

NORTH CAROLINA
COURT OF APPEALS
REPORTS

VOLUME 237

21 OCTOBER 2014

2 DECEMBER 2014

RALEIGH

2017

CITE THIS VOLUME

237 N.C. APP.

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

SUZANNE DAVIS CAMPBELL, PLAINTIFF
v.
WILLIAM TAYLOR CAMPBELL, III, DEFENDANT

No. COA14-329

Filed 21 October 2014

**Appeal and Error—interlocutory orders and appeals—improper
Rule 54(b) certification—no substantial right—writ of
certiorari**

Plaintiff wife’s appeal from an interlocutory order vacating her judgment of absolute divorce under N.C.G.S. § 1A-1, Rule 60(b) was dismissed. The trial court’s order could not properly be certified under N.C.G.S. § 1A-1, Rule 54(b). Further, plaintiff failed to meet her burden of showing that the order deprived her of a substantial right. The Court of Appeals declined plaintiff’s request to construe her appellate filings as a petition for a writ of certiorari.

Appeal by plaintiff from order entered 21 October 2013 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 11 September 2014.

Allman Spry Davis Leggett & Crumpler, P.A., by Joslin Davis, Loretta C. Biggs and Anna E. Warburton, for plaintiff-appellant.

Wilson, Helms & Cartledge, LLP, by Gray Wilson and Lorin J. Lapidus, and Morrow, Porter, Vermitsky & Fowler, PLLC, by John F. Morrow, Sr. and John C. Vermitsky, for defendant-appellee.

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[237 N.C. App. 1 (2014)]

DIETZ, Judge.

Plaintiff Suzanne Davis brings this interlocutory appeal from the trial court's order vacating her judgment of absolute divorce under Rule 60(b) of the Rules of Civil Procedure. The trial court, exercising its discretion under Rule 60(b), set aside Ms. Davis' divorce judgment so that her ex-husband William Campbell could assert a belated claim for equitable distribution.

This Court has held that an appeal from a trial court order setting aside an absolute divorce judgment "is interlocutory and subject to dismissal." *See Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994). Applying this precedent, our Court recently granted a motion to dismiss for lack of appellate jurisdiction in an appeal with facts nearly identical to those presented here. *See Steele v. Steele*, No. COA 14-231 (N.C. App. 2014). Mr. Campbell did not file a motion to dismiss this appeal, but we are obliged to review our own jurisdiction in every case. We hold that, although there may be factual circumstances in which the grant of a Rule 60(b) motion setting aside a divorce judgment affects a substantial right, Ms. Davis did not make a sufficient showing in this case. Accordingly, we dismiss this appeal for lack of jurisdiction.

Factual Background

After a decade of marriage, Plaintiff Suzanne Davis and Defendant William Campbell separated on 11 May 2012. On 16 November 2012, Ms. Davis filed a complaint for equitable distribution, among other claims. Mr. Campbell filed an answer and counterclaim in that action, but mistakenly failed to assert his own claim for equitable distribution. Both parties engaged in several months of vigorous discovery and motions practice on the issue of equitable distribution.

On 13 May 2013, Ms. Davis filed a separate complaint for absolute divorce and to resume use of her maiden name. On 1 July 2013, the trial court granted Ms. Davis' unopposed motion for summary judgment on that absolute divorce claim.

At some point during this process, Ms. Davis determined that it was no longer in her interests to pursue equitable distribution, although neither party's brief explains precisely why this was so. Just over a month after obtaining her absolute divorce judgment, Ms. Davis voluntarily dismissed her equitable distribution claim. Under North Carolina law, the entry of an absolute divorce judgment bars any new claims for equitable distribution. *See* N.C. Gen. Stat. § 50-11(e) (2013). As a result, although

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Mr. Campbell still desired to complete the equitable distribution process, Ms. Davis' voluntary dismissal of her own claim (the only pending equitable distribution claim) permanently ended all equitable distribution litigation.

Mr. Campbell promptly filed a motion to set aside the divorce judgment under Rule 60(b) of the Rules of Civil Procedure. He contended that his failure to timely assert his own claim for equitable distribution before entry of the absolute divorce judgment was the result of excusable neglect. Specifically, he asserted that, at the time he filed his initial counterclaim in the equitable distribution action, his counsel had recently given birth to a premature baby who weighed less than two pounds. The child was hospitalized with life-threatening conditions through much of this litigation. Mr. Campbell argued that he instructed his counsel to file a claim for equitable distribution and that his counsel, distracted by her newborn's medical needs, mistakenly thought she had done so.

