,000 and that therefore the trial court did not err in refusing defendant's requested instruction on conspiracy to commit misdemeanor larceny.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act . . . ." *State v. Massey*, 76 N.C. App. 660, 661-62, 334 S.E.2d 71, 72, *supersedeas allowed*, 314 N.C. 672, 335 S.E.2d 325 (1985). A person who conspires with another to commit a felony "is guilty of a felony;" a person who conspires to commit a misdemeanor "is guilty of a misdemeanor." N.C. Gen. Stat. § 14-2.4 (2011). Whether a larceny is felonious or not depends on whether the goods taken have a fair market value in excess of $1,000. N.C. Gen. Stat. § 14-72(a). Thus, whether defendant would be guilty of felony conspiracy to commit larceny or misdemeanor conspiracy depends on whether the goods he conspired to take had a fair market value of more than $1,000.

Here, the evidence showed that defendant and Mr. Champion agreed to take as many batteries as they could. In the context of conspiracy to traffic in marijuana, we have held that "evidence of the cumulative quantity of controlled substance that a defendant sells in the course of a single open-ended conspiracy is sufficient to support his conviction for conspiracy to sell that quantity even though the agreement of the conspirators is silent as to exact quantity." *State v. Williamson*, 110 N.C. App. 626, 631, 430 S.E.2d 467, 470 (1993). Similarly, in the context of conspiracy to commit larceny, evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, "even though the agreement of the conspirators is silent as to exact quantity." *Id.*

Here, the only evidence presented as to value, even taken in the light most favorable to defendant, indicated that the total value of the batteries taken was well in excess of $1,000. Mr. McCall estimated that the starter batteries—the cheapest batteries taken—were worth between $99 and $150. Defendant took eighteen starter batteries, which would be worth $1782, even using the lowest estimated value. Thus, the total value exceeded $1,000, even excluding all of the other batteries taken. Mr. McCall's testimony was the only evidence presented as to value. As mentioned above, his statement that the stolen battery cores could be sold for $15 dollars is not evidence of the fair market value of the batteries. *See Dees*, 14 N.C. App. at 113, 187 S.E.2d at 435.

Thus, "the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements." *Debiase*, 211 N.C. App. at 503-04, 711 S.E.2d at 441. Moreover, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991) (citation omitted). Therefore, we hold that the trial court did not err in refusing to instruct the jury on conspiracy to commit misdemeanor larceny.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss the charges of felonious larceny and conspiracy to commit felonious larceny. We also hold that the trial court did not err in refusing defendant's jury instruction request. We reverse the trial court's denial of defendant's motion to dismiss the eighteen counts of breaking or entering a boat. Because the trial court entered judgment for each breaking or entering conviction separately from the other charges, there is no need to remand this case for re-sentencing. *Cf. State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (noting that the better practice is to remand for resentencing where one conviction in a consolidated judgment is reversed).

NO ERROR in part; REVERSED in part.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
BENJAMIN SCOTT MARLOW

No. COA13-18

Filed 17 September 2013

1. Evidence—stipulations—not ambiguous—not prejudicial—no plain error

The trial court did not commit plain error in a first-degree rape case by admitting two stipulations after the close of the State's case-in-chief. Assuming arguendo, that stipulations can be reviewed for plain error, the stipulations were not ambiguous and did not have a probable impact on the jury's findings.

2. Sentencing—statutory rape—incest—not lesser-included offense

The trial court erred by sentencing defendant for two crimes, statutory rape and incest, which arose out of the same transaction, thereby violating his constitutional rights by subjecting him to double jeopardy. The elements of statutory rape are not all included in the elements of incest and 2002 amendments to N.C.G.S. § 14-178 did not make statutory rape a lesser-included offense of incest.

3. Sentencing—colloquy with defendant—unnecessary

The trial court did not err in a rape case by sentencing defendant as a Prior Record Level II before conducting a statutorily mandated colloquy with defendant. Given the routine determination as to whether defendant was convicted of possession of drug paraphernalia while on probation for another offense, conducting such questioning with defendant would have been inappropriate and unnecessary.

4. Satellite-Based Monitoring—first-degree rape—use of force

The trial court did not improperly order defendant to enroll in lifetime satellite-based monitoring upon release from imprisonment. Defendant was convicted of first-degree rape, which necessarily involves the use of force.

Appeal by defendant from judgments entered on 29 June 2012 by Judge Timothy S. Kincaid in Cleveland County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Michael E. Casterline for defendant appellant.

McCULLOUGH, Judge.

Benjamin Scott Marlow ("defendant") appeals from his convictions for first-degree rape (four counts), indecent liberties with a child (four counts), first-degree sex offense with a child (four counts), and incest (two counts) on the following grounds: (1) the trial court committed plain error when it read stipulations into the record that were neither definite nor certain; (2) the trial court subjected defendant to double jeopardy when it sentenced defendant for both statutory rape and incest because statutory rape is a lesser included offense of incest; (3) the trial court failed to follow the statutory mandate in calculating defendant's prior record level; and (4) the trial court erroneously ordered defendant to enroll in lifetime satellite-based monitoring ("SBM") when it found aggravating factors warranting such an imposition. For the following reasons, we find no error.

I. Background

Prior to the summer of 2010, defendant had been living with his father. During late summer of 2010, when defendant was twenty-one years of age, he went to live with his mother and her three daughters, T.A., P.A., and S.A.[1] Because defendant's mother had the children with a man who was not the biological father of defendant, they are his half-sisters. At the time defendant moved in, all of the daughters were 11 years of age or younger.

During defendant's brief tenancy at his mother's house, he became close with his half-sisters. Due to the small size of the house, the living arrangements were such that defendant had to sleep in the living room or the dining room. T.A. and P.A. had their own bedrooms, and S.A. slept in the dining room. The daughters enjoyed having defendant in the house; and when defendant was not working, he would sometimes play games and watch television with the girls.

Throughout the next few months, defendant began inappropriately touching P.A. and T.A. On one occasion, T.A. had come home from

1. Because the three daughters were all minors during the commission of the crimes, pseudonyms are used to protect their identities.

trick-or-treating and was watching television with defendant. Around 11:00 p.m., T.A.'s parents told her to go to bed. T.A. then asked that defendant go to her room and cover her up, and defendant agreed. Defendant then lay down with T.A. Sometime thereafter, defendant began to rub T.A.'s leg. He later placed his hand inside of her pants, but over her underwear, and then on her buttocks, inside of her underwear. Before moving out in early 2011, defendant also came into similar contact with P.A., T.A.'s twin sister.

On "fifteen or twenty" more occasions, defendant initiated similar contact with T.A. T.A. testified that defendant continued to get into her bed late at night, place his hands down her pants, and that he began putting his hand up her shirt. T.A. testified that defendant even began placing his finger inside her vagina, causing her discomfort or pain. T.A. also testified that on multiple occasions defendant began rubbing his penis outside of her vagina, and eventually inserted his penis inside of her vagina. The act of defendant placing his penis inside of T.A.'s vagina happened in various places, including multiple times outside in the woods, as well as in the living room.

T.A. also testified that defendant would force T.A. to put his penis inside of her mouth by grabbing her head and telling her to lick his penis. T.A. testified that when this happened, defendant would not ejaculate in her mouth. She knew this because she would see him manipulate his penis and wipe the "white liquid" on his shirt. On other occasions when defendant would insert his penis into T.A.'s mouth, he would ejaculate. The act of defendant placing his penis inside T.A.'s mouth occurred "five to ten times." At some point after Halloween, T.A. testified that defendant also penetrated her anus with his penis. According to T.A., the anal penetration "hurt worse than him putting his finger in my vagina, but it hurt just about the same as when he put his penis in my vagina."

Throughout defendant's stay, he was able to convince T.A. not to say anything about the aforesaid incidents, because if she did, "he would never get to see her again." However, on 1 March 2011, T.A. reported to a counselor at school that her brother had been touching her private parts and that she was forced to touch his as well. The counselor then contacted the Department of Social Services so a social worker could conduct interviews of T.A. and P.A. Then, on 4 March 2011, a detective from the sheriff's department interviewed T.A. and P.A. and recorded the interviews on DVD. T.A. and P.A. were then examined by a pediatrician who specialized in observing signs of physical and sexual abuse. Upon examination, the pediatrician opined that T.A.'s hymen and anus

appeared to have been penetrated with a finger or other object. The pediatrician did not report similar findings for P.A.

On 21 March 2011, the sheriff's detective interviewed defendant about the information they received. On 11 April 2011, defendant was indicted for a sex offense against T.A., leading to his arrest just ten days later. Defendant was eventually indicted and charged with a total of fourteen sex offenses; thirteen against T.A. and one against P.A.

Prior to trial, defendant filed several motions, including a motion to suppress an interview with the sheriff's detective, a motion to have defendant examined for mental capacity, and other motions concerning evidentiary issues. Also prior to trial, defendant agreed to stipulate to his age and his relationship with the alleged victims. Specifically, defendant stipulated that he was twenty-one years of age during the time the alleged events took place, and that he was the half-brother of the alleged victims because they shared a common parent, their mother. At trial, no objections were made when the stipulations were read to the jury.

During the State's case-in-chief, the State introduced testimony from T.A., P.A., the school counselor, the social worker who initially interviewed the daughters, the pediatrician who examined them, and the sheriff's detective who conducted an interview of defendant. Defendant chose not to testify at trial. Following the close of the State's evidence, the jury deliberated for approximately forty-five minutes before returning guilty verdicts for all fourteen charged sex offenses.

During sentencing, the trial court inquired about defendant's prior record. Defendant stipulated that he was previously convicted of possession of drug paraphernalia while he was on unsupervised probation for underage possession of alcohol. The stipulation resulted in his classification as a Prior Record Level II. Defendant was then sentenced within the presumptive range to consecutive terms, totaling a minimum of 1,356 months' imprisonment to a maximum of 1,686 months' imprisonment. In addition to the consecutive terms of imprisonment, the trial court found aggravating factors and ordered defendant to enroll in lifetime SBM upon release from prison.

II. The Trial Court's Acceptance of Agreed Upon Stipulations

[1] Defendant's first argument on appeal is that the trial court committed plain error in admitting two stipulations after the close of the State's case-in-chief. We disagree.

As a part of the adversarial nature of our legal system, parties have an obligation to raise objections to errors at the trial level. *State v. Oliver*,

309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983); *see also State v. Walker*, 316 N.C. 33, 37, 340 S.E.2d 80, 82 (1986) (holding that unless a party makes a timely objection, errors will not be preserved for appellate review). To hold otherwise would place "an undue if not impossible burden . . . on the trial judge." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983). As such, it holds true that even errors of constitutional magnitude that are not preserved for appellate review will not be addressed on appeal. *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000).

However, in recognizing the rigidity of this procedural requirement, we have reviewed unpreserved issues on appeal in special circumstances. Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure states that,

> [i]n 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) (2011).

Our Supreme Court has described the concept of "plain error" as follows:

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (footnotes omitted). However, because it is to be applied cautiously, "[t]he adoption of the 'plain error' rule does not mean that every [error] . . .

mandates reversal regardless of the defendant's failure to object at trial." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378; *see also State v. Greene*, 351 N.C. 562, 566-67, 528 S.E.2d 575, 578 (2000) (refusing to extend the plain error analysis to anything but jury instructions and evidentiary matters).

Turning to the facts of the case *sub judice*, while the law is clear on when our courts are permitted to use the plain error analysis, it is not clear whether stipulations fall within the purview of such parameters. Assuming *arguendo*, that stipulations can be reviewed for plain error, we nonetheless find no error. "It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act." *State v. Watson*, 303 N.C. 533, 538, 279 S.E.2d 580, 583 (1981). There is no particular form that stipulations must have, but they " 'must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.' " *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (quoting *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961)).

Defendant contends that two stipulations to which both parties agreed, and to which neither objected, were ambiguous, and therefore created such a potential for confusion that they had a probable impact on the outcome of the trial. The first fact to which the parties stipulated was defendant's date of birth. At the conclusion of the State's case-in-chief, the jury was instructed that "Benjamin Scott Marlow[] was born July 5, 1989, and at all times during the events that took place between August 28, 2010, and December 26, 2010 the defendant was 21 years of age." The second fact to which the parties stipulated, which defendant also contends was ambiguous and prejudicial, is defendant's relationship to the alleged victims. The stipulation states that "defendant is the half-brother of the named victims, [P.A.] and [T.A.], in these matters and in that they share a mother and have different fathers."

As to the first stipulation, defendant contends that the inclusion of "at all times during the events that took place" was superfluous and ambiguous. Defendant argues that, since his theory of the case was that the events did not take place, the stipulation creates an ambiguity by essentially admitting that the alleged events did take place. Additionally, defendant argues that the inclusion of "named victims" in the second stipulation was improper because it necessarily implies (1) that the alleged victims were victimized, and (2) there were potentially unnamed victims.

In *State v. Lawrence*, our Supreme Court recently clarified the holding in *Odom*, 307 N.C. 655, 300 S.E.2d 375, holding that, while an

erroneous instruction had been given, it did not amount to plain error because "[t]he evidence against [the] defendant is overwhelming. The record contains testimony by multiple witnesses describing the efforts of the group . . . ." 365 N.C. 506, 519, 723 S.E.2d 326, 334-35 (2012). Further, the Court went on to state that the defendant failed to show prejudice because he did not show that had the error not been committed, a different result would have been reached; therefore the error did not affect "the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 519, 723 S.E.2d at 335.

Similar to our Supreme Court's holding in *Lawrence*, upon review of the whole record, and in light of the fact that the stipulations were not read to the jury until after the State closed its case-in-chief, we are hard-pressed to see how the inclusion of the quoted material in the stipulations had any impact on the jury's findings. Indeed, throughout the trial, the State presented an overwhelming amount of evidence about the alleged acts that took place by having both T.A. and P.A. testify. To corroborate their testimony, the State presented testimony from a social worker, Carolyn Freeman; a pediatrician, Dr. Nancy Hendrix; and a schoolteacher, Joanna Runyon. In addition, and similar to *Lawrence*, all of this evidence was uncontroverted because the defendant chose not to testify. Accordingly, we hold that the stipulations were not ambiguous and did not have a probable impact on the jury's findings, and therefore their admission was not plainly erroneous.

III. Sentencing Defendant for Statutory Rape and Incest

[2] Defendant's second argument on appeal is that the trial court erred in sentencing defendant for two crimes, statutory rape and incest, which arose out of the same transaction, thereby violating his constitutional rights by subjecting him to double jeopardy. We disagree.

The Supreme Court of the United States has held that, absent clear and unequivocal legislative intent to the contrary, a defendant may not be punished twice for the same crime. *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d 535 (1983). In order to determine if two crimes are the "same" the Supreme Court stated that "the test to be applied . . . is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932).

In *State v. Etheridge*, our Supreme Court stated that "incest, which requires proof of a familial relationship, is not a lesser included offense of statutory rape[.]" 319 N.C. 34, 51, 352 S.E.2d 673, 683 (1987). As such, the Court held that, despite the fact that multiple crimes all arose from the same transaction, the defendant's rights against double jeopardy

were not violated because "the convictions of statutory rape, taking indecent liberties with a child, and incest . . . are legally separate and distinct crimes, none of which is a lesser included offense of another." *Id.*

Defendant does not disagree that *Etheridge* was properly decided at the time the case was heard. However, defendant contends that, since *Etheridge*, a 2002 amendment to N.C. Gen. Stat. § 14-178(b)(1)(a) renders *Etheridge* inapplicable. For the following reasons, we disagree.

Under North Carolina law, one is guilty of statutory rape "if the person engages in vaginal intercourse: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.2(a)(1) (2011). In addition, one is guilty of incest if "the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood[.]" N.C. Gen. Stat. § 14-178(a) (2011).

Using the analysis set forth in *Blockburger*, it is clear that the elements of statutory rape are not all included in the elements of incest, since statutory rape requires a showing of the victim's and the defendant's age, while the elements of incest can be proven without any reference to age, and incest requires a familial relationship that is not required for one to be convicted of statutory rape. Therefore, since one can be convicted of incest without also necessarily satisfying the elements of statutory rape, statutory rape is not a lesser included offense of incest.

However, defendant argues that the 2002 amendments to N.C. Gen. Stat. § 14-178 made statutory rape a lesser included offense of incest. We disagree. As amended, the elements of incest remained unchanged following the amendment. *See* N.C. Gen. Stat. § 14-178(a) (2011). The legislature did, however, add a punishment and sentencing scheme which provides:

> (1) A person is guilty of a Class B1 felony if . . . :
>
> a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.

N.C. Gen. Stat. § 14-178(b)(1)(a). Defendant is correct in asserting that the elements of statutory rape are all included within subsection (b). However, the argument that makes statutory rape a lesser included offense of incest is flawed since the punishment and sentencing subsection of incest is only applicable after the elements of incest have been

established. Therefore, *Etheridge* has not been abrogated by the 2002 statutory amendment, and statutory rape is not a lesser included offense of incest. Defendant's argument is overruled.

IV. Defendant's Stipulations to Prior Record Level

[3] Defendant's third argument on appeal is that the trial court erred in sentencing defendant as a Prior Record Level II before conducting a statutorily mandated colloquy with defendant. We disagree.

The calculation of prior record points, whether stipulated to or found by a jury, is dictated by N.C. Gen. Stat. § 15A-1340.14, which states that a prior record point may be assigned "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2011). While a jury may determine the existence of prior points, subsection (f)(1) allows proof of prior convictions by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f)(1).

In all of the cases involving a probation point resulting from a (b)(7) offense, generally a court shall first determine under N.C. Gen. Stat. § 15A-1022(a) that the defendant is making an informed choice in admitting the existence of an aggravating sentencing factor. N.C. Gen. Stat. § 15A-1022(a) (2011). Furthermore, N.C. Gen. Stat. § 15A-1022.1(b) provides:

> [T]he court shall address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

N.C. Gen. Stat. § 15A-1022.1(b) (2011).

However, while a Court is usually required to follow the procedural requirements when a prior record point is found under N.C. Gen. Stat. § 15A-1340.14(b)(7), N.C. Gen. Stat. § 15A-1022.1(e) excepts such requirements when "the context clearly indicates that they are inappropriate." N.C. Gen. Stat. § 15A-1022.1(e).

In reviewing the circumstances under which defendant's prior record was stipulated, we hold that conducting such questioning with defendant would have been inappropriate and unnecessary. After the jury returned the verdicts, the State moved to sentence defendant as a Prior Record Level II, in that he was convicted of possession of drug paraphernalia on 7 January 2008 and was on probation at that time for another offense. After asking defense counsel if they had a chance to review the prior record level and have a discussion with defendant, defense counsel responded "[h]e did [stipulate], yes, sir." Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions. With such a routine determination as to whether defendant was convicted of possession of drug paraphernalia while on probation for another offense, we see no reason to have engaged in an extensive colloquy with defendant. No error.

V. The Imposition of Lifetime SBM

[4] Defendant's fourth and final argument on appeal is that the trial court improperly ordered defendant to enroll in lifetime SBM upon release from imprisonment. We disagree.

> In evaluating the lawfulness of a trial court order requiring a convicted defendant to enroll in SBM, we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.

State v. Clark, 211 N.C. App. 60, 70, 714 S.E.2d 754, 761 (2011) (internal quotations marks and citations omitted), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 595 (2012).

A court shall order lifetime SBM when "the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A . . . ." N.C. Gen. Stat. § 14-208.40A(c) (2011). In the case *sub judice*, defendant was ordered to enroll in lifetime SBM because the trial court found that defendant committed an aggravated offense.

An aggravated offense is statutorily defined as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2011).

Defendant was charged with, and convicted of, first-degree rape, under N.C. Gen. Stat. § 14-27.2(a), which states that

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.2(a) (2011).

"[I]n determining whether a defendant's conviction offense qualifies as an 'aggravated offense' for purposes of N.C. Gen. Stat. § 14-208.40A, the trial court is only permitted to consider the elements of the offense for which the defendant has been convicted and 'is not to consider the underlying factual scenario giving rise to the conviction.' " *Clark*, 211 N.C. App. at 72, 714 S.E.2d at 762 (quoting *State v. Davison*, 201 N.C. App. 354, 360, 689 S.E.2d 510, 515 (2009), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010)). Stated otherwise, without looking at the underlying factual scenario, a court must first find (1) that a sexual act involving penetration occurred; *and* (2) that sexual penetration involved force or

the threat of serious violence or a victim under the age of twelve in order to impose lifetime SBM on the basis of an aggravated offense.

For the following reasons, we hold that the imposition of lifetime SBM was appropriate. Without engaging in an improper examination of the underlying facts giving rise to the crimes for which defendant was convicted, the trial court could have ascertained that both vaginal penetration and force were involved. In *Clark*, as in the case before us, the defendant was convicted of first-degree rape, which requires a showing that the defendant engaged in vaginal intercourse with the victim. 211 N.C. App. at 73, 714 S.E.2d at 762-63, stating that ("Unlike the various conviction offenses at issue in the cases upon which [the] Defendant relies . . . obtaining a first degree rape conviction pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) requires proof that a defendant 'engage[d] in vaginal intercourse' with [the] victim, as compared to some other form of inappropriate contact.") (citation omitted).

Defendant in this case meets the first prong of the test as first-degree rape by its elements requires vaginal penetration. Nevertheless, defendant argues that this Court's holding in *State v. Treadway*, 208 N.C. App. 286, 702 S.E.2d 335 (2010), renders the trial court's imposition of lifetime SBM erroneous. In *Treadway*, we held that the imposition of lifetime SBM was inappropriate because "first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) does not qualify as an aggravated offense." *Id.* at 301, 702 S.E.2d at 348. This Court reasoned that a first-degree sexual offense only requires the victim to be under 13, while an aggravated offense requires the victim to be under 12. Therefore, without considering the underlying factual scenario, the trial court could not have upheld the conviction based off the age prong of N.C. Gen. Stat. § 14-208.6(1a). *Id.*; *see also State v. Phillips*, 203 N.C. App. 326, 330, 691 S.E.2d 104, 108 (2010) stating that ("Since 'a child less than 16 years' is not necessarily also 'less than 12 years old,' without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse . . . committed that offense against a child less than 12 years old.").

However, defendant's reliance on *Treadway* is misplaced. While it is true that without examining the underlying factual scenario of the case *sub judice*, the trial court could not have determined that the victim was under the age of 12. Therefore the imposition of lifetime SBM could not be sustained on that basis alone and does not foreclose the imposition of lifetime SBM altogether. Similar to *Treadway*, defendant in the case *sub judice* was charged with engaging in a sexual act with a victim who is under the age of thirteen. However, in *Treadway*, 208 N.C. App.

at 301, 702 S.E.2d at 347, we did not consider the "force prong" of the statute, quoting that ("The State did not allege in the indictment, nor did it provide evidence at trial, that [the] defendant was guilty of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(2), which requires use of force and . . . infliction of serious personal injury . . . . Accordingly, our holding is limited to N.C. Gen. Stat. § 14-27.4(a)(1).").

As already discussed, the imposition of lifetime SBM is appropriate when the commission of a sexual act of penetration involves the use of force or threat of serious violence. N.C. Gen. Stat. § 14-208.6(1a). After *Treadway* was decided, in *Clark*, we held that "because we believe that the act of vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence . . . first degree rape fit[s] within the definition of aggravated offense as is required by *Davison* and its progeny." 211 N.C. App. at 74, 714 S.E.2d at 763 (internal quotation marks omitted). Therefore, despite the fact that the defendant in *Clark* was convicted of N.C. Gen. Stat. § 14-27.2(a)(1), we upheld the imposition of lifetime SBM on the basis that we believed force was necessarily used in the commission of the rape.

Unlike *Treadway*, defendant in the case *sub judice* was convicted of first-degree rape, as opposed to a first-degree sexual offense not involving vaginal penetration. Therefore, *Treadway* is distinguished from *Clark* and this case now on appeal. While defendant in this case was convicted of N.C. Gen. Stat. § 14-27.2(a)(1), since we have previously determined that such a conviction necessarily involves the use of force, the trial court was presented with sufficient evidence to not only conclude that sexual penetration occurred, but that such penetration was achieved by the use of force. Accordingly, we hold that the imposition of lifetime SBM was not erroneous.

VI. Conclusion

For the aforementioned reasons, we hold that the trial court committed no error.

No error.

Judges HUNTER (Robert C.) and GEER concur.

STATE OF NORTH CAROLINA
v.
JEREMY ANTUAN MARSH, DEFENDANT

No. COA13-190

Filed 17 September 2013

Constitutional Law—effective assistance of counsel—failure to raise issue—vacated first-degree murder sentence improper

The trial court erred by vacating defendant's conviction for first-degree murder. The pertinent juror did not provide improper extraneous prejudicial information to the jury, and thus, defendant's trial counsel did not provide ineffective assistance of counsel by failing to raise this issue before the trial court. The case was reversed and remanded to the trial court for consideration of defendant's remaining issues presented in his various motions for appropriate relief.

Appeal by the State from order entered 22 October 2012 by Judge John O. Craig, III, in Superior Court, Randolph County. Heard in the Court of Appeals 6 June 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Teresa M. Postell, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for defendant-appellee.

STROUD, Judge.

The State appeals the order of the trial court vacating defendant's sentence for first degree murder. For the following reasons, we reverse and remand.

I. Background

On or about 21 March 2003, defendant was convicted of, *inter alia*, first degree murder and sentenced to life imprisonment without parole; that same day defendant appealed to this Court. Within the week, defendant filed a motion for appropriate relief ("MAR 1") with the trial court arguing that his "counsel was ineffective in his representation of the Defendant . . ., and that Defendant therefore did not receive a fair and impartial trial with due process of law and his conviction and sentencing is in violation of the" United States and North Carolina Constitutions.

Defendant's MAR 1 stated that he had "discovered, after the return of the verdict, and after giving Notice of Appeal in open Court, that there were certain irregularities in the jury's deliberations that give reasonable grounds to question the validity of the verdict in this case." Defendant's MAR 1 included an affidavit from a juror, Kathleen Newsom, averring that

> various jurors claimed that a conviction of second degree murder would result in the release of the Defendant after serving a term of no more than eight years in prison . . . . [and that she] was overborne by the other eleven jurors, and she agreed to assent to the verdict of guilty of first degree murder in order to return a unanimous verdict . . . .

Juror Newsom also averred that

> [w]ere the jury to have been individually polled by the Court at the request of the Defendant, there is a possibility that the undersigned would have informed the Court that she did not assent to that verdict and that it was not a unanimous verdict of guilty of first degree murder.

The State opposed defendant's MAR 1, and in January of 2004 at the hearing on the MAR, defendant's trial counsel testified that he did not have any strategic reason for his failure to request a poll of the jury. Juror Newsom also testified to essentially the same facts as were stated in her affidavit, but she emphasized that, had she been individually polled, she would have informed the judge that she did not assent to the verdict of guilty of first degree murder:

> [A]s I look back on it, you know, now, I absolutely wouldn't waiver [sic] because I've had so much time to think about it . . . .
>
> . . . .
>
> . . . I would be very certain that even at that point [if we had been polled] I would have said no, I don't agree.

Juror Newsom also testified that

> we took a vote as to who thought . . . [defendant was guilty of] first-degree murder . . . and basically from the gate it was convincing us as to why w[e] needed to vote that way.
>
> . . . .
>
> I said I was very comfortable with voluntary manslaughter and perhaps second-degree murder, but definitely not

> first-degree murder. . . . I absolutely did not think it was planned out well ahead of time and . . . [that defendant] had come and just done cold-blooded murder. . . . .
>
> . . . .
>
> [But the other jurors, w]ell, they were vehemently against [a verdict other than first-degree murder], especially there were probably two or three of the men especially. It was two women who were dissenting, in my opinion. . . . [But after another vote] I was the only one left at that point. But one of the gentlemen began making comments like . . . would you want Jeremy Marsh to come shoot your son. Or how would you feel if you give him second-degree murder, he'll be out in eight years, and he will come after your son . . . .
>
> . . . .
>
> . . . There was a good deal of discussion [about sentencing and] why second-degree murder would not be a good verdict.
>
> . . . .
>
> . . . I think the main thought in my head was the reason I changed my vote is I knew that it had to be a unanimous decision. . . .
>
> . . . .
>
> . . . I voted against my conscience.

Juror Newsom's testimony also addressed the impact that the other jurors' statements had on her deliberations:

> [I]t was very difficult for me to be in that jury room with the other jurors. Because my -- Because my opinion was different than theirs.
>
> . . . .
>
> [The comments regarding the defendant coming after my son were] very emotionally difficult for me to deal with.
>
> . . . .
>
> . . . And you have to understand me to understand . . . I'm a people pleaser by nature, and so it's really tough to sit

> in [that] environment and have especially some very, very adamant and vehement comments made to me . . . . [I had a lot of] thoughts swirling around, and so my judgment at that moment was not what I wish it would have been.
>
> . . . .

On 16 January 2004, the trial court denied defendant's MAR 1. Defendant appealed.

On 19 July 2005, in *State v. Marsh*, 171 N.C. App. 516, 615 S.E.2d 739, 2005 WL 1669335 at *3 (unpublished) (2005) ("*Marsh I*"), this Court issued an opinion addressing the appeal of both defendant's judgment convicting him of first degree murder and his MAR 1. In *Marsh I*, this Court noted that defendant had "abandoned" any issues regarding MAR 1, and ultimately found no error as to defendant's conviction for first degree murder. *Marsh* at *3, *6.

In defendant's first appeal, the record included Juror Newsom's 2003 affidavit as well as the trial court's order denying MAR 1, but the issues presented in MAR 1, including those regarding extraneous information and failure to poll the jury, were not presented as one of the 36 assignments of error raised in the first appeal. This Court noted that "In his brief, defendant brings forward only six of the thirty-six assignments of error set forth in the record on appeal. His remaining assignments of error, *including those related to his motion for appropriate relief*, are deemed abandoned." *See id.* at *3 (emphasis added). Defendant filed a petition for discretionary review with the Supreme Court of North Carolina, which was subsequently denied on 21 October 2003. On 2 August 2006, defendant petitioned this Court for a writ of certiorari because he "was under the assumption that [his] MAR [1] would be appealed with [his] Direct Appeal." On 22 August 2006, this Court denied defendant's petition.

On 22 May 2008, defendant filed a second MAR ("MAR 2") bringing forth two claims:

> [1.] The defendant's rights secured by the Sixth Amendment to the United States Constitution and the North Carolina Constitution were violated when the jury based their decision in part on extraneous information regarding punishment which was inaccurate and not properly introduced into evidence and because a juror was intimidated into voting for first degree murder.

. . . .

> [2.] The defendant did not receive effective assistance of counsel during his MAR hearing and on direct appeal because his trial counsel failed to amend the MAR to conform to the testimony given during the hearing and his appellate counsel failed to raise the issues on direct appeal.

(Original in all caps.)

On or about 7 August 2008, defendant filed an amendment to his MAR 2 ("MAR 2.1") and added three more claims:

> [3.] The failure of trial counsel to adequately preserve the issue of testimony related to self defense constituted ineffective assistance of counsel. Further, the failure of appellate counsel to raise an ineffective assistance of counsel claim due to the failure to preserve the testimony on direct appeal constituted ineffective assistance of appellate counsel.
>
> [4.] The failure to provide the defendant with notice and opportunity to be heard when both a trial attorney and appellate attorney withdrew from representing the defendant violated the defendant's right to due process, and right to counsel.
>
> [5.] The defendant did not receive effective assistance of counsel because his trial counsel failed to include in the defendant's MAR a claim that the jury was given extraneous information regarding the punishment for second degree murder.

(Original in all caps.) On or about 5 November 2008, the State filed a response in opposition to defendant's MAR 2.

On or about 17 December 2008, defendant filed a second amendment to his MAR 2 ("MAR 2.2") arguing:

> [6.] The district attorney improperly delegated his prosecutorial function and discretion to the victim's family members when he proffered a plea to second degree murder to the defendant, contingent on defendant's trial counsel tendering that plea to the victim's family and the victim's family accepting the plea offer, in violation of the defendant's right to due process as secured by the

> Fourteenth Amendment of the United States Constitution and N.C. Const. Art IV, § 18.

(Original in all caps.)

On 11 March 2009, defendant filed a third amendment to his MAR 2 ("MAR 2.3") arguing that "defense counsel's dual representation of defendant and [a] key prosecution witness in an unrelated case established conflict of interest in violation of defendant's right to counsel as secured by the Sixth and Fourteenth Amendment." (Original in all caps.)

On 22 October 2012, the trial court vacated defendant's conviction for first degree murder based upon defendant's MAR 2. The State petitioned this Court for a writ of certiorari to review the trial court's order vacating defendant's sentence, and on 5 November 2012, this Court allowed the State's petition.

II. Standard of Review

> When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.

State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation omitted) (citation and quotation marks omitted).

III. MAR 2

The State contends that the trial court erred in vacating defendant's conviction for first degree murder. Facially, the trial court appears to have granted claim one of defendant's MAR 2, which alleged that

> [t]he defendant's rights secured by the Sixth Amendment to the United States Constitution and the North Carolina Constitution were violated when the jury based their decision in part on extraneous information regarding punishment which was inaccurate and not properly introduced into evidence and because a juror was intimidated into voting for first degree murder.

(Original in all caps.) In fact, the trial court's order is even entitled "Order Granting Claim One of Defendant's Motion for Appropriate Relief[.]" (Original in all caps.) Yet it is clear from the trial court's order

that defendant's conviction was actually vacated on the basis of his second claim in MAR 2 which alleged

> [t]he defendant did not receive effective assistance of counsel during his MAR hearing and on direct appeal because his trial counsel failed to amend the MAR to conform to the testimony given during the hearing and his appellate counsel failed to raise the issues on direct appeal.

(Original in all caps.) Indeed, the trial court concluded that

> 3. The Defendant was entitled to the effective assistance of counsel at the trial level and the appellate level. . . .
>
> 4. The failure of trial counsel . . . to raise and vigorously argue in . . . [MAR 1] the question of whether prejudicial extraneous information had been injected into the jury deliberations, constituted ineffective assistance of counsel, in violation of the Defendant's rights secured by the Sixth and Fourteenth Amendments to the United States Constitution.
>
> 5. The failure of appellate counsel to present the issue to the Court of Appeals of whether prejudicial extraneous information had been injected into the jury deliberation and whether trial counsel had provided effective assistance of counsel in preparing and presenting the ten day MAR, constituted ineffective assistance of counsel, in violation of the Defendant's rights secured by the Sixth and Fourteenth Amendments to the United States Constitution.

In summary, the trial court actually determined that the second claim in MAR 2 regarding ineffective assistance of counsel was a proper ground upon which to vacate defendant's conviction for first degree murder as the appellate counsel failed to raise the ineffectiveness of defendant's trial counsel in failing to raise the issue presented in defendant's MAR claim two regarding extraneous information being presented to the jury.

Rule 606(b) of the North Carolina Rules of Evidence provides that

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from

> the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question 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. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2007) (emphasis added). Regarding a juror's testimony about extraneous information, the North Carolina Supreme Court has stated that under Rule 606(b)

> extraneous information is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried.

State v. Rosier, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988); *see State v. Quesinberry*, 325 N.C. 125, 135-36, 381 S.E.2d 681, 688 (1989) ("Under North Carolina Rule 606(b), as interpreted in *Rosier*, allegations that jurors considered defendant's possibility of parole during their deliberations are allegations of 'internal' influences on the jury. First, the 'information' that defendant would be eligible for parole in about ten years was not information dealing with this particular defendant, but general information concerning the possibility of parole for a person sentenced to life imprisonment for first degree murder. Second, there is no allegation that the jurors received information about parole eligibility from an outside source. The juror affidavits state that it was the jurors' 'idea,' 'belief,' or 'impression' that defendant would be released in ten years. We have said that it would be naive to believe jurors during jury deliberations do not relate the experiences they have had, and that the possibility of parole or executive clemency is a matter of common knowledge among most adult persons. Most jurors, through their own experience and common knowledge, know that a life sentence does not necessarily mean that the defendant will remain in prison for the rest of his life. Therefore, the jurors' 'belief' about defendant's possibility of parole was an 'internal' influence on the jury. Allowing jurors to impeach their verdict by revealing their 'ideas' and 'beliefs' influencing their verdict is not supported by case law, nor is it sound public policy." (citations,

quotation marks, and brackets omitted)), *pet. for writ of cert. granted and judgment vacated on other grounds*, 494 U.S. 1022, 108 L.Ed. 2d 603 (1990). Accordingly, extraneous information "deal[s] with the defendant or" defendant's case. *Rosier*, 322 N.C. at 832, 370 S.E.2d at 363. Even prohibited information that simply relates to the defendant's case is not necessarily extraneous. *Id.* at 832, 370 S.E.2d at 362–63 ("Although the foreman of the jury should have obeyed the instructions of the court and not have watched the program on child abuse, the matters he reported to the jury did not deal with the defendant or with the evidence introduced in this case.").

The jurors' comments about defendant's possible sentence or a fear of possible future retribution are not specific information regarding "the defendant or the case being tried." *Id.* at 832, 370 S.E.2d at 363. Comments about potential sentencing or even about a fear of retribution from a defendant who has, after all, allegedly killed another person, are general and nonspecific. These comments were about defendant or defendant's case only in the general sense that all of the jurors' substantive discussions are necessarily regarding "the defendant or the case being tried." *Id.* Defendant and his alleged actions are the subject of their deliberations. The difference is that the jurors' discussion as expressed by Juror Newsom is not specific extraneous factual information about this defendant. For example, if a juror told the other jurors that he got an anonymous phone call the prior evening from a caller who said that defendant told him he would kill the juror's son if he ever got out of prison, this would be specific information regarding defendant, and thus extraneous information. *See id.* Certainly jurors often discuss their personal ideas and beliefs about many issues, and these comments may at times be incorrect in the legal sense or without any basis in fact, but Rule 606(b) still forbids inquiry into these matters unless the information presented is specific information about "the defendant or the case being tried." *Id.*; see N.C. Gen. Stat. § 8C01, Rule 606(b).

Even assuming *arguendo* that had Juror Newsom been polled she would have dissented and revealed the jury's discussion regarding defendant's possible sentence, this information would still not be considered extraneous pursuant to North Carolina General Statute § 8C-1, Rule 606(b). *See* N.C. Gen. Stat. § 8C-1, Rule 606(b). As the information revealed by Juror Newsom was not extraneous, defendant's trial counsel did not render ineffective assistance by his failure to raise this issue in defendant's MAR 1, and since defendant's trial counsel was not ineffective in this regard, defendant's appellate counsel also was not ineffective in failing to raise the issue on appeal. *See generally*, *State*

v. Mitchell, ___ N.C. App. ___, ___, 735 S.E.2d 438, 442 (2012) ("The United States Supreme Court has set forth the test for determining whether a defendant received constitutionally ineffective assistance of counsel . . . . Pursuant to the two part test, the defendant must first 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." (citation and quotation marks omitted)).