On 21 October 2013, the trial court granted Mr. Campbell's Rule 60(b) motion in an order containing detailed findings of fact and conclusions of law. The court set aside the absolute divorce judgment and ordered Mr. Campbell to file an answer and counterclaim for equitable distribution within 30 days. Ms. Davis appealed the trial court's order that same day. This Court allowed Ms. Davis' petition for a writ of superseas and stayed the trial court's Rule 60(b) order pending disposition of this appeal.

Analysis

Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court. *See Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). An interlocutory order entered before final judgment is immediately appealable "in only two circumstances: (1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Robinson v. Gardner*, 167 N.C. App. 763, 767, 606 S.E.2d 449, 452 (2005) (quotation marks omitted).

The trial court's Rule 60(b) order in this case is a textbook example of a non-final, interlocutory order; it took an otherwise final judgment and re-opened it, requiring "further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also Metcalf v. Palmer*, 46 N.C. App. 622, 624, 265 S.E.2d 484, 484 (1980) (holding that orders

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[237 N.C. App. 1 (2014)]

granting a Rule 60(b) motion are, by their nature, interlocutory). Thus, the trial court's order in this case is appealable only if it is properly certified under Rule 54(b) or if it affects a substantial right.

Ms. Davis first asserts that the trial court's order is appealable because "[t]he trial court entered a Certification of Order for Immediate Appeal" under Rule 54(b) in this case. And, indeed, the trial court entered an order in this case entitled "Certification of Order for Immediate Appellate Review." That order purports to authorize an immediate appeal under Rule 54(b) of the Rules of Civil Procedure.

But Rule 54(b) does not apply here. Under Rule 54(b), a trial court may certify a case for immediate appeal when it enters "a final judgment as to one or more but fewer than all of the claims or parties" in the case. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b). The Rule 60(b) order from which Ms. Davis appeals did not enter a final judgment on some but not all claims; rather, it set aside an earlier final judgment under Rule 60(b), re-opening the case in its entirety. Thus, the trial court's order could not properly be certified under Rule 54(b).

It is well-settled that the trial court's mistaken certification of a non-final order under Rule 54(b) is ineffective and does not confer appellate jurisdiction on this Court. *See, e.g., First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 248, 507 S.E.2d 56, 61 (1998). Accordingly, we reject Ms. Davis' argument that her appeal is properly before us based on the trial court's improper Rule 54(b) certification.

Next, Ms. Davis asserts that the trial court's Rule 60(b) order affects a substantial right. This Court, and our Supreme Court, repeatedly have held that Rule 60(b) motions setting aside the entry of summary judgment (as happened here) do not affect a substantial right. *See, e.g., Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978); *Braun v. Grundman*, 63 N.C. App. 387, 388, 304 S.E.2d 636, 637 (1983); *Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (2005). In *Baker*, this Court acknowledged that an appeal from a "trial court's order setting aside the judgment of absolute divorce and permitting defendant to file her answer and counterclaim for equitable distribution" was "interlocutory and subject to dismissal." 115 N.C. App. at 339, 444 S.E.2d at 480. Relying on this precedent, this Court recently dismissed an appeal from a Rule 60(b) order in an absolute divorce case involving facts nearly identical to both *Baker* and the present case. *See Steele v. Steele*, No. COA 14-231 (N.C. App. 2014).

Ms. Davis argues that this precedent is not controlling because the trial court's Rule 60(b) order is "analogous" to the denial of a motion

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based on collateral estoppel, which affects a substantial right. See *Hillsboro Partners LLC v. City of Fayetteville*, ___ N.C. App. ___, ___, 738 S.E.2d 819, 823 (2013). This is so, according to Ms. Davis, because of the effect of Section 50-11(e) of the General Statutes. Section 50-11(e) states that “[a]n absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution . . . unless the right is asserted prior to judgment of absolute divorce.” N.C. Gen. Stat. § 50-11(e) (2013). Ms. Davis argues that the trial court’s Rule 60(b) order is immediately appealable because, as a consequence of § 50-11(e) and the entry of her absolute divorce judgment, Mr. Campbell was “effectively collaterally estopped as a matter of law from asserting a new equitable distribution claim.”