IV. Conclusion

As the information presented by Juror Newsom was not "extraneous prejudicial information [which] was improperly brought to the jury's attention or . . . any outside influence[,]" N.C Gen. Stat. § 8C-1, Rule 606(b), upon the jury deliberations, defendant's trial counsel did not provide ineffective assistance of counsel in failing to raise this issue before the trial court and defendant's appellate counsel was not ineffective in failing to raise the issue of defendant's trial counsel's ineffectiveness. Accordingly, we reverse and remand for the trial court to consider defendant's remaining issues presented in his various MARs to the extent that they have not previously been addressed by the trial court or this Court.

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE v. TINNEY

[229 N.C. App. 616 (2013)]

STATE OF NORTH CAROLINA
v.
ANDREW TINNEY

No. COA13-209

Filed 17 September 2013

1. Appeal and Error—transfer of juvenile case to superior court—no right of appeal—guilty plea

The trial court did not err in an attempted murder, secret assault, and assault with a deadly weapon upon a governmental officer case by concluding that defendant had no statutory right to appeal the allowance of an order transferring his case from juvenile court to the superior court based on his guilty plea. In light of the steps taken by the trial court to advise defendant of the likelihood that his attempt to reserve his right to seek appellate review of the transfer order would prove unsuccessful, defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

2. Constitutional Law—effective assistance of counsel—failure to advise about consequences of guilty plea—no prejudice

Defendant did not receive ineffective assistance of counsel in an attempted murder, secret assault, and assault with a deadly weapon upon a governmental officer case based on trial counsel allegedly failing to advise him that the Court of Appeals would refuse to consider his challenge to the transfer order in the event that he persisted in pleading guilty. Defendant made that decision with full knowledge of the virtually nonexistent likelihood that his attempt to reserve the right to seek appellate review of the transfer order would prove successful. Further, defendant cannot make the necessary showing of prejudice.

Review pursuant to the issuance of a writ of *certiorari* of judgment entered 29 October 2012 by Judge Eric L. Levinson in Moore County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

N.C. Prisoner Legal Services, Inc., by Allison Standard, for Defendant.

ERVIN, Judge.

Defendant Andrew Tinney appeals from a judgment sentencing him to a term of 100 to 129 months imprisonment based upon his convictions for attempted murder, secret assault, and assault with a deadly weapon upon a governmental officer. On appeal, Defendant argues that the trial court's judgment should be vacated on the grounds that he was precluded from obtaining the benefit of the bargain inherent in his plea agreement and that, in the alternative, his guilty plea resulted from deficient representation on the part of his trial counsel. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we find no justification for disturbing the trial court's judgment.

I. Factual Background

A. Substantive Facts

At the time of the incident which led to the institution of the charges for which he has been convicted and sentenced, Defendant was a fifteen-year-old ninth grader at Union Pines High School. On 18 October 2011, Defendant emerged from a school restroom with a knife concealed beneath his shirt; walked up behind Officer Steven Clark, a resource officer at the school; and stabbed him in the back three times. With the assistance of the wrestling coach, Officer Clark was able to take the knife away from Defendant and handcuff him. As a result of the fact that he was wearing a bulletproof vest, Officer Clark was not seriously injured. When Defendant was being put into Officer Clark's patrol car, he stated, "Damn, I did not know you were wearing a bullet proof vest."

After being transported to the detention center and being advised of his rights against compulsory self-incrimination, Defendant admitted having planned his attack upon Officer Clark as part of what appeared to have been an apparent attempt to either be killed by police or incarcerated in view of the fact that a lengthy prison sentence had recently been imposed upon his father. Prior to the incident, Defendant told his family, among other things, that he loved them and would miss them, and told a friend that he was going to do something bad at school. Subsequently, investigating officers found a letter which Defendant had written to his father in which Defendant stated:

> Hey, daddy, I love you and I always will. Don't ever forget that. You and Grandma raised me right. My mistakes are my fault, not y'all's. When you get this letter you will know what happened. I don't deserve you, Grandma, because I'm worthless, but I still love you all and always will. Love, Andrew.

B. Procedural Facts

A petition alleging that Defendant should be adjudicated a delinquent juvenile on the grounds that he had assaulted a governmental officer with a deadly weapon was filed on 18 October 2011. On 10 January 2012, Judge Lee Gavin entered an order transferring the case against Defendant to the Moore County Superior Court "for trial as in the case of an adult" for committing misdemeanor injury to school property, having a weapon on school property, assault with a deadly weapon on a government official, and assault with a deadly weapon with the intent to kill on the grounds that "the juvenile is an extreme risk to commit homicide," that "the attack by the juvenile was planned and dangerously carried out," and that "the juvenile needs long term supervised treatment that would not be available beyond his 19th birthday which is the limit of the juvenile jurisdiction of this court." On 14 June 2012, Judge William R. Pittman entered an order affirming Judge Gavin's order and allowing the transfer of Defendant's case to the Moore County Superior Court.

On 9 July 2012, the Moore County grand jury returned bills of indictment charging Defendant with attempted murder, assault with a deadly weapon with the intent to kill, assault on a government official with a deadly weapon, secret assault, possession of a weapon on school property, and injury to personal property. On 29 October 2012, Defendant tendered a plea of guilty to the offenses of attempted murder, assault on a governmental official with a deadly weapon, and secret assault subject to an agreement that the State would voluntarily dismiss the possession of a weapon on school property, injury to personal property, and assault with a deadly weapon with the intent to kill charges; that the attempted murder, assault on a governmental official with a deadly weapon, and secret assault charges would be consolidated for judgment; and that Defendant would be sentenced in the mitigated range, with Defendant "[p]reserving [the] right to appeal [t]ransfer to Superior [Court] of [j]uvenile case." As will be discussed in more detail in the course of our opinion, the trial court added, "(But see discussion on the record regarding this and S. v. Moore, S. v. Evans)" during the course of a hearing held for the purpose of evaluating the validity of Defendant's guilty plea. At the conclusion of the plea hearing, the trial court accepted Defendant's guilty plea; consolidated for judgment Defendant's convictions for attempted murder, secret assault, and assault on a governmental official with a deadly weapon; and sentenced Defendant to a term of 100 to 129 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

On 15 March 2013, the State filed a motion to dismiss Defendant's appeal. On 20 March 2013, Defendant filed a petition seeking the issuance of a writ of *certiorari* for the purpose of permitting review of the trial court's judgment. On 2 April 2013, this Court entered an order allowing the State's dismissal motion. This Court granted Defendant's *certiorari* petition on 5 April 2013. As a result, Defendant's challenges to the trial court's judgment are properly before us.

II. Legal Analysis

A. Validity of Defendant's Guilty Plea

[1] In his initial challenge to the trial court's judgment, Defendant contends that the fact that the order transferring the case against him from District Court to Superior Court was not appealable in light of his decision to enter a guilty plea and the fact that his guilty plea was tendered on the understanding that he would be able to seek appellate review of the transfer order requires us to vacate the trial court's judgment and to allow Defendant the opportunity to withdraw his plea and either go to trial or seek to negotiate a new plea agreement. In support of this assertion, Defendant argues that, in the event that a defendant pleads guilty to committing a criminal offense in return for certain promises, he or she has the right to withdraw his guilty plea in the event that he or she cannot obtain the benefit of the bargain embodied in the plea agreement. We do not find this argument convincing.

1. Appealability of the Transfer Order

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

> A defendant who pleads guilty has a right of appeal limited to the following:
>
> 1. Whether the sentence "is supported by the evidence." This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
>
> 2. Whether the sentence "[r]esults from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21." N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);

> 3. Whether the sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
>
> 4. Whether the sentence "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
>
> 5. Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);
>
> 6. Whether the trial court improperly denied defendant's motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003) (alterations in original). In *State v. Evans*, 184 N.C. App. 736, 738-39, 646 S.E.2d 859, 860 (2007), this Court specifically addressed a situation in which the defendant pled "guilty . . . to second-degree murder and assault with a deadly weapon with intent to kill" while "attempt[ing] to preserve the right to appeal issues related to his transfer from District Court to Superior Court for trial as an adult" and held that, since the defendant's "appeal following his guilty plea does not fall within any of the categories of appeal permitted under [N.C. Gen. Stat. § 15A-1444]" and since the defendant "ha[d] not petitioned for a writ of certiorari," "we lack[ed] jurisdiction to consider Defendant's appeal" and dismissed it. As a result, it is clear, in light of *Evans*, that a defendant who enters a plea of guilty has no statutory right to appeal the allowance of an order transferring his or her case from juvenile court to the Superior Court.

2. Adequacy of the Trial Court's Plea Colloquy

According to Defendant, the fact that his "plea agreement expressly reserve[d] the right to appeal the district court's decision to transfer him to superior court" coupled with the fact that his decision to enter a guilty plea forfeited his right to challenge the validity of the transfer order on appeal establishes that his "plea was not the product of an informed choice because he cannot get the benefit of his plea bargain." In essence, Defendant contends that the fact that the entry of his plea was conditioned on a reservation of the right to take an action that he

was precluded from taking established that he had not knowingly, voluntarily, and understandingly pled guilty to the offenses reflected in the trial court's judgment. Defendant's argument is not persuasive in light of the unusual facts present in this case.[1]

As the Supreme Court has stated:

> a plea of guilty . . . may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty . . . unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated . . . . If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly . . . [and that] the nature and consequences of the plea [had] been explained to defendant *in open court*.

State v. Ford, 281 N.C. 62, 67-68, 187 S.E.2d 741, 745 (1972). Although "a plea agreement arises in the context of a criminal proceeding, [and] remains in essence a contract," "it is markedly different from an ordinary commercial contract" because, "[b]y pleading guilty, a defendant waives many constitutional rights, not the least of which is his right to a jury trial." *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), (citing *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993), and *State v. Pait*, 81 N.C. App. 286, 289, 343 S.E.2d 573, 576 (1986)), *remanded on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (2000). As a result, a defendant is entitled to relief from a trial court's judgment in the event that his decision to enter a guilty plea did not result from an informed choice. *See* N.C. Gen. Stat. § 15A-1022(b) (providing that a "judge may not accept a plea of guilty . . . without first determining that the plea is [the] product of [an] informed choice"). The extent to which a criminal defendant who entered a negotiated plea of guilty failed to make an informed choice by virtue of the fact that he did not get the benefit of his bargain is a question of law subject to *de novo* review. *State*

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1. In his brief, Defendant notes that he was still a juvenile at the time that the trial court accepted his guilty plea and argues that his age should be taken into account in evaluating the extent to which his plea was knowingly, voluntarily, and understandingly entered. However, given that Defendant has not argued that any of the trial court's comments would not have been readily understood by a person of Defendant's age and the fact that Defendant expressed comprehension of the trial court's comments about the likelihood that he would be able to obtain appellate review of the transfer order in the event that he persisted in pleading guilty, we are unable to see anything about Defendant's level of maturity that calls for a different outcome than the one set out in the text with respect to this issue.

v. Demaio, __, N.C. __, __, 716 S.E.2d 863, 867 (2011) (stating that the issue of whether a defendant's "plea was not the product of informed choice because he cannot get the benefit of his plea bargain . . . presents a question of law, and, as such, is reviewed *de novo*").

In seeking to persuade us that he is entitled to relief from the trial court's judgment, Defendant emphasizes our decision in *Demaio*, in which the defendant entered a negotiated plea of guilty pursuant to a plea agreement in which "he preserved the right to appeal the denial of his motion to dismiss and motion *in limine*." *Id.* at __, 716 S.E.2d at 865. More specifically, the defendant in *Demaio* "pled guilty on the condition that 'his right to appeal the court's denial of his motion to dismiss and [] motion to limit expert testimony' was preserved." *Id.* at __, 716 S.E.2d at 868 (alteration in original). As a result of the fact that the defendant had "no statutory right to appeal [the denial of his] motions . . . [and the fact that] this Court [concluded that it lacked the authority to] grant certiorari to review either of [his] motions," we held that, "because there [was] no way for Defendant to achieve his end of the plea bargain, his plea bargain violated the law," so that the defendant should be "place[d] . . . back in the position he was before he struck his bargain." *Id.*

Unlike the situation present in *Demaio* and a number of other cases in which this Court has determined that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue had the effect of rendering a plea agreement unenforceable, *e.g.*, *State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008) (vacating a plea agreement which provided that "*the defendant's pretrial motions shall be preserved for appeal*" because the defendant "was entitled to receive the benefit of his bargain" and could not receive that benefit due to the fact that his guilty plea precluded appellate review of the issues raised by those motions), *disc. review denied*, 363 N.C. 588, 684 S.E.2d 37 (2009), Defendant had ample notice that the provision in his plea agreement reserving his right to challenge the validity of the transfer order on appeal was, in all probability, unenforceable and elected to proceed with his guilty plea in spite of the fact that he knew that the provision in question was of questionable validity. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Demaio*.

At the time that Defendant tendered his plea of guilty, his trial counsel noted that, while "keeping his right to appeal the transfer to superior [court], he pleads guilty to these charges." Upon hearing this statement, the trial court inquired if "the statute allows you to preserve for Raleigh the decision by the Superior Court judge on the review of the District

Court judge's decision" and was told by Defendant's trial counsel that, "[a]s far as I can find, all I had to do was be sure we appeal the transfer to preserve that." At the trial court's suggestion, language reserving Defendant's right to seek appellate review of the transfer order was added to Defendant's plea transcript. As the plea colloquy continued, the trial court and Defendant discussed certain limitations on a defendant's ability to note an appeal after entering a guilty plea, the State provided a factual basis for Defendant's plea, and an explanation was offered for Defendant's decision to enter a negotiated plea of guilty. At that point, the trial court expressed concern about the fact that Judge Pittman had not made sufficient findings and conclusions in his transfer order and recessed court to examine the validity of his concerns about the transfer order.

As soon as court resumed after the conclusion of the lunch recess, the prosecutor argued, in reliance upon *Evans*, that the transfer order was valid and that Defendant did not have the right to seek appellate review of that order in the event that he entered a guilty plea. According to the prosecutor:

> In my research, though, I did find that the defendant cannot preserve his appeal if he does enter a guilty plea. That is clearly spelled out in the *Evans* case, and also there is another case, *Moore*, which stated that if a defendant did plead guilty, he could not preserve his appeal of the transfer order.

After noting that he had dissented from the decision in *Evans* and inquiring if any more recent decision addressed the appealability of a transfer order following the entry of a guilty plea, Judge Levinson engaged in a colloquy with counsel for the parties concerning the extent, if any, to which Defendant would actually be entitled to seek appellate review of the transfer order:

> THE COURT: . . . I just want to make sure you've had a chance to talk with him just so he understands that it appears that there is a good chance, though I can't speak for the Court of Appeals, but at least by current law it appears that that decision by Judge Pitts, I think it was, I don't know him or her, but Judge Pitts, or Pittman?
>
> [DEFENDANT]: Pittman.
>
> THE COURT: Where there's a guilty plea as opposed to being convicted as a consequence of a jury verdict, that that decision by Judge Pittman is not reviewable and

-- by a later court. And I want to make sure you've had a chance to talk with him about that and he understands it.

[DEFENDANT]: We've talked about it. It's, I mean, I'm giving him the best I can understand, and that's coming from a guy that just got notified by the scooter store he qualified, so . . .

THE COURT: Well, so, Mr. Tinney, do you understand generally what I'm talking about here?

THE DEFENDANT: Yes, sir.

THE COURT: You want to repeat back to me what I've tried to tell you here about whether you have a right -- or whether or not you think the Court of -- do you understand -- let me put it this way. Do you understand that by pleading guilty here, and I'm going to appoint the public appellate defender's office in Durham to represent you on the appeal, but it appears that there's a pretty good chance that the Court of Appeals is not going to review again the decision that the District Court judge made here to transfer your case to Superior Court for hearing. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you're prepared still to move forward on the basis that we've discussed this morning in terms of your guilty plea?

THE DEFENDANT: Yes, sir.

In addition to engaging in this discussion with Defendant, the trial court added a notation to Defendant's plea transcript referencing this on-the-record discussion of the appealability of the transfer order in light of *Evans* and *Moore*. As a result, the record clearly establishes that, at the time that he entered his guilty plea, Defendant had been clearly informed and fully understood that, in the event that he proceeded to enter his negotiated plea of guilty, he would, in all probability, not be able to obtain appellate review of the transfer order.

According to our decision in *Demaio*, a guilty plea entered pursuant to a transcript of plea which purports to reserve the right to seek appellate review of a particular legal issue which is not subject to such review following the entry of a guilty plea does not result in the entry of a plea which "is a product of informed choice." N.C. Gen. Stat. § 15A-1022(b).

However, unlike the situation at issue in *Demaio*, in which the defendant was never advised that the "preservation of rights" provision in his plea agreement was invalid, the trial court interrupted the taking of Defendant's plea, examined the issue of whether a defendant could seek appellate review of the lawfulness of an order transferring a case from the juvenile courts to the Superior Court under such circumstances, and specifically informed Defendant that there was a "good chance, though I can't speak for the Court of Appeals[,] . . . that [the] decision by Judge Pittman is not reviewable." Although Defendant acknowledges that the trial court discussed the likelihood that the Court of Appeals would hold that the transfer order was not subject to appellate review in light of his guilty plea, he asserts that the advice that the trial court gave to Defendant "was insufficient" on the grounds that, while his plea "was based on his understanding that there was at least some possibility that the appellate courts would review the decision to transfer his case to [S]uperior [C]ourt for trial as an adult," "there was no chance that [this Court] would review [the transfer] decision." As a result, the ultimate issue raised by Defendant's challenge to the validity of his guilty plea is whether the trial court's advice concerning the likely outcome of an attempt to seek appellate review of the transfer order in the aftermath of the entry of his guilty plea was sufficiently definitive to support a determination that Defendant's guilty plea was entered knowingly, voluntarily, and understandingly.

The record clearly reflects that Defendant should have had little doubt about the appealability of the transfer order in the event that he entered a guilty plea in the aftermath of his colloquy with the trial court. Both the prosecutor and the trial court cited the controlling decision of this Court and clearly informed Defendant that the likelihood that he would be able to obtain appellate review of the transfer order was extremely low. Although the trial court did not definitively state that Defendant had absolutely no right to successfully obtain a decision from this Court addressing the merits of his challenge to the transfer order, he could have scarcely reached any conclusion other than that the likelihood that he would be able to obtain relief from the trial court's judgment by challenging the transfer order on appeal was extremely remote. Given that set of circumstances, we are unable to conclude that the trial court's decision to speak in terms of probabilities rather than certainties justifies a decision to set the trial court's judgment aside. Thus, we conclude that, in light of the steps taken by the trial court to advise Defendant of the likelihood that his attempt to reserve his right to seek appellate review of the transfer order would prove unsuccessful, Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

B. Ineffective Assistance of Counsel

[2] Secondly, Defendant argues that he should receive relief from the trial court's judgment on the grounds that he received ineffective assistance from his trial counsel. More specifically, Defendant argues that a "reasonable attorney would have informed his client that the plea agreement was invalid and objected to the entry of the plea." We do not believe that Defendant's contention has merit.

> 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, 695, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)) (quoting *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)) (citations and quotation marks omitted). As a result, in order to assert a successful ineffective assistance of counsel claim, it is not enough to simply show that the representation provided by the defendant's counsel was constitutionally inadequate. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 209-10 (1985) (holding that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel" and that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas"). Thus, in order "[f]or a defendant to show that ineffective counsel was harmful, he must show that there is a reasonable probability that, but for counsel's error, he would not have entered a plea of guilty." *State v. Russell*, 92 N.C. App. 639, 644, 376 S.E.2d 458, 461 (1989).

Assuming, without in any way deciding, that Defendant received constitutionally deficient advice from his trial counsel concerning the extent to which he had the right to seek appellate review of the transfer order following the entry of his guilty plea, we are unable to conclude

that Defendant can show the prejudice necessary to justify a decision to overturn his conviction. Simply put, as we have already explained, any indication that Defendant may have received ineffective assistance from his trial counsel to the effect that he could seek and obtain appellate review of the trial court's transfer order after entering a guilty plea was clearly dispelled by the trial court's warning that "there's a pretty good chance that the Court of Appeals is not going to review" a challenge to the lawfulness of the transfer order under the circumstances at issue here. In spite of the fact that he was clearly advised that his chances of obtaining appellate review of the transfer order after entering a guilty plea were, at best, remote, Defendant persisted in entering a plea of guilty in accordance with the terms set out in his plea agreement. Having made that decision with full knowledge of the virtually nonexistent likelihood that his attempt to reserve the right to seek appellate review of the transfer order would prove successful, we are unable to conclude that there is any reasonable likelihood that he would have withdrawn from his plea agreement and refrained from entering a guilty plea had his trial counsel correctly advised him that this Court would refuse to consider his challenge to the transfer order in the event that he persisted in pleading guilty. Moreover, given our determination that information contained in the existing record demonstrates that Defendant cannot make the necessary showing of prejudice, we have no difficulty in deciding that "the cold record reveals that no further investigation is required" and that Defendant's claim can 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), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). As a result, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of his ineffective assistance of counsel claim.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
RAYMOND WATKINS, DEFENDANT

No. COA13-260

Filed 17 September 2013

1. Appeal and Error—writ of certiorari—failure to timely pursue appeal—no fault of defendant

Defendant's petition for writ of *certiorari* was allowed and the State's motion to dismiss his appeal was denied. Defendant lost his right to prosecute an appeal by failure to take timely action due to an oversight by the trial court in failing to file the appellate entries despite defendant's notice of appeal.

2. Jurisdiction—sentencing—insufficient findings of fact

The trial court's findings of fact regarding its jurisdiction to sentence defendant were insufficient and the issue was remanded for a *de novo* re-sentencing hearing to allow for findings on that issue.

On Writ of Certiorari to review judgment entered on or about 3 July 2008 by Judge James L. Baker, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 29 August 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 Hannah Hall, for defendant-appellant.

STROUD, Judge.

Raymond Watkins ("defendant") appeals the judgment entered 3 July 2008 after he pled guilty to financial card theft and attaining the status of a habitual felon. For the following reasons, we remand for a new sentencing hearing.

I. Background

On 15 November 2004, defendant pled guilty to financial card theft and having attained habitual felon status. Pursuant to a plea agreement, prayer for judgment was continued to 24 January 2005; by consent of

both parties it was continued again until 23 January 2006; and, for reasons that are unclear from the record, it was postponed and rescheduled no less than five more times in 2006. In the interim, defendant was dealing with several federal criminal matters: in April 2005 he was arrested for a federal probation violation and sentenced to a year in federal custody, and in June 2006 he was convicted for possession of a firearm by a felon and sentenced to sixty months in federal prison. Ultimately, defendant was not sentenced in this case until 5 February 2007, more than a year after the date to which sentencing was last continued.

At the 5 February 2007 sentencing hearing, defendant contended the trial court was divested of jurisdiction to sentence him because of the lengthy delay. The State responded by speculating that the delay was caused by difficulties transferring defendant from the federal prison system to state court for a hearing. Without further discussion of the issue, the trial court found "in its discretion" that it did have jurisdiction to pronounce a sentence. It then sentenced defendant to a minimum of 64 and a maximum of 85 months imprisonment, the sentence to run concurrently with the federal sentence defendant was serving at the time.

The State appealed, and in an opinion filed 3 March 2008 this Court held the sentence was erroneous because the penalty imposed fell below the statutory minimum and because the trial court imposed a concurrent sentence of imprisonment when a consecutive one was required by N.C. Gen. Stat. § 14-7.6. *See State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008). While defendant again raised the issue of jurisdiction in his appellee's brief, he did not cross-appeal and this Court did not address the issue of jurisdiction in its opinion. *Id.*

After the sentence was vacated and remanded by this Court, a re-sentencing hearing was held on 3 July 2008. Defendant again challenged the trial court's jurisdiction to pronounce a sentence, and the trial court again overruled defendant's objection—this time on grounds that the trial court was reluctant to contradict the original trial judge's finding on jurisdiction and that it was "clothed with jurisdiction by the appellate order." Because he was convicted of a class C felony[1] with a prior record level IV, defendant was sentenced to imprisonment for a minimum term of 80 months and a maximum term of 105 months. Defendant gave oral notice of appeal at the close of the re-sentencing hearing.

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1. Defendant was convicted of financial card theft, a Class I felony, and attaining habitual felon status, which raises the punishment to that of a Class C felony.

II. Petition for Writ of Certiorari and Motion to Dismiss Appeal

[1] Defendant's appeal comes to this Court under a rather unusual set of circumstances. Defendant gave oral notice of appeal on 3 July 2008. Yet, apparently due to an administrative oversight, the trial court did not complete defendant's appellate entries until more than four years later, on 13 September 2012.

On 1 April 2013, defendant filed a petition for writ of certiorari in this Court "to permit appellate review of the July 3, 2008 Judgment and Commitment because [defendant] has lost his right to prosecute an appeal by failure to take timely action due to no fault of his own." The State responded on 9 April 2013 and filed a motion to dismiss the appeal pursuant to N.C.R. App. P. 25(a), arguing defendant failed to timely "take any action required to present the appeal for decision."

The State argues that because no order establishing defendant's indigency *for the appeal* was entered on 3 July 2008, defendant had fourteen days to contract for the transcript under N.C.R. App. P. 7 and, by missing this and subsequent deadlines, defendant failed to comply with the rules. We need not reach this issue because, in any event, it would be inappropriate to punish defendant for what was clearly an oversight on the part of the trial court in failing to file the appellate entries despite defendant's notice of appeal. We therefore allow defendant's petition for writ of certiorari, deny the State's motion to dismiss, and proceed to the merits of defendant's appeal.

III. Re-Sentencing

[2] On appeal, defendant contends the trial court (1) lacked jurisdiction to sentence defendant because the State failed to move for imposition of the sentence within a reasonable time after the last date to which prayer for judgment was continued, (2) erred in finding that a trial court cannot enter a prayer for judgment continued in a case involving habitual felon status, (3) erred in sentencing defendant at a prior record level IV because the State failed to present sufficient evidence regarding defendant's prior convictions, and (4) impermissibly used two prior convictions to establish both defendant's prior record level and defendant's habitual felon status. Because we hold the trial court's findings on the threshold issue of jurisdiction were insufficient and remand for a *de novo* re-sentencing hearing to allow for findings on that issue, we do not address defendant's remaining arguments.

A. Sentencing Jurisdiction

Once a guilty plea is accepted in a criminal case, a trial court may continue the case to a subsequent date for sentencing. *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993); N.C. Gen. Stat. § 15-1334(a) (2007). "A continuance of this type vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated." *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993). Although the General Statutes appear to authorize the State to move for imposition of a sentence "[a]t any time" when a prayer for judgment has been continued, N.C. Gen. Stat. § 15A-1416(b)(1) (2007), we have held that "the State's failure to do so within a reasonable time divests the trial court of jurisdiction to grant the motion." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493. Yet even when a prayer for judgment is continued to a date certain and a sentence is not imposed until long after that date, a trial court is not stripped of jurisdiction to impose the sentence "[a]s long as a prayer for judgment is not continued for an unreasonable period . . . and the defendant was not prejudiced." *Absher*, 335 N.C. at 156, 436 S.E.2d at 366.

We have previously noted several factors relevant to determining whether sentencing has been continued for "an unreasonable period," such as "the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493. In any case, a defendant's failure to request sentencing on the last date to which a prayer for judgment has been continued "is tantamount to his consent to a continuation of the sentencing hearing beyond that date." *Id.* at 641–42, 430 S.E.2d at 493.[2]

Here, defendant contends the trial court that imposed his original sentence on 5 February 2007 was divested of jurisdiction because prayer for judgment was last continued to 23 January 2006 and he was not sentenced until one year and thirteen days after that date. Relying on the factors we considered in *Degree*, defendant argues that this delay was without valid justification, was unreasonable in length, occurred without defendant's consent, and resulted in prejudice to defendant. If true, this jurisdictional defect would likewise infect the 3 July 2008 re-sentencing

2. The Legislature recently enacted N.C. Gen. Stat. § 15A-1331.2, which governs prayers for judgment continued for certain felonies. Nevertheless, we do not reach the issue of how this statute affects the rules laid out in *Degree* and *Absher* as the statute only applies to offenses committed on or after 1 December 2012, 2012 N.C. Sess. Laws 149, §§ 11, 12, and is therefore inapplicable in the present case.

hearing because (1) the trial court simply relied on the original trial court's finding of jurisdiction,[3] and (2) the trial court wrongly concluded it was "clothed with jurisdiction by" this Court on remand when the issue of jurisdiction was not addressed by our previous opinion in this case.

Of course, if we had determined that the trial court possessed jurisdiction, it would be bound by that determination. Here, however, the issue of jurisdiction was not expressly determined by this Court. Moreover, the trial court's jurisdiction it was not "necessarily involved in determining the case" before us and was not "embodied in the determination made by the Court." *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956). While "an appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*," *Herman*, ___ N.C. App. at ___, 726 S.E.2d at 866 (quotation marks omitted), it does not follow that the Court *necessarily* did so here. Such an assumption is especially questionable where, as here, the parties agreed that jurisdiction is an issue to be resolved on remand.

Defendant argued in his appellee's brief filed in response to the State's 2007 appeal almost verbatim what he argues now—that the record raises a colorable issue of jurisdiction, but that the facts may need to be more fully developed in the trial court. In its reply brief in the first appeal on this matter, the State contended the issue of jurisdiction ought to be set aside and the issue re-addressed by the trial court on remand for re-sentencing. The State specifically argued:

> [T]he record is simply not developed well enough at this time for meaningful review [of defendant's jurisdictional challenge], especially when it comes to the matter of whether defendant ever sought imposition of judgment. The reasons for the delay in sentencing and the matter of actual prejudice also need further development. . . . Any hearing on the jurisdiction of the trial court to enter judgment should afford both sides full opportunity to present their positions and should permit a trial judge opportunity to make a well informed determination of jurisdiction that lends itself to effective appellate review. At this point review of this jurisdictional issue will not be effective and will not lend itself to principled decision making. . . . A decision now in this appeal in favor of the State would not

3. The original sentencing court also made no findings relevant to whether the delay in sentencing was reasonable. It simply announced "in its discretion" that it had jurisdiction.

> necessarily preclude a subsequent challenge by defendant to the trial court's jurisdiction to enter a judgment modified to comport with statutory requirements. This is particularly true if the Court made its decision without prejudice to defendant to raise the jurisdictional issue by applicable means in the superior court. In all events, the State says this Court should decide the appeal on its merits and let the parties concern themselves with litigating the jurisdictional issue in the court below.

This Court apparently agreed and did not address the jurisdictional issue. Thus, the issue of jurisdiction was not "necessarily involved in determining the case" before us and was not "embodied in the determination made by the Court." *See Hayes*, 243 N.C. at 536, 91 S.E.2d at 681–82. Because the issue of jurisdiction was not decided on appeal and was left for further consideration by the trial court during re-sentencing, the trial court could not have been "clothed with jurisdiction" by this Court's previous opinion.

Furthermore, although defendant failed to cross-appeal the issue of jurisdiction initially, nothing in our case law suggests that once the trial court loses jurisdiction due to an unreasonable delay in sentencing, it can somehow regain it. Moreover, "[i]t is well-established that the issue of a court's jurisdiction over a matter may be raised at any time." *State v. Shaw*, ___ N.C. App. ___, ___, 737 S.E.2d 596, 600 (2012) (citation and quotation marks omitted). Thus, defendant's failure to cross-appeal the original determination of jurisdiction is not fatal to his jurisdictional argument in this appeal.[4]

The one-year delay here was not unreasonable in and of itself. *See State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 133 (2003) (finding that when delay was due to *defendant's* successful appeal, over five-year delay in sentencing was not unreasonable); *State v. Pakulski*, 106 N.C. App. 444, 452, 417 S.E.2d 515, 520 (finding a five and a half year delay reasonable where much of the delay was "attributable" to the defendants), *disc. rev. denied*, 332 N.C. 670, 424 S.E.2d 415 (1992).

Nevertheless, there are insufficient facts in the record for this Court to weigh the remaining three factors we considered in *Degree*. Thus, we must remand for a *de novo* sentencing hearing. Specifically, the trial

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4. This case is not one where the original sentencing court made relevant findings of fact that were not challenged on appeal. *Cf. State v. Richmond*, ___ N.C. App. ___, ___, 715 S.E.2d 581, 583 (2011) (noting that "findings of fact to which defendant failed to assign error are binding on appeal" (citation and quotation marks omitted)).

court should take evidence and make findings on (1) whether the delay in sentencing defendant had any valid justification tied to defendant's incarceration in federal prison in 2005 and 2006—for instance, whether his federal incarceration hampered the State's efforts to sentence defendant in North Carolina court; (2) whether defendant consented to the delay in sentencing by failing to request sentencing on or around 23 January 2006, *compare Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (stating that a defendant's failure to request sentencing on the last date to which prayer for judgment is continued is "tantamount to his consent to a continuation of the sentencing hearing beyond that date."), *with Lea*, 156 N.C. App. at 181, 576 S.E.2d at 133 ("a prayer for judgment may not be continued over the defendant's objection." (citation and quotation marks omitted)); and (3) whether defendant was in fact prejudiced. Without further factual findings from the trial court on these questions, any attempt by this Court to conclusively decide whether the trial court was stripped of jurisdiction due to an "unreasonable" delay in sentencing would be based on pure speculation.

Jurisdiction is a condition precedent to a trial court's authority to impose a sentence upon criminal defendants. *See State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502 (1977) ("jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of a court to enter judgment."). Here defendant contested jurisdiction at both the 5 February 2007 hearing and the 3 July 2008 hearing. In each instance the trial court found it had jurisdiction to sentence defendant, but the record contains insufficient information to permit an appropriate review of defendant's argument on that point. We therefore remand this case for a *de novo* sentencing hearing in accordance with this Court's holding in *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493, so the trial court can properly consider the jurisdictional issue raised by defendant.

IV. Conclusion

The record in this case lacks the information necessary for this Court to properly consider defendant's objection to the trial court's jurisdiction. Therefore, the trial court's judgment must be reversed and this case remanded for a *de novo* sentencing hearing so the trial court may have an opportunity to take evidence and make findings relevant to this issue.

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
STEVEN LYNN BARBOUR

No. COA12-990

Filed 17 September 2013

1. Jury—verdict sheet—examination by judge—outside presence of parties—resume deliberations

The trial court did not commit plain error in a robbery and homicide case by examining outside of the presence of the parties the verdict sheet returned by the jury, rejecting the verdict, directing the jury to resume deliberations without allowing counsel to examine the jury verdict sheet, and failing to preserve the verdict sheet for the record. The trial court preserved the original answers of the jury on the verdict sheet and the Court of Appeals was able to discern the jury's intent.

2. Criminal Law—prosecutor's closing argument—no *ex mero motu* intervention required

The trial court did not err in a robbery and homicide case by failing to intervene *ex mero motu* during the State's closing argument where the State made one reference to evidence that was not before the jury in its closing argument, and the judge instructed the jury to follow their own recollection of the evidence.

3. Constitutional Law—right to remain silent—evidence of silence—no error

The trial court did not commit plain error in a robbery and homicide case by allowing the State to present evidence of defendant's post-*Miranda* exercise of his right to remain silent where there was no evidence in the record that defendant exercised his right to remain silent. Furthermore, even assuming arguendo that defendant did exercise this right, the State's re-direct examination of a witness was not a comment on defendant's right to remain silent.

Appeal by defendant from judgment entered 29 September 2011 by Judge R. Stuart Albright in Wayne County Superior Court. Heard in the Court of Appeals 8 May 2013.

Roy Cooper, Attorney General, by Gary R. Govert, Assistant Solicitor General, for the State.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Where the actions of the trial court preserved the original answers of the jury on the verdict sheet, and we are able to discern the jury's intent, the trial court did not err in directing the jury to resume deliberations without allowing counsel to examine the jury verdict sheet. Where the State made one reference to evidence that was not before the jury in its closing argument, and the judge instructed the jury to follow their own recollection of the evidence, it was not error for the trial court to fail to intervene *ex mero motu*. Where the State's re-direct examination of a witness was not a comment on defendant's right to remain silent, it was not plain error to allow this testimony.

I. Factual and Procedural Background

On the morning of 3 December 2009, the body of Jamie Hinson was discovered at the Evergreen Cemetery in Wayne County. The body had multiple areas of blunt force impact, bruises, laceration to the face, broken ribs, fractured fingers, a fractured skull, and six stab wounds to the neck.

On 6 December 2010, Steven Barbour (defendant) was indicted for robbery with a dangerous weapon and the first-degree murder of Jamie Hinson. On 29 September 2011, the jury found defendant guilty of robbery with a dangerous weapon and first-degree murder, based upon felony murder, but not based upon malice, premeditation and deliberation. The trial court arrested judgment on the robbery conviction, and sentenced defendant to life imprisonment without parole for first-degree murder.

Defendant appeals.

II. Failure to Preserve the Verdict Sheet

[1] In his first argument on appeal, defendant contends that the trial court erred in examining the verdict sheet returned by the jury outside of the presence of the parties, rejecting the verdict, and failing to preserve the verdict sheet for the record. We disagree.

A. Standard of Review

> Our "statutes do not specify what constitutes a proper verdict sheet [,] ... [n]or have our Courts required the verdict

> forms to match the specificity expected of the indictment." A verdict is deemed sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions." Normally, where the defendant appeals based on the content of the verdict sheet but failed to object when the verdict sheet was submitted to the jury, any error will not be considered prejudicial unless the error is fundamental. Violations of constitutional rights, such as the right to a unanimous verdict, however, are not waived by the failure to object at trial and may be raised for the first time on appeal.

State v. Wiggins, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citations omitted).

> 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 right, viewed in light of the entire record, the error was not plain error).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

"The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion." *State v. Hampton*, 294 N.C. 242, 247, 239 S.E.2d 835, 839 (1978).

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2011).

B. Analysis

After charging the jury, the trial court submitted two issues to the jury: whether defendant was guilty of first-degree murder, guilty of second-degree murder, or not guilty; and whether defendant was guilty or not guilty of robbery with a dangerous weapon. If the jury found defendant guilty of first-degree murder, it was to state whether this was based upon malice, premeditation and deliberation, and whether this was also based upon felony murder. The trial court gave the jury a written copy of its instructions. The jury announced that it had reached a unanimous verdict. The trial court received the verdict sheet, examined it, and then instructed the jury:

> Okay. I've reviewed the verdict sheet.
>
> I'm going to instruct the jury to ans -- well, let me have the attorn -- well ... Count I, you need to answer yes or no, okay? Beside what your verdict is. If you're find -- well . . . the first question you answer yes or no. Okay?
>
> The second -- if you've answered the first question no, you go to the second question, and you answer it yes or no. If you answer it no, you go to the third question, which is not guilty, which would be yes. Okay?
>
> I'm not encouraging or discouraging any answer, but I need you to clearly indicate what your verdict is. Simply answer yes or no as to what your verdict is. Okay?
>
> Yes means that's your answer for that particular question. No means it's not. Okay?
>
> Sheriff, if you'll approach the bench. Give the verdict sheet to the jury. Have them return to the jury room to resume deliberations.