We cannot accept this argument because it ignores why our appellate courts hold that denial of a motion based on collateral estoppel affects a substantial right. Collateral estoppel is intended to “prevent repetitious lawsuits.” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). It ensures that parties (or those in privity) are not forced to re-litigate issues that were fully litigated and actually determined in previous legal actions. *Id.* Our appellate courts have concluded that an order denying a motion based on collateral estoppel is immediately appealable because “parties have a substantial right to avoid litigating issues that have already been determined by a final judgment.” *Id.*

That is not the situation here. The trial court’s order will not force Ms. Davis to re-litigate equitable distribution issues that already were determined by a court in an earlier proceeding. Indeed, in the only similar proceeding between the parties, Ms. Davis voluntarily dismissed her equitable distribution claim, preventing the trial court from determining that issue on the merits.

In effect, Ms. Davis argues not that she is compelled to re-litigate an issue previously determined by a court, but instead that she must fully litigate—for the first time—an issue that she thought was precluded by the judgment she obtained. But that argument can be made in virtually every Rule 60(b) case and our appellate courts have long rejected it as a basis for immediate appeal. See *Waters*, 294 N.C. at 208, 240 S.E.2d at 344; *Robinson*, 167 N.C. App. at 768, 606 S.E.2d at 452. In short, because no court has yet adjudicated the parties’ equitable distribution claim, Ms. Davis cannot rely on our collateral estoppel precedent to immediately appeal the trial court’s Rule 60(b) order.

Ms. Davis also argues that the trial court’s order results in “the possibility of having to litigate two separate equitable distribution cases on

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[237 N.C. App. 1 (2014)]

the same claims with inconsistent verdicts.” But Ms. Davis voluntarily dismissed her own equitable distribution claim after obtaining her absolute divorce judgment—meaning there was no verdict on that claim. See N.C. Gen. Stat. § 1A-1, Rule 41(a) (dismissal without prejudice is not “an adjudication upon the merits”). Simply put, the trial court’s Rule 60(b) order does not expose Ms. Davis to the risk of a second, inconsistent equitable distribution verdict because there was never a first equitable distribution verdict.

Finally, Ms. Davis argues that she might “be forced to take steps to invalidate the true representations she has made in reliance on the Divorce Judgment to establish herself as a single individual.” But she does not explain how changing those “true representations” about her marital status would rise to the level of affecting a substantial right. From this record, it is impossible to tell whether this would be a complicated process or something as simple as filling out some additional paperwork. As this Court has repeatedly held, “[i]t is not the duty of this Court to construct arguments for or find support for appellant’s right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Moreover, Ms. Davis has provided no reason why she could not renew her motion for entry of the absolute divorce judgment as soon as Mr. Campbell asserts his claim for equitable distribution. The trial court already considered and granted that motion once before, and likely would do so promptly a second time. Thus, the time period in which Ms. Davis would be deprived of her previously entered divorce judgment likely would be exceedingly short. Ms. Davis offers no evidence or argument to the contrary. Accordingly, we hold that Ms. Davis “has not met [her] burden of showing this Court that the order deprives [her] of a substantial right.” *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003).

In dismissing this appeal, we do not suggest that no litigant can satisfy the substantial rights test in similar circumstances. We can imagine a number of specific factual circumstances in which a Rule 60(b) motion setting aside a judgment for absolute divorce, and effectively remarrying the parties, might affect a substantial right. But “[t]he extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis.” *Hamilton v. Mtge. Info. Serv., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011). Here, as in the *Steele* appeal that we

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[237 N.C. App. 7 (2014)]

dismissed several months ago, the appellant did not make a sufficient showing to satisfy the substantial rights test.

Conclusion

For the reasons discussed above, we dismiss this appeal for lack of appellate jurisdiction. We also decline Ms. Davis' request to construe her appellate filings as a petition for a writ of certiorari. Ms. Davis will have a full and fair opportunity for appellate review of the trial court's Rule 60(b) order after entry of final judgment in this case. Thus, certiorari is not appropriate here. *See Sood v. Sood*, ___ N.C. App. ___, ___, 732 S.E.2d 603, 609, *appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012).

DISMISSED.

Judges STEELMAN and GEER concur.



PENNY FOX, PLAINTIFF

v.