The verdict sheet was returned to the jury without further discussion of its contents with the parties, and the jury was sent back to the jury room for further deliberations. The trial court then stated:

> Okay. The Court reviewed -- let the record reflect all 12 jurors have left the courtroom.
>
> The Court, in reviewing Count I -- Count II had been clearly answered.
>
> Count II -- Count I, there were scribbles, and there was a circle. There was not a yes or a no as to first degree

> murder, but there were scribbles on it. I did not understand what it meant. But there was nothing answered, for the second question, to second degree murder or for not guilty. You heard what I said in response to my reviewing the verdict sheet.
>
> The Sheriff then approached me and said that the jurors made a mistake and want a new verdict sheet.

The trial court then asked whether either party objected to the instruction it had given the jury. Both counsel responded in the negative. The trial court then asked if the parties had any objections to the fact that the jury had requested a new verdict sheet. Once again, both parties responded in the negative, although defendant requested that if a new verdict sheet was submitted to the jury, that the original verdict sheet be preserved for the record. The trial court then asked:

> THE COURT: What about if I bring the jury back in, for the State, and just tell them to write their answers just -- instead of -- if they've already messed up in the spaces that were provided, just write it right next to the space provided as opposed to that?
>
> Any objection from the State?
>
> MR. DELBRIDGE: No, sir.
>
> THE COURT: How about from the Defendant?
>
> MR. FISHER: No, your Honor.

Subsequently, the trial court brought the jury back into the courtroom and informed it that it would not receive a new verdict sheet. Instead, the jury was directed to "[r]ecord [its] answers in the space next to the space provided." The jury was then sent back to the jury room for further deliberations. Subsequently, there was a conference with the attorneys at the bench, which was not documented in the record.

The verdict sheet offered the jury the option of finding defendant guilty of first-degree murder, based on either malice, premeditation and deliberation and/or felony murder, or second-degree murder, or not guilty; and of finding defendant guilty or not guilty of robbery with a dangerous weapon. On the robbery charge, the jury wrote "yes" in the blank space next to "Guilty of Robbery with a Dangerous Weapon." However, on the murder charge, whatever was originally written in the blank to indicate whether defendant was guilty of first-degree murder was blotted out. Out to the side was written "yes," and it was initialed by the

foreperson of the jury. The original answer as to whether the murder conviction was based upon malice, premeditation and deliberation was blotted out, but in the blank space was written "no." Out to the side of this question, "no" was again written, and initialed by the foreperson. The original answer to whether defendant was guilty of first-degree murder under felony murder was "yes," with none of the answer blotted out. Out to the side, a second "yes" was written. Both "yes" answers were initialed by the foreperson. The trial court's description of these markings was consistent with the verdict sheet contained in the record.

Defendant contends that the trial court's alleged error was a violation of defendant's constitutional right to a unanimous jury verdict. We have traditionally found such error when a jury instruction was sufficiently ambiguous that it was impossible to determine "whether the jury unanimously found that the defendant committed one particular offense." *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991). In the instant case, however, no such ambiguity exists; the markings on the verdict sheet clearly indicate that, both before and after the trial court's supplemental instructions, the jury had marked "no" on the issue of guilt of first-degree murder based upon malice, premeditation and deliberation, and "yes" based upon felony murder. The jury clearly determined that defendant was guilty of first-degree murder only under the felony murder rule.

While it would have been preferable for the trial court to have excused the jury from the courtroom, and allowed counsel to view the verdict sheet and to be heard prior to the court's instructions to the jury, we can discern no prejudice to defendant based upon what happened following the initial return of the verdict sheet by the jury. By instructing the jury to mark their verdict "in the space next to the space provided," the trial court preserved the original markings on the verdict sheet. As discussed above, the only place where the basis of the first-degree murder verdict was blotted out was that as to malice, premeditation and deliberation. That issue was ultimately answered in favor of the defendant. There can thus be no prejudice to defendant arising out of the actions of the trial court. As to the answer to the question of whether defendant was guilty of first-degree murder under the felony murder rule, this answer was not blotted out, and was clearly and unequivocally answered "yes" by the jury. Given the answer to that question, the jury had to answer the issue of guilty of first-degree murder "yes." We hold that the trial court's handling of the verdict sheet was not error or plain error.

This argument is without merit.

III. Failure to Intervene in Closing Arguments

[2] In his second argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

A. Standard of Review

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

B. Analysis

Defendant contends that the State, in its closing arguments, made arguments that were not supported by the evidence. Defendant further contends that the trial court erred in failing to intervene *ex mero motu*.

Defendant called Tracey Deaver to testify at trial. While in prison, Deaver had met Joseph Lanier, who testified for the State that defendant murdered Jamie Hinson. On direct examination, Deaver testified that Lanier told him that he had murdered Hinson. On cross-examination, the State asked Deaver several times whether Deaver had been placed in a separate prison cell due to his complaining of hearing voices. Deaver denied having heard voices, although he admitted to having been placed in a separate prison cell.

In its closing argument to the jury, the State argued that Deaver had heard voices. Defendant contends that this was an improper closing argument, because there was no evidence that Deaver had heard voices.

Defendant did not object to this argument at trial. This is the only portion of the State's argument to which defendant objects on appeal.

We fail to see how this one misstatement of fact by the State, alone amidst a sea of arguments not objected to by defendant, was "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107; *see also State v. Barden*, 356 N.C. 316, 346, 572 S.E.2d 108, 129 (2002) (failure to intervene upon reference to defendant's ethnicity was not error); *State v. Fair*, 354 N.C. 131, 153, 557 S.E.2d 500, 517 (2001) (failure to intervene upon challenge to defendant's credibility was not error); *State v. Fletcher*, 348 N.C. 292, 322-23, 500 S.E.2d 668, 685-86 (1998) (failure to intervene upon observation that defendant offered no evidence was not error).

Further, in the instant case, the trial court instructed the jury, "if your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence." We have previously held that a defendant could not demonstrate prejudice where the State's closing remarks were cured by the trial court's subsequent instructions to the jury. *State v. Goss*, 361 N.C. 610, 626-27, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Even assuming *arguendo* that the State's remarks were improper, therefore, this instruction reminding the jury to rely on its own recollection, instead of that of the State, cured any defect.

This argument is without merit.

IV. Admission of Post-*Miranda* Evidence

[3] In his third argument, defendant contends that the trial court committed plain error by allowing the State to present evidence of defendant's post-*Miranda* exercise of his right to remain silent. We disagree.

A. 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 Goss*, 361 N.C. at 622, 651 S.E.2d at 875.

> [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, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)) (emphasis in original).

B. Analysis

The State presented the testimony of Detective Michael Kabler (Kabler) of the Wayne County Sheriff's Department. Kabler had interviewed defendant prior to his arrest, during which time defendant was advised of his *Miranda* rights. On cross-examination, defense counsel examined Kabler at length concerning his interviews of Tara Sparks and Joseph Lanier concerning the murder, and why Kabler didn't discuss the substance of those interviews with defendant.

On re-cross examination, defendant again asked Kabler why he didn't ask to interview defendant at the jail after having spoken with Sparks and Lanier. The State objected to this questioning, and the trial court excused the jury from the courtroom to hear counsel's arguments on the objection. The trial court overruled the objection. After the jury returned to the courtroom, defendant asked Kabler if he could have made an effort to ask defendant about what Sparks and Lanier had said. Kabler responded that it was "possible" that he could have attempted to speak further with defendant.

On redirect, the State asked Kabler:

> Did Steven Barbour, this defendant, ever ask to speak to you after he was arrested? Or anybody else in the Sheriff's Department?

Kabler responded in the negative. Defendant did not object to the question or its answer. Defendant contends that the admission of this testimony constituted plain error, in that it was a comment on defendant's exercise of his right to remain silent.

It is true that "when a person under arrest has been advised of his rights pursuant to *Miranda* . . . there is an implicit promise that the silence will not be used against that person." *State v. Hoyle*, 325 N.C. 232,

236, 382 S.E.2d 752, 754 (1989). However, in the instant case, there is no evidence in the record that defendant exercised his right to remain silent. To the contrary, after being advised of his *Miranda* rights, defendant waived these rights and made statements to the police. Defendant's contention that the testimony elicited by the State violates a constitutional right defendant never exercised is fallacious.

Even assuming *arguendo* that defendant had exercised his right to remain silent, however, the testimony of Kabler was not presented to place defendant's exercise of that right before the jury. Rather, the question was posed to rebut defendant's contentions on cross and re-cross examination that Kabler could have spoken to defendant at any time to discuss Sparks' and Lanier's statements. The State was engaged in redirect examination of the witness. We hold that the trial court did not commit plain error in permitting the State to rebut the issues raised by defendant upon the cross and re-cross examination of Kabler.

This argument is without merit.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DAMIAN D. JACKSON

No. COA12-1533

Filed 17 September 2013

1. Evidence—admission of testimony and records—business record—lay witness—not unduly prejudicial

The trial court did not err in an assault, sexual battery, larceny from the person, and second-degree sexual offense case by admitting testimony and evidence of GPS tracking based on data from the electronic monitoring device worn by defendant. The GPS tracking evidence was properly admitted as a business record, Sergeant Scheppegrell's testimony was properly admitted as testimony of a lay witness based on his perception of the data, and the evidence was not unduly prejudicial pursuant to N.C.G.S. § 8C-1, Rule 403.

2. Identification of Defendants—show-up identification—impermissibly suggestive—sufficient aspects of reliability—in-court identification admissible

The trial court did not plainly err in an assault, sexual battery, larceny from the person, and second-degree sexual offense case by admitting evidence concerning an out-of-court "showup" identification of defendant. Although the identification was impermissibly suggestive, it possessed sufficient aspects of reliability to outweigh the suggestiveness of the identification procedures. Furthermore, defendant's argument that an in-court identification did not have an origin independent of the prior out-of-court identification was meritless.

3. Constitutional Law—effective assistance of counsel—no deficient performance

Defendant did not receive ineffective assistance of counsel in an assault, sexual battery, larceny from the person, and second-degree sexual offense case. The trial court did not err in admitting the evidence challenged on appeal and defense counsel's performance was not deficient.

Appeal by defendant from judgments entered 27 July 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Assistant Public Defender Julie Ramseur Lewis for defendant appellant.

McCULLOUGH, Judge.

Damian D. Jackson ("defendant") appeals from his convictions for simple assault, sexual battery, larceny from the person, and second-degree sexual offense. For the following reasons, we find no error.

I. BACKGROUND

Defendant was indicted by a Mecklenburg County Grand Jury on 24 August 2009 for one count each of simple assault, sexual battery, larceny from the person, and second-degree sexual offense. Defendant's case came on for jury trial on 25 July 2012, during the Criminal Session of

Mecklenburg County Superior Court, the Honorable F. Lane Williamson presiding. The State's evidence at trial tended to show the following.

At approximately 10:40 p.m. on 30 July 2009, the victim left her home on Blue Hampton Lane and walked up Kingville Drive in search of someone with a cigarette. When the victim noticed no one outside, the victim turned around to walk home. As the victim walked back down Kingville Drive towards Blue Hampton Lane, a "[b]lack male" with "dreadlocks" (the "assailant") approached the victim from behind in the 600 block of Kingville Drive. The assailant first asked the victim if she had a man. The victim responded that she did. The assailant then touched the victim on the butt. The victim told the assailant not to touch her, but the assailant continued to walk beside her and touched her butt a second time. At that point, the victim told the assailant that she was going to call the police. The assailant then pushed the victim to the ground. While on top of the victim, the assailant put his hands under the victim's shirt and down the victim's pants. The victim testified that the assailant inserted several fingers into her vagina as far as they would go and touched her breasts. During the assault the victim fought back against the assailant by biting, punching, and yelling for help.

The assailant's assault of the victim ended when the assailant jumped up, grabbed the victim's phone, and ran away. At that time, the victim ran in the opposite direction to a neighbor's house and called the police. The police responded within 10 minutes.

Once the police arrived, the victim informed the police of the sexual assault and described the assailant as a black male with dreadlocks, about 5 feet 9 inches tall, wearing a white tank top and gray sweat pants. Soon thereafter, a woman approached the police on the scene with additional information. The woman informed the police that she had heard a woman scream as she was walking down Kingville Drive and then saw a black male running through the woods and a black female walking out of the woods. The woman informed police that the black male looked similar to her neighbor and directed them to a residence at 416 Kingville Drive.

Following the tip, the police responded to 416 Kingville Drive and found defendant, who was wearing an electronic monitoring device. Due to the similarity between the description of the assailant provided by the victim and defendant's appearance, the police performed a "showup" identification. The showup, which took place approximately one hour after the assault, resulted in a positive identification of defendant by the victim. Defendant was then arrested.

In addition to the testimony from the victim and responding officers concerning the events that transpired on 30 July 2009, the victim identified defendant as the assailant a second time at trial and the State introduced evidence from defendant's electronic monitoring device in order to place defendant at the scene of the assault.

On 27 July 2012, the jury returned verdicts finding defendant guilty of simple assault, sexual battery, larceny from the person, and second-degree sexual offense. Thereafter, judgments were entered sentencing defendant to consecutive terms totaling 102 to 133 months' imprisonment; a term of 96 to 125 months' imprisonment for the second-degree sexual offense conviction and a consecutive term of 6 to 8 months' imprisonment for the remaining convictions that were consolidated for judgment. In addition, the trial court ordered defendant to register as a sex offender and enroll in satellite-based monitoring, both for the remainder of his natural life, upon release from prison. Defendant gave notice of appeal in open court.

II. ANALYSIS

Now on appeal, defendant contends that the trial court committed plain error by admitting: (1) testimony and evidence of GPS tracking based on data from the electronic monitoring device worn by defendant; and (2) out-of-court and in-court identifications of defendant by the victim. Additionally, defendant contends that, to the extent his counsel failed to object to the admission of the tracking evidence and the identifications, he was denied the effective assistance of counsel.

Standards of Review

In regard to defendant's assertions of plain error, "[i]n criminal cases, an issue that was not preserved by objection noted at trial . . . 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). 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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only

that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In regard to defendant's claims of ineffective assistance of counsel, "[i]t is well established that ineffective assistance of counsel claims 'brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . .' " *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)). "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006).

Evidence of Tracking

Expanding on the background above, at trial, the State called Sergeant Dave Scheppegrell ("Sgt. Scheppegrell") to testify concerning the electronic monitoring device worn by defendant and the data produced by that device. Sgt. Scheppegrell testified that he is the supervisor of the electronic monitoring unit of the Charlotte-Mecklenburg Police Department ("CMPD") and has been a member of the unit since he started it in 2007. Sgt. Scheppegrell further testified that he received training from the vendors of the electronic monitoring devices used by the CMPD and from the National Institute of Justice in the electronic monitoring field. Moreover, Sgt. Scheppegrell noted that he was appointed to the National Standard Developing Committee to develop a national standard for the electronic monitoring industry.

Regarding the specific electronic monitoring device worn by defendant, Sgt. Scheppegrell identified the device as the Omni-Link 210, manufactured by Omni-Link Systems, and described the different components of the device. Sgt. Scheppegrell then testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the electronic monitoring device at least every four minutes. The tracking data is then uploaded from the device to a secured server where it is stored. Sgt. Scheppegrell explained that the device primarily uses GPS signals, which are very accurate, usually within four to ten meters. However, when a GPS signal is unavailable, the device uses cell phone triangulations, which are accurate within forty to fifty meters. Sgt. Scheppegrell testified that he can view the data stored on the secured server via a web service and produce reports based on the data, and routinely does so in the normal

course of business. Sgt. Scheppegrell has never had any issue with the accuracy of the data.

Regarding the evidence admitted in this case, Sgt. Scheppegrell described how he retrieved the data for defendant's electronic monitoring device for 28 July 2009 through 31 July 2009 and produced the event log entered into evidence as the State's Exhibit 15. Sgt. Scheppegrell also explained how he used Omni-Link software to produce a video file plotting the tracking data for defendant on the evening of 30 July 2009 from 10:00 p.m. to midnight. The video file contained a sequence of twenty tracking points, each three minutes apart. Sgt. Scheppegrell testified that the video file stored on a CD was a fair and accurate representation of the tracking data and the CD was then admitted into evidence as the State's Exhibit 16 ("Exhibit 16"). As the video file was shown at trial, Sgt. Scheppegrell testified as to certain tracking points in the sequence.

[1] Now on appeal, defendant contends that the trial court plainly erred in admitting testimony and evidence of tracking based on data from the electronic monitoring device worn by defendant. We disagree.

Defendant first argues the GPS tracking evidence was not properly authenticated and was inadmissible hearsay. We disagree and hold the GPS tracking evidence was properly admitted as a business record.

"Hearsay" is defined in the North Carolina Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Although generally inadmissible at trial, hearsay may be allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2011). N.C. Gen. Stat. § 8C-1, Rule 803(6) establishes an exception to the general exclusion of hearsay for business records. A business record includes:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association,

> profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2011).

> Business records stored electronically are admissible if
>
> > "(1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy."

State v. Crawley, ___ N.C. App. ___, ___, 719 S.E.2d 632, 637 (2011) (quoting *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973)). "There is no requirement that the records be authenticated by the person who made them." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985).

At the outset, we hold that the tracking data from the electronic monitoring device worn by defendant stored on the secured server is a data compilation and that Exhibit 16, the CD containing the video file plotting the data from defendant's electronic monitoring device on the evening of 30 July 2009, is merely an extraction of that data produced for trial. Thus, Exhibit 16 was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation is laid.

On appeal, defendant does not dispute that the data from defendant's electronic monitoring device was recorded in the regular course of business near the time of the incident. Instead, defendant's primary contention concerning the admissibility of the tracking evidence is that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. Citing *Ruise v. Florida*, 43 So. 3d 885 (Fla. Dist. Ct. App. 2010) (holding a sufficient foundation was laid to admit tracking data from a defendant's electronic monitoring device where an employee of the monitoring company testified how the device operated and a probation officer testified the accuracy of the device had been verified) and *State v. Agudelo*, 89 N.C. App. 640, 645, 366 S.E.2d 921, 924 (1988) (holding there was an insufficient foundation to admit telephone records under the business records exception to the hearsay rule where the accuracy of a machine that recorded call

information had not been verified), defendant asserts it was necessary for the State to elicit testimony to verify the accuracy of the electronic monitoring data.

As described above, Sgt. Scheppegrell established his familiarity with the GPS tracking system by testifying about his experience and training in the field of electronic monitoring. Sgt. Scheppegrell then testified concerning how the electronic monitoring device worn by defendant transmits data to a secured server where the data was stored and routinely accessed in the normal course of business. Sgt. Scheppegrell then explained how, in this particular instance, he accessed the tracking data for defendant's electronic monitoring device and produced Exhibit 16 for trial. According to Sgt. Scheppegrell, producing reports such as Exhibit 16 was normal in the course of business.

As we have recognized, "[t]rustworthiness is the foundation of the business records exception." *State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986). We hold Sergeant Scheppegrell's testimony established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record. Furthermore, assuming *arguendo*, that Sgt. Scheppegrell's testimony was insufficient to lay a proper foundation and authenticate the tracking evidence, we find it likely that, had defendant objected to the admission of the tracking evidence at trial, the State could have produced additional testimony to overcome the objection. As a result, the insufficiency of foundation does not amount to plain error. *See State v. Jone*s, 176 N.C. App. 678, 627 S.E.2d 265 (2006) (holding failure to lay a proper foundation for introduction of video surveillance into evidence did not amount to plain error where the State could have supplied the necessary foundation had defendant objected). Moreover, we note that defendant did not dispute the reliability of the tracking evidence at trial, but instead used the tracking data on cross-examination of Sgt. Scheppegrell to show that the tracking data never placed defendant within 325 feet of the location where the assault occurred. Where defendant attempted to use the tracking data to his advantage, we will not hold the trial court plainly erred in admitting it into evidence.

In addition to arguing the GPS evidence was improperly admitted into evidence, defendant argues that Sergeant Scheppegrell's testimony concerning the GPS data was inadmissible as lay witness testimony and expert witness testimony. We disagree and hold Sergeant Scheppegrell's testimony was properly admitted as testimony of a lay witness based on his perception of the data.

N.C. Gen. Stat. § 8C-1, Rule 602 provides that a witness may testify to a matter to which he has personal knowledge.

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

N.C. Gen. Stat. § 8C-1, Rule 701 (2011).

At trial, Sgt. Scheppegrell testified regarding the operation of the electronic monitoring device and tracking data retrieved from the secured server. When questioned about specific tracking points in the sequence of points mapped in Exhibit 16, Sgt. Scheppegrell identified the date, time, accuracy reading, and relative location of the tracking points. We hold this testimony by Sgt. Scheppegrell was rationally based on his perception of the tracking data, not Sgt. Scheppegrell's personal knowledge as to defendant's actual location. Nonetheless, we find the testimony helpful to a clear understanding of defendant's whereabouts around the time of the assault on 30 July 2009. We find this holds true even in the single instance where Sgt. Scheppegrell testified as to defendant's location instead of the location of the tracking point stating, "In my professional opinion, at 10:42 P.M., [defendant] was on Aerial Court." As a result, we hold the testimony based on the tracking data was properly admitted as lay witness testimony.

Defendant's final argument concerning the admissibility of Sgt. Scheppegrell's testimony is that it was highly prejudicial and should have been excluded by the trial court pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . ." Specifically, defendant contends Sgt. Scheppegrell's testimony was highly prejudicial and likely to mislead the jury "because of the aura of reliability incident to his testimony as a skilled, experienced officer."

Upon review of defendant's argument, we hold the trial court did not err by admitting the evidence. The trial court does abuse its discretion under N.C. Gen. Stat. § 8C-1, Rule 403, simply because the testimony was provided by a skilled, experienced officer. Moreover, we find Sgt. Scheppegrell's testimony highly probative of defendant's whereabouts around the time of the assault.

Identifications

[2] On appeal, defendant also contends that the trial court plainly erred in admitting evidence concerning the out-of-court "showup" identification because the identification was impermissibly suggestive and violated his due process rights. We disagree and hold defendant's due process rights were not violated by the admission of the identification.

"Due process forbids an out-of-court confrontation which is so unnecessarily 'suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 1253 (1968)). "If an out-of-court identification procedure is so suggestive that it leads to a substantial likelihood of misidentification, the out-of-court identification is inadmissible." *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194-95 (1981).

As both defendant and the State recognize, "[s]how-ups, the practice of showing suspects singly to witnesses for purposes of identification, have been criticized as an identification procedure by both [the N.C. Supreme Court] and the U.S. Supreme Court." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citing *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967); and *Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1980)[1]). As our Supreme Court explained, "such a procedure . . . may be 'inherently suggestive' because the witness 'would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties.' " *Oliver*, 302 N.C. at 45, 274 S.E.2d at 194 (quoting *State v. Matthews*, 295 N.C. 265, 285-86, 245 S.E.2d 727, 739 (1978). Nevertheless, "[p]retrial show-up identifications . . . , even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights." *Turner*, 305 N.C. at 364, 289 S.E.2d at 373. "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E.2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976).

> In evaluating such claims of denial of due process, this Court employs a two-step process. First, we must

1. In *Turner*, *Oliver* is incorrectly cited as filed in 1980. As cited, *supra*, *Oliver* was filed in 1981.

> determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need inquire no further. If it is answered affirmatively, the second inquiry we must make is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification.

State v. Leggett, 305 N.C. at 220, 287 S.E.2d at 837.

In the present case, the victim was told by police that they "believed they had found the suspect" and was then taken in a patrol car to 416 Kingville Drive where defendant was standing in the front yard with police officers. With a light shone on defendant, the victim then identified defendant as the perpetrator from the patrol car. As we have held in cases addressing similar showup identifications, *see State v. Rawls*, 207 N.C. App. 415, 423-24, 700 S.E.2d 112, 118 (2010), we hold the showup identification in this case impermissibly suggestive.

Nevertheless, as explained above, a holding that the showup identification was impermissibly suggestive does not end our inquiry. "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Turner*, 305 N.C. at 364, 289 S.E.2d at 373.

> The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Grimes, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983). " 'Against these factors is to be weighed the corrupting effect of the suggestive identification itself.' " *Turner*, 305 N.C. at 365, 289 S.E.2d at 374 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

Considering the above factors, we find the showup identification in the present case possessed sufficient aspects of reliability to outweigh the suggestiveness of the identification procedures.

Despite the facts that it was dark and the assault on the victim lasted only 5 minutes, the victim had the opportunity to view her assailant while he walked beside her and spoke to her, and while he was on top of her during the assault. From her observations of the assailant, the victim was able to describe the assailant to police as a black male with dreadlocks, about 5 feet 9 inches tall, wearing a white tank top and gray sweat pants. Although defendant was not dressed exactly as described by the victim, defendant largely matched the description of the assailant the victim provided to the police. Furthermore, the showup identification in this case occurred shortly after the assault, approximately one hour, and the victim testified that she was one hundred percent certain that defendant was the assailant.

"[A]lthough the discrepancy between [the victim's] description and defendant's attire detracts from the reliability of the identification, other factors—including her certainty, her ability to view him directly from a short distance, and the short window between the crime and the identification—substantially bolster it." *State v. Rawls*, 207 N.C. App. at 425, 700 S.E.2d at 119. Thus, considering the totality of the circumstances, we hold the trial court did not err in admitting evidence of the out-of-court showup identification at trial.

In addition to challenging the out-of-court showup identification, defendant contends that the trial court erred in admitting the victim's subsequent in-court identification of defendant on the ground that the in-court identification did not have an origin independent of the prior out-of-court identification.

> When the pre-trial investigatory identification procedures have created a likelihood of irreparable misidentification, neither the pre-trial procedures nor an in-court identification is admissible. Stated another way, in-court identifications are permissible only if the out-of-court suggestiveness was *not* conducive to irreparable mistaken identity. In this jurisdiction, this often meant that the in-court identification was admissible if the state could show that the in-court identification was of independent origin from the suggestive pre-trial procedures.

State v. Oliver, 302 N.C. at 45, 274 S.E.2d at 194 (internal quotation marks and citations omitted).

Having determined that the trial court did not err in admitting evidence of the out-of-court identification, we hold defendant's

argument that the trial court erred in admitting the in-court identification is meritless.

Ineffective Assistance of Counsel

[3] In addition to asserting the trial court plainly erred in admitting the tracking evidence and identifications of defendant at trial, defendant argues that, to the extent his trial counsel failed to object to the admission of the evidence, he received ineffective assistance of counsel. Defendant's arguments are overruled. It is axiomatic that, having determined the trial court did not err in admitting the evidence challenged on appeal, defense counsel's performance was not deficient.

III. CONCLUSION

For the reasons discussed above, we find the trial court did not err, much less plainly err, in admitting the testimony and evidence of GPS tracking and the identifications of defendant. Moreover, where the challenged evidence was properly admitted at trial, failure by defense counsel to object did not deprive defendant of effective assistance of counsel. Accordingly, we find no error below.

No error.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
ALPHONSO ELLIS KIRKWOOD, LARELL MCDANIEL, DEFENDANTS

No. COA12-1359

Filed 17 September 2013

1. Firearms and Other Weapons—discharging weapon into occupied property—motion to dismiss—sufficiency of evidence—perpetrator or co-conspirator

The trial court did not err by denying defendant Kirkwood's motion to dismiss the charges of discharging a weapon into occupied property based on alleged insufficient evidence that he was the perpetrator or a co-conspirator of the charged offenses. The State's evidence was sufficient to allow a reasonable jury to find that

defendant was the driver of the vehicle from which the three shots were fired into the victims' home.

2. Constitutional Law—double jeopardy—multiple convictions—discharging weapon into occupied property

The trial court did not violate defendant McDaniel's right to be free from double jeopardy by entering judgment against him on more than one count of discharging a weapon into occupied property. Regardless of the uncertainty as to the number of shooters and whether only the revolver rather than both guns was used in the shooting, the State's evidence tended to show that each of the three shots for which defendant was convicted was distinct in time, and each bullet hit the pertinent house in a different place.

3. Constitutional Law—effective assistance of counsel—failure to move to arrest judgment on additional charges—no prejudicial error

Defendant McDaniel did not receive ineffective assistance of counsel based on his trial counsel's failure to move, based on double jeopardy grounds, to arrest judgment on two counts of discharging a weapon into occupied property. Defendant could properly be convicted of and sentenced for all three counts.

Appeal by defendants from judgments entered 3 May 2012 by Judge Wayland J. Sermons, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Tina L. Hlabse, for the State (Kirkwood appeal).

Attorney General Roy Cooper, by Assistant Attorney General Christina S. Hayes, for the State (McDaniel appeal).

Sarah Jessica Farber for defendant-appellant Kirkwood.

Sue Genrich Berry for defendant-appellant McDaniel.

GEER, Judge.

Defendants Alphonso Ellis Kirkwood and Larell McDaniel appeal from their convictions of three counts of discharging a weapon into occupied property. On appeal, defendant Kirkwood argues that the trial court erred in denying his motion to dismiss because the State failed to

present substantial evidence that he was the perpetrator or a co-conspirator of the charged offenses. We hold that the State's evidence was sufficient to allow a reasonable jury to find that defendant Kirkwood was the driver of the vehicle from which the three shots were fired into the victims' home. This evidence was sufficient to defeat defendant Kirkwood's motion to dismiss.

Defendant McDaniel primarily argues on appeal that the trial court violated his right to be free from double jeopardy by entering judgment against him on more than one count of discharging a weapon into occupied property. We hold, based upon *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995), and *State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999), that defendant McDaniel could properly be convicted and sentenced for three counts of discharging a weapon into occupied property.

Facts

The State's evidence tended to show the following facts. At approximately 12:15 a.m. on 14 April 2011, four gunshots were fired into the front door area of a house located in Smithfield, North Carolina. At that time, the house was occupied by Marcus Manley, Larnetta Moss, and Ms. Moss' then four-year-old daughter. Immediately after the shots were fired, a witness heard tires squealing, and both Ms. Moss and a neighbor called 911.

Within one minute of receiving the 911 call, Officer Steven Allen Walker, II of the Smithfield Police Department responded to the call and, while in route to the scene of the shooting, saw a burgundy SUV leaving the area near the shooting at a "high rate of speed." The SUV cut in front of Officer Walker's patrol car at an intersection. Officer Walker pulled behind the SUV and activated his blue lights and siren, but the SUV did not stop. Several additional police officers then joined the chase.

While Officer Walker pursued the SUV, he saw a gun thrown from the driver's side of the vehicle. Officers later returned and collected that gun, a semiautomatic .25 caliber Titan handgun. The hammer was pulled back on the gun and it had one live round in the chamber.

Officers continued pursuing the SUV until it turned onto a dead end street and stopped. Both of the driver's side doors and one of the passenger's side doors of the SUV opened and three people ran from the vehicle. The person who got out of the passenger's side door was never identified. Defendant McDaniel exited from the rear driver's side seat. Defendant Kirkwood, wearing all dark colored clothing, exited from the driver's seat. Several officers pursued the SUV down the dead end

street and then chased defendants on foot as defendants ran into a "cut-through" at the end of the street.

When the SUV turned down the dead end street, Officer Walker drove around the block and stopped his patrol car near where the cut-through ended. As defendants ran from the cut-through, Officer Walker and other officers ran after them. At least one officer kept sight of defendants running through the cut-through until the time Officer Walker attempted to stop them at the other end. Defendants evaded Officer Walker and ran into a trailer home nearby.

Officers surrounded the trailer and ordered the people inside to come out. Defendant McDaniel's mother, who lived in the trailer, came outside. After about 30 seconds to a minute, defendant Kirkwood came out of the trailer wearing all dark clothing and drenched in sweat. After roughly five minutes with the officers yelling for defendant McDaniel to come out, he left the bathroom of the trailer wearing only boxer shorts.

Defendants were taken to the police department, and a gunshot residue test was performed on defendant Kirkwood. Subsequent analysis of the gunshot residue test tended to show that defendant Kirkwood had recently discharged a firearm, handled a discharged firearm, or was in close proximity to a firearm when it was discharged.

During an interview with Detective Chris Blinson of the Smithfield Police Department, defendant Kirkwood stated that he was walking through backyards and saw police officers shoot at a burgundy Chevrolet Blazer. Detective Blinson told defendant Kirkwood his story did not make sense, and defendant Kirkwood then stated he had been at the house of "Ms. Dees" and that he "didn't even go to that part of town." Detective Blinson asked him what part of town he meant, and defendant Kirkwood responded he was talking about "where the shooting happened." Detective Blinson had not yet, however, told defendant Kirkwood where the shooting happened.

At the scene of the shooting, officers identified four bullet holes in the front door area of the house. One was in the top of the door, near the ceiling of the porch. Two bullet holes were located to the right of the front door, one higher up than the other. Officers removed and collected one projectile from the wooden door frame of the house, but did not recover the others.

Detective Blinson seized a box of 7.65 caliber pistol ammunition in the door of the burgundy SUV. He also found an unfired .25 caliber bullet in the SUV that was identical to the bullet found in the Titan handgun.

At approximately 1:30 p.m. on 14 April 2011, a citizen passerby found a New England Firearms, five-shot revolver directly across the street from where the Titan handgun was recovered. There was a single 7.65 round of ammunition in the cylinder of the revolver, identical to the ammunition found in the burgundy SUV a few hours earlier. The revolver was a single and double action gun and could fire in both modes. Single action means that when the user manually cocks the gun and pulls the trigger, the hammer falls and the gun fires. Double action means that when the user pulls the trigger, the hammer cocks and releases and, at the same time, the cylinder rotates into alignment with the barrel and the gun fires.

Subsequent testing of the New England revolver, the Titan handgun, and the projectile recovered from the house indicated that the projectile was a bullet fired from the revolver. The New England revolver functioned properly during testing. The Titan handgun fired at times during testing, but sometimes did not fire when the trigger was pulled.

Defendants Kirkwood and McDaniel were indicted for four counts of discharging a weapon into occupied property. At trial, defendant McDaniel testified in his own defense to the following. On the night of 14 April 2011, defendant McDaniel was picked up by his friend, Jamel Rhodes, and went to see another friend. Mr. Rhodes dropped defendant McDaniel off in the area of East Parker Street and defendant McDaniel walked to meet the friend while Mr. Rhodes remained further down the block. After 10 to 15 minutes, defendant McDaniel heard three gunshots, returned to Mr. Rhodes' SUV, got in the rear driver's side seat, and asked what was happening. Mr. Rhodes drove away and another male, who had not been in the SUV earlier, who was not defendant Kirkwood, and whom defendant McDaniel could not identify or describe, was in the SUV.

The police began to chase the SUV, and when defendant McDaniel asked Mr. Rhodes to stop so he could get out of the vehicle, Mr. Rhodes refused because he was a felon and was illegally in possession of a gun. Defendant McDaniel opened his door to jump several times, but whenever he did, the SUV sped up. When the SUV stopped, defendant McDaniel saw two people near the end of the dead end street.

While running towards his mother's house, defendant McDaniel saw defendant Kirkwood running in front of him, and the two entered the house. Defendant McDaniel initially lied to the police because he was scared. Defendant McDaniel did not fire a gun that night, did not know anybody else was going to do so, never had a gun that night, and never

disposed of a gun for anybody that night. Defendant Kirkwood was never in the SUV with defendant McDaniel.

Defendant Kirkwood did not present evidence at trial. At the close of the State's evidence, the trial court dismissed one count of discharging a weapon into occupied property as to each defendant. The jury found both defendants guilty of three counts of discharging a weapon into occupied property. The trial court sentenced defendant Kirkwood to three consecutive presumptive-range terms of 51 to 71 months imprisonment. The court sentenced defendant McDaniel to three consecutive presumptive-range terms of 60 to 81 months imprisonment. Both defendants timely appealed to this Court.

I

[1] Defendant Kirkwood's sole argument on appeal is that the trial court erred in denying his motion to dismiss because the State failed to present substantial evidence that he was the perpetrator or a co-conspirator of the charged offenses. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In making its determination, the trial court must consider all evidence admitted, 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). " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy

[it] beyond a reasonable doubt that the defendant is actually guilty.' " *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 76, 430 S.E.2d at 919).

Here, the State's evidence[1] tended to show that the bullet recovered from the door frame of Mr. Manley and Ms. Moss' house was fired from the New England revolver. The revolver was found on the same day of the shooting, across the street from the Titan handgun that officers saw thrown from the burgundy SUV. The single bullet found in the revolver was identical to the box of bullets found in the burgundy SUV. Moreover, the revolver was a five-shot revolver and four of the chambers were empty when the revolver was recovered, consistent with four shots being fired into the home.

Immediately after the shooting, a witness heard tires squealing. When the responding officers first saw the SUV, it was driving away from the area near the shooting at a high rate of speed and cut in front of one officer's patrol car. When officers attempted a traffic stop of the SUV, it fled and led the officers on a chase through the town. A reasonable jury could conclude from this evidence that the shooter was in the burgundy SUV.

The officers' testimony showed that when the burgundy SUV stopped on the dead end street, a tall, thin black male dressed in dark-colored clothing got out of the driver's seat and ran into the cut-through. Officer Page Carroll of the Smithfield Police Department kept that individual in her sight until she saw Officer Walker and others chasing him on the other side of the cut-through. An officer chasing the suspects on the other side of the cut-through saw them enter the back door of the trailer belonging to defendant McDaniel's mother. Defendant McDaniel's mother testified at trial that defendant Kirkwood and defendant McDaniel ran into the back door of her trailer just before the police arrived.

When police ordered people out of the trailer, defendant Kirkwood came out wearing all dark clothing and drenched in sweat. Officer

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1. This Court has held that "when defendants are tried jointly and one of them offers no evidence, the evidence of the co-defendant may not be considered on a motion to dismiss by the defendant offering no evidence." *State v. DiNunno*, 67 N.C. App. 316, 319, 313 S.E.2d 3, 5 (1984) (interpreting N.C. Gen. Stat. § 15-173). Here, defendant Kirkwood moved to dismiss at the close of the State's evidence and at the close of all the evidence. Based on *DiNunno*, our review of defendant Kirkwood's motion to dismiss is limited to only whether the State's evidence was sufficient to survive defendant Kirkwood's motion to dismiss.