SARA LEE CORPORATION AND JOHN ZIEKLE, DEFENDANTS

No. COA14-326

Filed 21 October 2014

Emotional Distress—intentional infliction—ratification of conduct

The trial court did not err by granting summary judgment for defendant on plaintiff's claim for intentional infliction of emotional distress. Plaintiff failed to present any evidence that defendant ratified the tortious actions of its employee, who allegedly assaulted plaintiff.

Appeal by plaintiff from order entered 3 December 2013 by Judge David L. Hall in Superior Court, Forsyth County. Heard in the Court of Appeals 9 September 2014.

Stephen A. Boyce, for plaintiff-appellant.

Constangy, Brooks & Smith, LLP by Robin E. Shea, for defendants-appellees.

FOX v. SARA LEE CORP.

[237 N.C. App. 7 (2014)]

STROUD, Judge.

Plaintiff appeals the trial court order granting defendant Sara Lee Corporation's motion for summary judgment and dismissing her claim. Because plaintiff failed to present any evidence that defendant Sara Lee ratified the tortious actions of its employee, defendant John Ziekle, we affirm the trial court's order granting summary judgment and dismissing plaintiff's claim.

I. Background

In 2005, plaintiff and defendant Ziekle were both employees of defendant Sara Lee and worked "in the Sara Lee Corporation Madison Park facility in Winston-Salem, North Carolina." Plaintiff was employed as an analyst in defendant Sara Lee's business government department, while defendant Ziekle worked in the information technology department and one of his duties was to service "the computer systems the Plaintiff used in her work." This case arises out of defendant's Ziekle's alleged sexual assault of plaintiff on 24 August 2005. Plaintiff's complaint was previously dismissed by the trial court and appealed to this Court. *Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 707, 709 S.E.2d 496, 498 (2011) ("*Fox I*"). We set forth the procedural background for this case in the first appeal, in *Fox I*:

Penny Fox (Plaintiff) filed a complaint against Sara Lee Corporation (Sara Lee) and John Ziekle (Mr. Ziekle) (collectively, Defendants) on 24 September 2009. In her complaint, Plaintiff alleged that she had been an employee at Sara Lee, and that Mr. Ziekle had been a co-worker. Plaintiff contended that she had been sexually assaulted by Mr. Ziekle and, as a result, suffered severe mental health problems that led to the loss of her job with Sara Lee. Plaintiff asserted claims of assault, battery, false imprisonment, intentional infliction of emotional distress and negligence, and sought damages. Sara Lee filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), contending that all of Plaintiff's claims were barred by the statute of limitations. In an order entered 21 January 2010, the trial court granted Sara Lee's motion and dismissed Plaintiff's complaint in its entirety with prejudice. Plaintiff appeals.

Id. at 707, 709 S.E.2d at 497-98.

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[237 N.C. App. 7 (2014)]

In *Fox I*, we determined that plaintiff had abandoned “her claims for assault, battery, and false imprisonment.” *Id.* at 708, 709 S.E.2d at 498. The only remaining issue in *Fox I* was “whether the trial court properly granted Sara Lee’s motion to dismiss Plaintiff’s claims based on emotional distress” because they were barred by the statute of limitations. *Id.* In *Fox I*, this Court reversed the dismissal of plaintiff’s claim based on the statute of limitations because

Plaintiff’s complaint sufficiently alleged that: (1) Plaintiff became an incompetent adult for the purposes of tolling the statute of limitations; and (2) Plaintiff was under a disability at the time she suffered the severe emotional distress which caused her claims to accrue. Therefore, we reverse the trial court’s order granting Sara Lee’s N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss as to Plaintiff’s claims for emotional distress and remand to the trial court.

Id. at 715, 709 S.E.2d at 502 (quotation marks omitted). *Fox I* was filed 5 April 2011. *See Fox I*, 210 N.C. App. 706, 709 S.E.2d 496.

On 25 April 2011, defendant Sara Lee answered plaintiff’s complaint and alleged various defenses. On 29 May 2012, the trial court entered default against defendant Ziekle based upon his failure to file “an answer, motion, or other responsive pleading, and he has not obtained an enlargement of time to do so.” On 29 August 2013, the trial court entered a default judgment against defendant Ziekle ordering him to pay plaintiff \$752,492.00; this default judgment was entered without any prejudice to defendant Sara Lee.