Carroll identified defendant Kirkwood as the person she had just seen get out of the driver's seat of the burgundy SUV and run into the cut-through. Likewise, Officer Walker and another officer who attempted to intercept the suspects on the other side of the cut-through and who saw the suspects enter the trailer, identified defendant Kirkwood as one of the two suspects they were chasing. This testimony constituted substantial evidence that defendant Kirkwood was the driver of the burgundy SUV.

Moreover, the gunshot residue test performed on defendant Kirkwood tended to show that he had recently discharged a firearm, handled a discharged firearm, or was in close proximity to a firearm when it was discharged. The State's expert witness in gunshot residue analysis testified that, according to studies, it was unlikely that the gunshot residue particles found on defendant Kirkwood's hands had been there for more than two or three hours.

Finally, during his police interview, defendant Kirkwood demonstrated knowledge of the shooting beyond what an uninvolved person would know by denying being in the part of town in which the shooting occurred before the interviewer ever told him where the shooting occurred. This evidence further tended to identify defendant Kirkwood as the perpetrator or a co-conspirator in the shooting.

Defendant Kirkwood nonetheless argues that he did not confess to committing the offenses; that defendant McDaniel testified defendant Kirkwood was not in the SUV and did not implicate defendant Kirkwood as a perpetrator; that Officer Walker erroneously chased the SUV instead of proceeding directly to the house where the shooting occurred; that during the foot chase, officers lost sight of the runners at times; that there were no fingerprints found on either gun in this case; and that the State's efforts in investigating the shooting were minimal. However, defendant's arguments merely ask the Court to view the evidence in the light most favorable to defendant, contrary to the well-established standard of review for motions to dismiss.

In light of the circumstantial evidence tying the burgundy SUV to the shooting, the evidence that defendant Kirkwood was the driver of the SUV, defendant Kirkwood's flight from police, defendant Kirkwood's statement showing knowledge of the location of the shooting, and the gunshot residue located on defendant Kirkwood shortly after the shooting, we hold that the State presented substantial evidence that defendant Kirkwood was the perpetrator or a co-conspirator of the charged offenses. Consequently, the trial court did not err in denying defendant Kirkwood's motion to dismiss.

II

[2] Defendant McDaniel first argues that the trial court erred in entering judgment on more than one of his three guilty verdicts for discharging a weapon into occupied property. Defendant McDaniel asserts that his sentence effectively punished him three times for committing the same offense and, thereby, violated his right to be free from double jeopardy. We disagree.

As an initial matter, the State contends that defendant McDaniel's double jeopardy argument is not properly preserved for appellate review. "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004).

Defendant McDaniel did not argue to the trial court that entering judgments on multiple counts of discharging a weapon into occupied property would violate his right to be free from double jeopardy. Defendant McDaniel nevertheless argues that this issue is preserved for appeal, despite his failure to raise the issue below, pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2011). N.C. Gen. Stat. § 15A-1446(d)(18) provides:

> Errors 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.

Defendant's argument is inconsistent with our Supreme Court's decisions holding that a double jeopardy issue cannot be raised for the first time on appeal. *See, e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.' " (quoting *Tirado*, 358 N.C. at 571, 599 S.E.2d at 529)); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) ("The defendant candidly concedes . . . that he did not raise any double jeopardy issue at trial. Therefore, this issue has been waived."). Since we are bound by the rulings of our Supreme

Court, we find defendant's preservation argument based upon N.C. Gen. Stat. § 15A-1446(d)(18) unpersuasive.

Nevertheless, despite defendant McDaniel's failure to raise his double jeopardy argument to the trial court, the trial court ruled on the double jeopardy issue on its own initiative. After arguments on defendants' motions to dismiss, the court stated:

> But getting to the question of the counts, *State versus Ray* says that we use the safe [sic] evidence test. The test is whether the facts alleged in the second or additional count would sustain a conviction under the first count *in a double jeopardy analysis*, *which is what it is*. . . .
>
> . . . .
>
> . . . I think I'm stuck with the same evidence test. When you analyze the same evidence test, the jury would have to find in order to convict the defendants of more than one count, that bullet A would stand for Count I. A separate bullet not being Bullet A, i.e., B or C, would have to stand for Count II and on and on and on. I think there is sufficient evidence to take the case to the jury on three counts.

(Second emphasis added.) The trial court then, based on the "same evidence test," dismissed the fourth count of discharging a weapon into occupied property as to each defendant.

The rule that constitutional questions must be raised first in the trial court is based upon the reasoning that the trial court should, in the first instance, "pass[] on" the issue. *Tirado*, 358 N.C. at 571, 599 S.E.2d at 529. *See also State v. Mason*, 174 N.C. App. 206, 208, 620 S.E.2d 285, 286-87 (2005) (" '[T]he double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.' " (quoting *State v. McKenzie*, 292 N.C. 170, 176, 232 S.E.2d 424, 428 (1977))). For this reason, this Court has previously explained that a " 'double jeopardy argument [need not] us[e] those exact words [to be preserved for appeal, if] the substance of the argument was sufficiently presented and, *more importantly*, *addressed by the trial court* . . . .' " *State v. Gobal*, 186 N.C. App. 308, 320-21, 651 S.E.2d 279, 287 (2007) (quoting *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003)), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008). Since, in this case, the transcript affirmatively shows that the trial court addressed and ruled upon the double jeopardy issue, albeit

on its own initiative, we hold that defendant McDaniel's double jeopardy issue is properly before this Court.

"Both the North Carolina and the United States Constitutions provide that no person may be twice put in jeopardy of life or limb for the same offense." *Rambert*, 341 N.C. at 175, 459 S.E.2d at 511. *See* U.S. Const. amend. V; N.C. Const. art. I, § 19. The constitutional guarantees against double jeopardy include "the protection against multiple punishments for the same offense." *Rambert*, 341 N.C. at 175, 459 S.E.2d at 512. A double jeopardy claim that the defendant is being punished more than once for the same offense must demonstrate that the multiple punishments stem from " 'the "same offense" *both in law and in fact.*' " *Id.* (quoting *State v. Lewis*, 32 N.C. App. 298, 301, 231 S.E.2d 693, 694 (1977)). "As such, when a court is determining whether a second indictment places the defendant in double jeopardy, the court must examine the law under which the charges are being brought and the facts underlying each count." *Id.*

Defendant McDaniel was indicted with a single indictment containing four counts of discharging a weapon into occupied property in violation of N.C. Gen. Stat. § 14-34.1(b) (2011). The elements of discharging a weapon into occupied property "are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *Rambert*, 341 N.C. at 175, 459 S.E.2d at 512.

Where multiple counts in "indictments [a]re identical and d[o] not describe in detail the specific events or evidence that would be used to prove each count," an "[e]xamination of the facts underlying each charge . . . more accurately illustrates whether defendant has been placed in double jeopardy." *Id.* at 176, 459 S.E.2d at 512. Here, each of the four counts in defendant McDaniel's indictment contained, in total, the following identical factual allegations: "[O]n or about April 14, 2011, in the county of Johnston, the Defendant named above unlawfully, willfully and feloniously did discharge a handgun, a firearm, into a building and dwelling, located at 209 East Parker Street, Smithfield, Johnston County, North Carolina, while it was actually occupied by Marcus Darnell Manley, Larnetta Moss and [Ms. Moss' daughter]." The trial court dismissed one of the four counts, leaving only three at issue in this appeal. Since the allegations in each count do not sufficiently describe the specific evidence to be used to prove the separate counts, we must examine the facts underlying each charge.

In *Rambert*, this Court rejected the defendant's argument that his conviction and sentencing on three counts of discharging a firearm into

occupied property violated double jeopardy principles. *Id.* at 177, 459 S.E.2d at 513. There, the State's evidence tended to show that the victim was sitting in a parked car in a parking lot when the defendant, riding in a car, pulled alongside the victim's car. *Id.* at 176, 459 S.E.2d at 512. The defendant produced a gun, the victim ducked, and the defendant fired a shot into the front windshield of the victim's car. *Id.* The victim drove forward and, when the cars were approximately 10 yards apart, the defendant fired a second shot that struck the passenger's side door of the victim's car. *Id.* The defendant then "pursued" the victim and fired a third shot, which lodged in the rear bumper of the victim's car. *Id.*, 459 S.E.2d at 512-13.

The Court in *Rambert* held that this evidence "clearly show[ed] 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.*, 459 S.E.2d at 512. The Court reasoned: "Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon." *Id.* at 176-77, 459 S.E.2d at 513. Moreover, "[e]ach act was distinct in time, and each bullet hit the vehicle in a different place." *Id.* at 177, 459 S.E.2d at 513.

Similarly, in *Nobles*, 350 N.C. at 505, 515 S.E.2d at 899, this Court relied upon *Rambert* to conclude that the trial court properly denied the defendant's motion to consolidate three of his seven charges of discharging a firearm into an occupied vehicle. The Court in *Nobles* relied upon evidence that tended to show the "defendant's actions were seven distinct and separate events," including evidence that prior to the time of the murder, the truck did not have any bullet holes or broken glass, but after the murder there were seven bullet holes in victim's truck: "[t]here were two bullet holes in the windshield, one near the middle of the windshield and one near the edge of the windshield on the passenger's side; there was a bullet hole below the windshield on the driver's side and one near the headlight on the driver's side; there was a bullet hole on the top of the truck's bed on the driver's side and one in the bed of the truck; and the driver's side door window was burst, which, based on the evidence, was caused by the fatal gunshot to the victim." *Id.*, 515 S.E.2d at 898-99. The Court further relied on evidence that the defendant's gun had the capacity to hold nine bullets, it was empty at the murder scene, and the gun was not a machine gun or other automatic weapon. *Id.*, 515 S.E.2d at 899.

The evidence in this case tended to show that, like the first two shots in *Rambert*, three gunshots were fired in quick succession. A neighbor

and Ms. Moss each heard three distinct although rapid gunshots. Officers responding to the scene located one bullet hole in the top of the front door, near the ceiling of the porch. They located two additional bullet holes to the right of the front door, one higher up than the other. These three bullet holes were, therefore, each in different locations around the front door area of the house, like the distinct bullet holes in different locations on the cars in *Rambert* and *Nobles*.

The evidence further showed that at least one of the shots was fired from the revolver, which, in single action mode, must be manually cocked between firings and, in double action mode, can still only fire a single bullet at a time. The other gun that may have been used in the shooting, the Titan handgun, was semiautomatic but did not always function properly and many times, when the trigger was pulled, would not fire. As in *Rambert* and *Nobles*, neither gun was a fully automatic weapon such as a machine gun.

We note that, based on our review of the record, there are several scenarios of the shooting supported by the evidence. For example, it is possible that two gunmen in the SUV, each using a different gun, fired one or more shots into the house. It is further possible that one gunman used both guns while shooting. It is also possible, however, that a single gunman used only the revolver.

However, despite this uncertainty as to the number of shooters and whether only the revolver rather than both guns was used in the shooting, the State's evidence nevertheless tended to show that each of the three shots for which defendant McDaniel was convicted was "distinct in time, and each bullet hit the [house] in a different place." *Rambert*, 341 N.C. at 177, 459 S.E.2d at 513.

Defendant McDaniel nonetheless cites *State v. Brooks*, 138 N.C. App. 185, 530 S.E.2d 849 (2000), and *State v. Dilldine*, 22 N.C. App. 229, 206 S.E.2d 364 (1974), in support of his argument. In *Brooks*, this Court held that the trial court erred in denying the defendant's motion to dismiss one of his two charges for assault with a deadly weapon for insufficient evidence because all the evidence showed the defendant shot the victim three times simultaneously. 138 N.C. App. at 189-90, 530 S.E.2d at 852-53. Similarly, in *Dilldine*, the Court observed that it was improper for the State to charge the defendant with two counts of felonious assault where the evidence showed that the defendant shot the victim three times in the front and then, when the victim turned to leave, twice in the back. 22 N.C. App. at 230, 231, 206 S.E.2d at 366.

Brooks and *Dilldine* each applied the rule, specific to assault cases, that "for a defendant to be charged with multiple counts of assault," the State must present evidence of " 'a distinct interruption in the original assault followed by a second assault.' " *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604-05 (2003) (quoting *Brooks*, 138 N.C. App. at 189, 530 S.E.2d at 852). In *Maddox*, another assault case, this Court relied upon *Brooks* and *Dilldine* and distinguished *Rambert* and *Nobles* since "neither involved charges of assault but instead multiple charges of discharging a weapon into occupied property." *Id.* at 133, 583 S.E.2d at 605. Conversely, since this case involves charges for discharging a weapon into occupied property and not assault, *Rambert* and *Nobles*, rather than *Brooks* and *Dilldine*, control our decision.

Defendant McDaniel additionally relies upon *State v. Potter*, 285 N.C. 238, 253, 204 S.E.2d 649, 659 (1974) ("[W]hen the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed."), and *State v. Becton*, 163 N.C. App. 592, 594-96, 594 S.E.2d 143, 144-45 (2004) (relying on *Potter* and applying same rule). However, the Courts in *Potter* and *Becton* addressed situations where multiple robbery charges were brought against the defendants for taking by force a single employer-victim's money from multiple employees. *See Potter*, 285 N.C. at 238, 251-52, 204 S.E.2d at 650, 658; *Becton*, 163 N.C. App. at 593, 594 S.E.2d at 143. *Potter* and *Becton* are, therefore, legally and factually distinguishable from the present case.

We conclude, based upon *Rambert* and *Nobles*, that the evidence here supported three separate charges against defendant McDaniel. Consequently, the trial court did not err in entering three judgments against defendant McDaniel for discharging a weapon into occupied property.

[3] Defendant McDaniel also argues that he received ineffective assistance of counsel because his trial counsel failed to move, based on double jeopardy grounds, to arrest judgment on two counts of discharging a weapon into occupied property. Since we have concluded that defendant McDaniel could properly be convicted of and sentenced for all three counts, he cannot show that his attorney failed to provide effective assistance of counsel. *See State v. Brewton*, 173 N.C. App. 323, 333, 618 S.E.2d 850, 858 (2005) (holding, where defendant challenged jury instruction and also claimed ineffective assistance of counsel based upon his counsel's failure to object to instruction, "because we find no error in the instructions, defendant's claim for ineffective assistance of

counsel must also be rejected"). We, therefore, conclude defendants received a trial free from prejudicial error.

No error.

Judges ELMORE and DILLON concur.

BRIAN WILKERSON, PLAINTIFF
v.
DUKE UNIVERSITY AND CHRISTOPHER DAY, DEFENDANTS

No. COA13-181

Filed 17 September 2013

1. False Imprisonment—law enforcement officer—genuine issue of fact—restraint—lawful conduct

Summary judgment for defendant Day on a false imprisonment claim was reversed in an action arising from an incident between Day, a Duke University police officer, and plaintiff, a parking valet at Duke University Hospital. There were genuine issues of material fact as to whether plaintiff was restrained and whether the restraint was lawful.

2. Assault—genuine issues of fact—reasonable apprehension of injury—harmful contact

Summary judgment for defendant Day on an assault and battery claim was reversed in an action arising from an incident between Day, a Duke University police officer, and plaintiff, a parking valet at Duke University Hospital. There were genuine issues of material fact as to whether plaintiff was in reasonable apprehension of injury by Day and whether there was harmful or official contact.

3. Emotional Distress—summary judgment—evidence of severe distress—not sufficient

The trial court properly granted summary judgment for defendant Day on claims for intentional and negligent infliction of emotional distress arising from an incident between Day, a Duke University police officer, and plaintiff, a parking valet at Duke University Hospital. There was not a sufficient forecast of evidence showing that plaintiff suffered from severe emotional distress.

4. Constitutional Law—state claims—adequate remedy

The trial court properly granted summary judgment for defendant Day on state constitutional claims from an incident between Day, a Duke University police officer, and plaintiff, a parking valet at Duke University Hospital. Plaintiff's state constitutional claims were based upon the same alleged conduct as his state law claims and state law provides an adequate remedy.

5. Employer and Employee—respondeat superior—underlying claims

Claims against Duke University based upon *respondeat superior* and arising from an incident between a Duke University police officer and a Duke Hospital parking valet were properly dismissed by summary judgment where there were no genuine issues of material fact in the underlying claims by the valet against the officer, and were reversed where there were genuine issues of fact in the underlying claims.

6. Employer and Employee—negligent supervision and retention—competency of police officer—knowledge of employer

Claims against Duke University based upon negligent supervision and retention and arising from an incident between a Duke University police officer and a Duke Hospital parking valet should not have been dismissed by summary judgment where there were genuine issues of material fact as to whether the officer was competent and whether his supervisors knew or had reason to know of his incompetency.

7. Appeal and Error—preservation of issues—argument required

Plaintiffs abandoned contentions on appeal by making no argument.

8. Pleadings—motion to amend—denial—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiffs motion to amend his complaint where he had delivered the motion to defendants thirteen months after he filed the initial complaint and five days before the summary judgment hearing. Moreover, the court properly denied the motion based upon the futility of the amendments.

Appeal by plaintiff from orders entered 17 September 2012 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 13 August 2013.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiff-appellant.

Ellis & Winters LLP, by Leslie C. Packer and Ashley K. Brathwaite, for defendant-appellees.

STEELMAN, Judge.

Where there were issues of material fact with respect to plaintiff's claims for false imprisonment, assault, battery, and negligent supervision and retention, the portion of the trial court's order granting summary judgment to defendants as to those claims is reversed. Where there was no evidence of severe emotional distress, the trial court's dismissal of plaintiff's claims for intentional infliction of emotional distress and negligent infliction of emotional distress is affirmed. Where plaintiff has an adequate remedy in state law, the trial court properly granted summary judgment in favor of defendants with respect to plaintiff's state constitutional claims. Where plaintiff filed a motion to amend his complaint thirteen months after he filed his initial complaint and five days before the hearing on summary judgment, we cannot say the trial court abused its discretion in denying plaintiff's motion to amend.

I. Factual and Procedural Background

On 15 July 2008, Brian Wilkerson (plaintiff) was working as an attendant at a valet parking area at Duke University Hospital. The valet parking area contained a gated lot. Plaintiff had been instructed to allow Duke University Police officers entry into the gated lot in the event of an emergency, but that in non-emergency situations, to inform police officers that they should park vehicles along a traffic circle, outside of the lot. On 15 July 2008, Duke University Police Officer Christopher Day (Day) came to the Hospital to assist in unlocking a car parked in the gated lot. Plaintiff refused to open the gate to the lot, resulting in a physical confrontation with Day. Day issued a notice of trespass to plaintiff, which forbade him to go upon any Duke University property. This resulted in plaintiff losing his job as a parking attendant.

Plaintiff filed a verified complaint in this action on 20 July 2011 against Day and Duke University. The complaint asserted the following claims: false imprisonment, assault, battery, public stigmatization, negligence, negligent supervision and retention, negligent infliction of emotional distress, intentional infliction of emotional distress, and violations of the North Carolina Constitution. Plaintiff sought compensatory

and punitive damages. Defendants filed an answer and a motion to dismiss all of plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 18 May 2012, defendants filed a motion for summary judgment and the matter came on for hearing at the 10 September 2012 Civil Session of Durham County Superior Court. On 5 September 2012, plaintiff filed a motion to amend his complaint to assert additional claims for tortious interference with contract, tortious interference with prospective contract, and unfair and deceptive trade practices. In ruling on defendants' motion for summary judgment, the trial court considered written discovery, depositions, and the pleadings. The trial court denied plaintiff's motion to amend and subsequently granted defendants' motion for summary judgment dismissing all of plaintiff's claims. The order did not specify whether the dismissal was with or without prejudice.