On 18 November 2013, plaintiff voluntarily dismissed her claim for negligent infliction of emotional distress against defendant Sara Lee. Thus, the only remaining claim was plaintiff’s claim against defendant Sara Lee for intentional infliction of emotional distress, based upon defendant Sara Lee’s alleged ratification of defendant Ziekle’s conduct. On 4 November 2013, defendant Sara Lee filed for summary judgment alleging plaintiff’s claim was “barred because she cannot create a genuine issue of material fact that Sara Lee ratified the alleged conduct of Defendant” Ziekle. On 3 December 2013, the trial court granted defendant Sara Lee’s motion for summary judgment and dismissed plaintiff’s only remaining claim. Plaintiff appeals.

II. Summary Judgment

Defendant Sara Lee’s motion for summary judgment alleged three possible bases for the trial court to grant summary judgment dismissing

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plaintiff's claim: (1) expiration of the statute of limitations, (2) workers' compensation exclusivity bars the claim, and (3) lack of sufficient evidence that defendant Sara Lee ratified defendant Ziekle's allegedly wrongful conduct. The order granting summary judgment does not state which of the rationales the trial court relied upon in dismissing plaintiff's claim.

Much of plaintiff's argument on appeal addresses her severe emotional distress and details of her disability, psychiatric diagnoses, and treatment. We do not doubt the validity and seriousness of plaintiff's emotional distress. We will assume *arguendo* for purposes of this appeal, viewing the evidence in the light most favorable to plaintiff, that her mental health was so severely impaired that the statute of limitations was tolled and that her claims were therefore timely filed. For this reason, we will not address plaintiff's arguments regarding the severity of her distress and its ramifications on her daily life nor will we address the statute of limitations; we will address only the merits of plaintiff's substantive claim, which is that defendant Sara Lee is liable to her for intentional infliction of emotional distress because it ratified defendant Ziekle's allegedly tortious conduct.

Thus turning to the trial court's summary judgment order on the merits of plaintiff's claim:

A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party. When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care,

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summary judgment is inappropriate. We review orders granting or denying summary judgment using a de novo standard of review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trillium Ridge Condominium Ass'n, Inc. v. Trillium Links & Village, LLC, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Sept. 16, 2014) (No. COA14-183) (citations, quotation marks, and brackets omitted).

Plaintiff argues that there are genuine questions raised by the evidence as to several facts: (1) “whether Prudy Yates was the Plaintiff’s immediate supervisor on August 24, 2005[;]” (2) “whether Manager Yates told the Plaintiff not to report the Ziekle assault[;]” (3) “whether Manager Yates ever reported the Ziekle assault[;]” and (4) “[w]hether Manager Yates’ instructions to not report the Ziekle assault and her failure to immediately report the assault herself were done in the line of duty and within the scope of Manager Yates’ employment.” (Original in all caps.) Plaintiff notes in her brief, deposition testimony and affidavits that present slightly varying descriptions of each of these facts. To the extent that there are any genuine issues raised by the evidence, we find that they are not material, since even if we view the evidence in the light most favorable to plaintiff, it does not support ratification by defendant Sara Lee.

In August of 2005, defendant Ziekle worked in defendant Sara Lee’s information technology department and one of his duties was to service “the computer systems the Plaintiff used in her work.” Plaintiff testified in her deposition that late in the day on Wednesday, 24 August 2005, she was preparing to leave work when defendant Ziekle came up behind her, trapped her in her cubicle, put his arm around her neck, and fondled her breast against her will. Plaintiff acknowledged that prior to the 24 August 2005 incident she could not remember thinking or feeling anything specifically “off putting” about defendant Ziekle.

After plaintiff got home from work, she called Ms. Prudy Yates, a manager in her department, and told her what defendant Ziekle had done to her. According to plaintiff, Ms. Yates told her to not report defendant Ziekle’s alleged wrongful conduct, and if she did report it, she should not provide names. The evidence shows, as summarized by plaintiff’s brief, that

[t]he day after the Ziekle assault and the telephone conversation with Manager Yates, Plaintiff Fox called HR Director Bostwick and arranged to meet with her the

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following Friday. (App. P. 36, Fox Dep. Vol. I, P. 235, L. 1-10)

Plaintiff Fox first met with Director Bostwick on Friday, August 26 and again on Wednesday, August 31, 2005. The Plaintiff testified that she described the Ziekle assault and her telephone conversation with Manager Yates during both meetings. She told Director Bostwick that Manager Yates had told her not to report the assault. Director Bostwick told the Plaintiff that she would investigate the Manager Yates telephone conversation, but the Plaintiff could not refer to Manager Yates in any complaint about the Ziekle assault. (App. P. 38-51, Fox Dep. Vol. I, P. 237, L. 11 – P. 250, L. 10)[.]

Whatever the truth may be about who first notified Ms. Amy Bostwick and how,¹ it is undisputed that she was the Director of Human Resources and that she initiated the investigation of defendant Ziekle immediately upon plaintiff's report to her.

Ms. Bostwick then contacted Mr. Nathan Chapman, who was the Senior Human Resources Manager over defendant Ziekle's work department. Mr. Chapman interviewed defendant Ziekle on Friday, 2 September 2005; defendant Ziekle claimed that he did not recall whether he had inappropriately touched plaintiff. Because defendant Ziekle did not deny the allegation, Mr. Chapman suspended defendant Ziekle that same day. Defendant Ziekle never returned to work at defendant Sara Lee after that day, and he was officially terminated on 12 September 2005. There was no contact between plaintiff and defendant Ziekle after the 24 August 2005 incident. Plaintiff never returned to work with defendant Sara Lee, except for a few days in December 2005, though from the perspective of defendant Sara Lee she was free to do so. On 31 August 2006, plaintiff claims she received a letter of termination because she "had been out on medical leave for one year."²

1. In her deposition Ms. Yates testified that on Thursday, 25 August 2005, she went to check on plaintiff. Ms. Yates said she asked plaintiff if she had contacted Ms. Bostwick; plaintiff informed her she did not have her phone number; so Ms. Yates gave plaintiff Ms. Bostwick's phone number and said, "You have got to call her." Ms. Bostwick's affidavit states that on 25 August 2005, Ms. Yates contacted her and told her she "needed to get in touch with" plaintiff.

2. There are no issues on appeal regarding plaintiff's medical leave or ultimate termination with defendant Sara Lee.

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In considering the alleged genuine issues of material fact posited by plaintiff, even if we assume that (1) “Prudy Yates was the plaintiff’s immediate supervisor on August 24, 2005[;]” (2) “Manager Yates told the Plaintiff not to report the Ziekle assault[;]” (3) “Manager Yates [never] reported the Ziekle assault[;]” and (4) “Manager Yates’ instructions to not report the Ziekle assault and her failure to immediately report the assault herself were done in the line of duty and within the scope of Manager Yates’ employment[;]” this does not demonstrate that defendant Sara Lee ratified defendant Ziekle’s actions.

Essentially, at best, plaintiff claims that Ms. Yates’ erroneous advice – not to report the defendant Ziekle’s assault – caused her to delay reporting defendant Ziekle’s actions to Ms. Bostwick for a period of time from the evening of 24 August 2005 until 25 August 2005. As summarized by plaintiff’s brief, “[t]he day after the Ziekle assault and the telephone conversation with Manager Yates, Plaintiff Fox called HR Director Bostwick and arranged to meet with her the following Friday[,]” which was the Friday after the Wednesday on which the incident occurred. We are unable to discern what effect, if any, Ms. Yates’ allegedly erroneous instructions to plaintiff had upon plaintiff’s actions, as she disregarded these instructions and on Thursday called to arrange an appointment with Ms. Bostwick and met with her on Friday. There is no dispute that from the time that plaintiff notified Ms. Bostwick, defendant Sara Lee investigated the claim promptly and terminated defendant Ziekle’s employment.

Plaintiff’s theory of ratification is based solely upon one phone call in which she alleges Ms. Yates told her not to report the incident, but if she did, not to use the name of the party involved. In *Denning-Boyles v. WCES, Inc.*, this Court described the legal bases for an employer’s liability for a wrongful intentional act by an employee as follows:

An employer may be held liable for the torts of an employee under the doctrine of *respondet superior* in circumstances where: (1) the employer expressly authorizes the employee’s act; (2) the tort is committed by the employee in the scope of employment and in furtherance of the employer’s business; or (3) the employer ratifies the employee’s tortious conduct. For plaintiff to have survived summary judgment as to [defendant], therefore, the evidence must necessarily have tended to show that the acts of [co-worker] and the conduct of [defendant] fell into one of the aforementioned categories. We conclude plaintiff presented a sufficient forecast of the evidence to

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move forward on the theory of ratification, and thus do not discuss the remaining categories.

This Court has held that:

In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act.

In addition,

the jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. Such course of conduct may involve an omission to act.