Plaintiff appeals.

II. Entry of Summary Judgment

In his first argument, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants. We agree in part. We address each of plaintiff's claims, first discussing his claims against Day and then addressing his claims against Duke University.

A. 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) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). We view the evidence in the light most favorable to the non-movant, and any question resolving the credibility of the witnesses is for the jury to decide. *Clark v. Brown*, 99 N.C. App. 255, 259-60, 393 S.E.2d 134, 136 (1990).

B. Claims Against Day

Plaintiff's claims against Day are based upon Day's conduct during the physical confrontation with plaintiff. Plaintiff's testimony, contained in his deposition, sets forth the following version of events:

> I was coming back to the booth and that's when he pointed at my face and asked me for my information, and then that's when I asked him nicely to not point at my face. He kept doing it, so I went back to work. Then that's when

> he pulled me and tried to grab me and then I got his arm off of me and then he grabbed me with his other arm on the other arm. Then I got that one off of me, and then he went to grab me with both arms and then I got both of his arms off me. He dropped everything in his packers [sic], and that's when he stopped and just waited for my managers to come.

Day's testimony from his deposition supports a different version:

> I put my hand on [plaintiff's] chest and-- and stopped him from going around me and told him, again, that I needed his ID. . . . [Plaintiff] basically kept saying, "There it is. There it is," but [plaintiff] and I basically locked arms, and he kept trying to go around me, and he told me to get my hands off of him. And at that point, his hands somehow grasped hold of, I guess, my pockets, and what I had in my pockets . . . came flying out and went all over the ground.

We now address each of plaintiff's claims against Day below.

1. False Imprisonment

[1] False imprisonment is the restraint of a person where the restraint is both unlawful and involuntary. *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 228, 139 S.E.2d 199, 201 (1964). The elements of false imprisonment include: "(1) the illegal restraint of plaintiff by defendant, (2) by force or implied threat of force, and (3) against the plaintiff's will." *Rousselo v. Starling*, 128 N.C. App. 439, 449, 495 S.E.2d 725, 732 (1998). "The restraint requirement of this action requires no appreciable period of time, simply sufficient time for one to recognize his illegal restraint. The tort is complete with even a brief restraint of the plaintiff's freedom." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988).

In the instant case, plaintiff's verified complaint alleges: "Day was detaining [plaintiff] with hands, physically detaining and controlling [plaintiff's person] and completely restricting [plaintiff's] freedom of movement. [Plaintiff] freed himself of [Day's] grip, and in the process, a notebook and coins fell from Day's shirt pocket." We treat the verified complaint as an affidavit. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein."). Plaintiff's

testimony from his deposition also asserts this version of events. In their brief, defendants assert that any restraint of plaintiff was lawful because Day was conducting an investigatory stop. Defendants, however, do not point to any conclusive facts in the record that demonstrate Day had "reasonable suspicion, based on objective facts, that [plaintiff was] involved in criminal activity." *See State v. Jones*, 304 N.C. 323, 328, 283 S.E.2d 483, 486 (1981) (citation omitted) (describing the reasonable suspicion required to conduct an investigatory stop). We hold that there are genuine issues of material fact as to whether plaintiff was restrained and if so, whether that restraint was unlawful. The portion of the trial court's order granting summary judgment in favor of Day with respect to plaintiff's claim for false imprisonment is reversed.

2. Assault and Battery

[2] "The elements of assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury." *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991) *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992). "A battery is made out when the person of the plaintiff is offensively touched against his will[.]" *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 410 (1972).

Based upon plaintiff's deposition testimony and Day's deposition testimony, there exist genuine issues of material fact as to whether plaintiff was in reasonable apprehension of injury by Day and whether there was a harmful or offensive contact. The portion of the trial court's order granting summary judgment in favor of Day with respect to plaintiff's claims of assault and battery is reversed.

3. Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

[3] The elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress . . . . " *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (2007). The elements of a claim for negligent infliction of emotional distress are: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Severe emotional distress has been defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional

or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.*; *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 354, 452 S.E.2d 233, 243 (1994). ("[T]he severe emotional distress required for [intentional infliction of emotional distress] is the same as that required for negligent infliction of emotional distress[.]").

In his deposition, when asked about the negative effect on his emotional health, plaintiff testified that "I can get arrested if I go see the people that I was putting smiles on their faces." He acknowledged that he has not been treated by a counselor, therapist, or doctor for any condition arising out of this incident and that he has not been diagnosed with any kind of mental health problems, including depression or anxiety. There was not a sufficient forecast of evidence showing that plaintiff suffered from severe emotional distress. The trial court properly granted summary judgment in favor of Day with respect to plaintiff's claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

4. Violations of the North Carolina Constitution

[4] "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim . . . under our Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). However, when an adequate remedy in state law exists, constitutional claims must be dismissed. *Wilcox v. City of Asheville*, __ N.C. App. __, __, 730 S.E.2d 226, 236 (2012). In order for a remedy to be adequate, "a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim" and "the possibility of relief under the circumstances." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009).

In the instant case, plaintiff's state constitutional claims are based upon the same alleged conduct that underlies his state law claims. Because state law gives plaintiff the opportunity to present his claims and provides "the possibility of relief under the circumstances," plaintiff's state constitutional claims must fail. The trial court properly granted summary judgment in favor of Day with respect to plaintiff's claims for constitutional violations.

C. Claims Against Duke University

Plaintiff's claims against Duke University are based upon two theories: respondeat superior and negligent supervision.

1. Respondeat Superior

[5] "The doctrine of *respondeat superior* generally allows an employer (sometimes referred to as a 'principal' in this context) to be held vicariously liable for tortious acts committed by an employee (sometimes referred to as an 'agent' in this context) acting within the scope of his employment." *Creel v. N.C. Dep't of Health & Human Servs.*, 152 N.C. App. 200, 203, 566 S.E.2d 832, 834 (2002).

In the instant case, the employee-employer relationship between Day and Duke University is undisputed. Duke University employed Day as a police officer in its Duke University Police Department. Day testified in his deposition that he was on duty during the time of the incident and was assisting another Duke University police officer in a "vehicle unlock." When Day was denied access to the gated lot where the vehicle was located, he attempted to obtain plaintiff's name and supervisor.

This theory of recovery is based upon Day's alleged conduct, and thus summary judgment was properly granted in favor of Duke University with respect to plaintiff's negligent infliction of emotional distress, intentional infliction of emotional distress, and state constitutional claims for the reasons already discussed. As to plaintiff's claims of false imprisonment, assault, and battery, there exist genuine issues of material fact as to whether Day's actions constituted tortious behavior. The trial court's entry of summary judgment in favor of Duke University as to these three claims is also reversed.

[6] 2. Negligent Supervision and Retention

> To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.

Smith v. Privette, 128 N.C. App. 490, 494-95, 495 S.E.2d 395, 398 (1998) (citation omitted). Plaintiff must therefore show sufficient evidence of Day's tortious act that resulted in injury to plaintiff and that Day's supervisors knew or had reason to know of his incompetency.

In the instant case, plaintiff contends that a reference to Day's nickname, "Hank," in his job performance evaluation indicates that Day's supervisors were aware of Day's tendency to "exhibit[] patterns of

uncontrolled rage." Plaintiff refers us to a performance evaluation from 1 May 2006 to 30 April 2007, that stated:

> I would like for PO Day to try and keep 'Hank' under control. At times, PO Day can seem disrespectful when he vents his frustration. He needs to keep his personal opinions more closely to himself and not speak of them in an open forum. Some officers think that he comes off as a disgruntled employee who complains a lot. He needs to take those concerns and discuss them privately and through proper channels.

In his deposition, Day testified that his supervisor was referring to his tendency to publicly voice concerns about the department:

> It's -- when he's saying when I talk to him or I voice concerns about the Department. . . . To do more -- to do it more in a one-on-one setting rather than in -- in briefing is what he was saying. . . . [H]e was just trying to say there's an appropriate time and place to voice concerns.

A more recent performance evaluation from 1 May 2007 to 30 April 2008 concluded:

> Officer Day is professional and courteous during interactions with the public and with other members of this department. He treats people fairly and with dignity. He does not abuse his authority as a law enforcement officer. He tends to let his personal problems distract him from completely focusing on his job. He is outspoken and is trying to be less vocal in voicing complaints and concerns.

While Day received positive feedback about his interactions with the public in the year immediately prior to the altercation with plaintiff, his evaluations also indicated that his supervisors were aware of inappropriate conduct: he was distracted from work by personal problems, he was outspoken, he was disrespectful at times, and he vented his frustration. It is unclear whether their awareness of Day's behavior related solely to his tendency to complain publicly within the department or whether it also related to his conduct during interactions with the public. Genuine issues of material fact exist as to whether Day was incompetent and whether his supervisors knew or had reason to know of his incompetency. The portion of the trial court's order granting summary judgment in favor of Duke on this claim is reversed.

D. Claims Abandoned on Appeal

[7] Plaintiff makes no argument on appeal that the trial court erred in granting summary judgment in favor of defendants with regards to his claims of public stigmatization and negligence. These arguments are deemed abandoned. N.C.R. App. P. 28(b)(6).

III. Denial of Motion to Amend Complaint

[8] In his second argument, plaintiff contends that the trial court erred in denying his motion to amend his complaint. We disagree.

A. Standard of Review

"A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

B. Analysis

Once a responsive pleading has been filed, a party may amend their complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15 (2011). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). "In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Draughon v. Harnett Cnty. Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004)

In the instant case, the trial court denied plaintiff's motion to amend his complaint "on the basis of undue delay and undue prejudice[.]" Plaintiff filed the complaint in this action on 20 July 2011. Defendants filed their answer on 19 August 2011, and their motion for summary judgment on 18 May 2012. Plaintiff hand-delivered the motion to amend his complaint to defendants on 5 September 2012, thirteen months after he filed the initial complaint and only five days before the hearing on defendants' motion for summary judgment. We cannot say the trial court abused its discretion in denying plaintiff's motion to amend for undue delay and undue prejudice.

We note that plaintiff's amended complaint asserted three additional claims: tortious interference with contract, tortious interference with

prospective contract, and unfair or deceptive trade practices. There is no evidence in the record that Day induced plaintiff's employer not to perform a contract with plaintiff, or that Day induced a third party to refrain from entering a contract with plaintiff without justification. *See Gupton v. Son-Lan Dev. Co., Inc.*, 205 N.C. App. 133, 142-43, 695 S.E.2d 763, 770 (2010) (describing a claims for tortious interference with contract and tortious interference with prospective contract). There is also no evidence in the record to support the claim for unfair or deceptive trade practices. *See Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) ("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 trial court properly denied the motion to amend the complaint based upon the futility of these amendments as well.

This argument is without merit.

IV. Conclusion

We reverse the portion of the trial court's order granting summary judgment in favor of defendants with respect to plaintiff's claims for false imprisonment, assault, battery, and negligent supervision and retention. We affirm all other portions of the summary judgment order. We also affirm the trial court's order denying plaintiff's motion to amend his complaint.

REVERSED IN PART, AFFIRMED IN PART.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 SEPTEMBER 2013)

CRAFT v. CITY OF NEW BERN No. 13-148	Craven (09CVS2090)	Affirmed
ENNIS v. MUNN No. 12-1349	New Hanover (11CVM1575-6)	Dismissed in part and affirmed in part
JAMES v. SCHOONDERWOERD No. 12-1457	Wake (10CVS3120)	Affirmed
MYERS v. BEN MYNATT CHEVROLET CADILLAC No. 12-1211	N.C. Industrial Commission (W99855)	Affirmed
N.C. BD. OF PHARMACY v. NAJARIAN No. 12-1140	Wake (11CVS7970)	Affirmed
OKITENBO v. CHARLOTTE MECKLENBURG SCH. No. 13-349	Mecklenburg (12CVS15454)	Affirmed
PREMIERE AUTO, L.L.C. v. WACHOVIA BANK, N. A. No. 13-328	Cumberland (11CVS6838)	Dismissed
STATE v. ALSBROOKS No. 13-414	Union (10CRS56747) (11CRS3737)	No Error
STATE v. AUSTIN No. 13-268	Gaston (11CRS63435) (11CRS63439) (12CRS6449-50) (12CRS6455-58) (12CRS6461-65)	No Error
STATE v. GARRETT No. 13-206	Craven (09CRS2984-86) (09CRS54179-80) (09CRS54182) (12CRS104)	No error in defendant's trial; remand to correct clerical error in judgment, Case Number 12 CRS 000104.
STATE v. INMAN No. 12-1561	Robeson (11CRS2843)	No Error in Part, Vacated and Remanded in Part.

STATE v. JENNINGS No. 13-411	Mecklenburg (00CRS25816) (07CRS201598)	Dismissed
STATE v. JONES No. 13-6	Edgecombe (10CRS3237) (10CRS51615) (10CRS52242-43)	No error in part and reversed in part.
STATE v. MCCLAIN No. 13-371	Wake (12CRS5589)	No Error
STATE v. MCKENZIE No. 13-294	Onslow (11CRS50379) (11CRS50381-83)	No Prejudicial Error
STATE v. MEGGETT No. 13-107	Wake (11CRS209117)	No Error
STATE v. MORRIS No. 13-99	Cleveland (07CRS51155-56)	Affirmed
STATE v. NAJJAR No. 13-204	Guilford (09CRS87053)	No Error
STATE v. PEACOCK No. 13-187	Duplin (11CRS51902)	No Error
STATE v. PHILLIPS No. 13-231	Burke (10CRS1059) (11CRS1164) (11CRS51557) (12CRS14-15)	Judgment arrested in part and remanded for resentencing.
STATE v. SHAH No. 13-307	Cabarrus (09CRS52965)	No plain error
STATE v. SMITH No. 13-397	Columbus (11CRS54182)	No Error
STATE v. TOLSON No. 13-121	Mecklenburg (09CRS259691)	No error; No plain error
STATE v. BLANTON No. 12-1517	Catawba (11CRS3984)	Ineffective assistance of counsel claim denied; no plain error.

STATE v. EVERETTE No. 12-1500	Wake (11CRS10639)	Vacated and Remanded
STATE v. JONES No. 12-1320	Mecklenburg (08CRS250566) (08CRS80584)	No Error
STATE v. WIGGS No. 12-1529	Cumberland (08CRS52185-86) (08CRS52639) (08CRS52641)	No Error
WHITE v. BURTON FARM DEV. CO. LLC No. 12-1407	Pamlico (11CVS205) (11CVS207) (12CVS17)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW—Continued

ex mero motu during the State's closing argument where the State made one reference to evidence that was not before the jury in its closing argument, and the judge instructed the jury to follow their own recollection of the evidence. **State v. Barbour, 635.**

Prosecutor's closing argument—not so grossly improper—*ex mero motu* intervention not required—no prejudice—The trial court did not err in a driving while impaired case by failing to intervene *ex mero motu* to address the State's closing argument. Although the State pushed the bounds of impropriety, its remarks during closing argument were not so grossly improper that the trial court erred by failing to intervene *ex mero motu*. Furthermore, even assuming *arguendo* that the State's closing argument was improper, defendant failed to make a definitive showing of prejudice to warrant a new trial. **State v. Marino, 130.**

DAMAGES AND REMEDIES

Punitive damages—summary judgment proper—The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendants as to plaintiffs' claim for punitive damages. Plaintiffs' complaint and forecast of evidence failed to provide any facts that defendants' conduct in causing the patient's injurious condition was willful, wanton, malicious, or fraudulent. **Robinson v. Duke Univ. Health Sys., Inc., 215.**

Treble—Retaliatory Employment Discrimination Act—no willful violation—The business court did not err by declining to treble plaintiff's $390,000 jury award under the Retaliatory Employment Discrimination Act (REDA). There was competent evidence to support the business court's determination that defendant did not willfully violate REDA. **Morris v. Scenera Research, LLC, 31.**

DISCOVERY

Denial of motion for discovery—due process—in camera review required—national security—The trial court erred in a first-degree murder case by denying defendant's motions for discovery of certain evidence contained in the files of some of the State's witnesses. Due process required the trial court to at least examine the records in camera to determine whether they should be provided to the defense. On remand, the trial court must determine with a reasonable degree of specificity how national security or some other legitimate interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review. **State v. Cooper, 442.**

Medical review privilege—statutory requirements—Even if a Root Cause Analysis (RCA) Team that examined the cause of an operating room fire qualified as a medical review committee, defendants did not meet their burden of proving that the documents at issue were privileged under N.C.G.S. § 131E-95. The mere submission of an affidavit by the party asserting the medical review privilege does suffice; such affidavits must demonstrate that each of the statutory requirements have been met. **Hammond v. Saini, 359**.

Production of documents—medical review privilege—The trial court did not err in an action arising from an operating room fire by granting plaintiff's motion to compel production of documents, despite defendants' claim of medical review privilege. Defendants' contentions rested on the proposition that the hospital's

EVIDENCE—Continued

SEARCH AND SEIZURE—Continued

stopped Defendant's vehicle, the stop was supported by the necessary reasonable articulable suspicion; and (3) whether, in the event that the stop of defendant's vehicle was not supported by the necessary reasonable articulable suspicion, the evidence obtained by officers of the Chapel Hill Police Department must be suppressed. **State v. Verkerk, 416.**

SENTENCING

Colloquy with defendant—unnecessary—The trial court did not err in a rape case by sentencing defendant as a Prior Record Level II before conducting a statutorily mandated colloquy with defendant. Given the routine determination as to whether defendant was convicted of possession of drug paraphernalia while on probation for another offense, conducting such questioning with defendant would have been inappropriate and unnecessary. **State v. Marlow, 593.**

Indecent liberties with child—improper version of statute—no prejudice—Defendant could not demonstrate any prejudice from any alleged error with respect to his sentencing for the crime of indecent liberties with a child. By applying the post 1 December 2009 version of Article 81B of Chapter 15A of the General Statutes, the trial court sentenced defendant at a lower prior record level than he would have been under the prior statute. **State v. Agustin, 240.**

Life imprisonment without parole—first-degree murder—not cruel and unusual punishment—The trial court did not violate defendant's right to be free from cruel and unusual punishment by sentencing him to life imprisonment without the possibility of parole for the crime of first-degree murder. The imposed sentence was authorized by the relevant statutory provisions, and thus, could not be classified as cruel and unusual in a constitutional sense. **State v. Perry, 304.**

Rape of child—minimum sentence of 300 months—The trial court did not err by sentencing defendant to 300-369 months imprisonment for the rape of a child charge. N.C.G.S. § 15A-1340.17 mandates a minimum sentence of 300 months. **State v. Agustin, 240.**

Sentence reduction credits—unconditional release date—The trial court correctly concluded that a defendant whose death sentence was converted to life in 1976 had a constitutionally protected liberty interest in good time, gain time, and merit time sentence reduction credits which he earned between 1975 and October 2009 and that defendant was entitled to have those sentence reduction credits deducted from his sentence for all purposes, including the calculation of his unconditional release date. This case is distinguished from *Jones v. Keller*, 364 N.C. 249, by the actual award and application of sentence reduction credits by the Department of Correction to reduce defendant's unconditional release date. **State v. Bowden, 95.**

Statutory rape—incest—not lesser-included offense—The trial court erred by sentencing defendant for two crimes, statutory rape and incest, which arose out of the same transaction, thereby violating his constitutional rights by subjecting him to double jeopardy. The elements of statutory rape are not all included in the elements of incest and 2002 amendments to N.C.G.S. § 14-178 did not make statutory rape a lesser-included offense of incest. **State v. Marlow, 593.**