Finally, although the employer must have knowledge of all material facts relative to its employee's acts in order to effect ratification,

if the purported principal is shown to have knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmation without qualification is evidence that he is willing to ratify upon the knowledge which he has.

123 N.C. App. 409, 411-15, 473 S.E.2d 38, 40-42 (1996) (citations, quotation marks, and brackets omitted). Black's Law Dictionary defines "ratification" as "[a]doption or enactment" or "[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done" or "[a] person's binding adoption of an act already completed[.]" Black's Law Dictionary 1376 (9th ed. 2009).

Plaintiff contends that her case is analogous to *Brown v. Burlington Industries, Inc.*, in which the plaintiff told her supervisor over the course of approximately two years about her co-workers' numerous acts of alleged sexual harassment, but the supervisor failed to take any action to protect the plaintiff or to investigate her claims. *See Brown*, 93 N.C. App. 431, 432, 378 S.E.2d 232, 233 (1989), *disc. review improvidently allowed per curiam*, 326 N.C. 356, 388 S.E.2d 769 (1990). Eventually, the plant manager found out about the plaintiff's co-worker's conduct and

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fired him within approximately a month of receiving the information. *Id.* at 432-33, 378 S.E.2d at 233. This Court determined that the supervisor's inaction ratified the co-worker's tortious conduct. *See id.* at 437-38, 378 S.E.2d at 236.

In *Denning-Boyles*, this Court also found that the defendant employer ratified the offending employee's action where multiple co-workers complained over a span of approximately four months about the repeated tortious conduct. *See id.* at 415, 473 S.E.2d at 41. In *Denning-Boyles*, the plaintiff was asked to stop complaining and the defendant ultimately decided the offending employee would keep his employment with defendant and plaintiff should be the one to leave. *See id.* at 416-17, 473 S.E.2d at 43.

This case is entirely distinguishable from both *Denning-Boyles* and *Brown*. Contrast *Denning-Boyles*, 123 N.C. App. 409, 473 S.E.2d 38; *Brown*, 93 N.C. App. 431, 378 S.E.2d 232. Here, plaintiff contacted Ms. Bostwick the day after the incident, met with her within two days of the incident, and Ms. Bostwick took immediate action to investigate the claim against defendant Ziekle, which resulted in Ziekle's termination within the month.

In order to prove ratification, plaintiff must first show that defendant Sara Lee "had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, show[ed] an intention to ratify the act." *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42. There was only one act alleged here, the 24 August 2005 groping by defendant Ziekle, and not a continuing course of conduct, as in *Denning-Boyles* and *Brown*. Contrast *Denning-Boyles*, 123 N.C. App. 409, 473 S.E.2d 38; *Brown*, 93 N.C. App. 431, 378 S.E.2d 232. Even taking the evidence in the light most favorable to plaintiff, and assuming that plaintiff described "all material facts and circumstances" to Ms. Yates on the phone, *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42, the only time period during which defendant Sara Lee could possibly be considered as "ratifying" defendant Ziekles's conduct would be from the time of the phone call until Plaintiff met with Ms. Bostwick within two working days of the incident. Whatever Ms. Yates told plaintiff on the phone, plaintiff reported the incident to the proper personnel of defendant Sara Lee, and defendant Sara Lee immediately initiated the investigation, which was, as a practical matter, the first opportunity that defendant Sara Lee had to address the incident.

Furthermore, plaintiff has not demonstrated "any course of conduct on the part of [defendant Sara Lee] which reasonably tends to show an

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intention on [its] part to ratify [defendant Ziekle]'s unauthorized acts. Such course of conduct may involve an omission to act." *Id.* Defendant Sara Lee immediately initiated an investigation, which was completed quickly and resulted in Ziekle's termination.

In fact, we are not sure how defendant Sara Lee could have acted much more quickly and decisively in its investigation of plaintiff's claims. Instead of ratifying, or even briefly tolerating, defendant Ziekle's conduct, defendant Sara Lee took action to protect plaintiff from further wrongful conduct on his part. As plaintiff failed to forecast sufficient evidence that defendant Sara Lee ratified defendant Ziekle's conduct or any other basis for *respondent superior* liability, we conclude that the trial court properly granted defendant Sara Lee's motion for summary judgment.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges McGEE and BRYANT concur.

IN THE MATTER OF L.R.S.

No. COA14-323

Filed 21 October 2014

**Termination of Parental Rights—grounds—dependency—
extended incarceration of parent—no alternative child
care arrangement**

The trial court did not err by terminating respondent mother's parental rights based on dependency. Respondent's extended incarceration constituted a condition that rendered her unable or unavailable to parent the minor child. Further, respondent had not proposed an alternative child care arrangement. The Court of Appeals did not address respondent's arguments that grounds also existed to terminate parental rights under N.C.G.S. § 7B-1111(a)(1) since one ground was already found to be sufficient.

Appeal by respondent mother from order entered 16 December 2013 by Judge David V. Byrd in Surry County District Court. Heard in the Court of Appeals 30 September 2014.

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Susan Curtis Campbell for petitioner-appellee Surry County Department of Social Services.

Mercedes O. Chut for respondent-appellant mother.

Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.

McCULLOUGH, Judge.

Respondent mother appeals from an order entered 16 December 2013, which terminated her parental rights to her minor child, L.R.S. (“Lilly”)¹. Because the trial court’s conclusion that the ground of dependency existed to terminate respondent’s parental rights is supported by its findings of fact and record evidence, we affirm.

The Surry County Department of Social Services (“DSS”) became involved with respondent and Lilly in January of 2012 when it obtained non-secure custody of Lilly and filed a petition alleging she was a neglected and dependent juvenile. At the time of the filing of the petition, Lilly was just two months old, respondent had been arrested and jailed on criminal charges, and Lilly’s father was incarcerated with the North Carolina Department of Public Safety. After a hearing on 8 March 2012, the trial court entered adjudication and disposition orders on 4 April 2012, concluding Lilly was a neglected and dependent juvenile and continuing custody of Lilly with DSS. At the time of the entry of the court’s orders, respondent lived in a residential facility in Wake County pursuant to a pre-trial release order for pending federal criminal charges.

Over the next several months, respondent resided in residential facilities awaiting disposition of her federal criminal charges. Respondent regularly visited with Lilly until 18 December 2012, when she was expelled from the residential facility for not complying with its rules. In January 2013, respondent was convicted of her federal criminal charges and sentenced to a term of 38 months imprisonment. Respondent was subsequently transported to a federal correctional institution in Danbury, Connecticut to serve her sentence. In a permanency planning order entered 11 March 2013, the trial court relieved DSS of further reunification efforts with both parents, set the permanent plan for Lilly as adoption, and directed DSS to initiate an action to terminate parental rights.

1. Pseudonyms are used to protect the child’s identity and for ease of reading.

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On 18 March 2013, DSS filed a motion for the termination of parental rights to Lilly. After a hearing on 28 August 2013, the trial court entered an order terminating the parental rights of both respondent and Lilly's father. The court concluded grounds existed to terminate respondent's parental rights based on neglect and dependency, *see* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2013), and that it was in Lilly's best interests to terminate her parental rights.² Respondent appeals.

On appeal from an order terminating parental rights, this Court reviews the order for "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (citations and quotation marks omitted), *disc. review denied sub nom.*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary." *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009). The trial court's findings of fact which an appellant does not specifically dispute on appeal "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd. per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

We first address respondent's argument that the trial court erred in concluding grounds existed to terminate her parental rights based on dependency. A trial court may terminate parental rights if it concludes:

That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

2. The trial court also terminated the parental rights of Lilly's father on the grounds of neglect, dependency, and abandonment. N.C. Gen. Stat. § 7B-1111(a)(1), (6), (7). Lilly's father also appealed from the trial court's order, but was permitted to withdraw his appeal by order of this Court entered 6 May 2014.

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N.C. Gen. Stat. § 7B-1111(a)(6) (2013). A dependent juvenile is defined as one who is “in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9) (2013). Thus, the trial court’s findings regarding this ground “must address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.” *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Respondent first asserts that the ground of dependency is only properly found where the evidence shows that the incapability will continue throughout the child’s minority. Respondent cites to this Court’s opinion in *In re Guynn*, 113 N.C. App. 114, 437 S.E.2d 532 (1993), for support for this assertion. However, in *Guynn*, this Court reviewed an order terminating parental rights using a prior statutory version of the ground of dependency. The dependency ground at issue in *Guynn* required the trial court to find:

That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

Id. at 119, 437 S.E.2d at 535-36; *see also* N.C. Gen. Stat. § 7A-289.32(7) (1991). Here, the trial court applied the current standard and was not required to find that there was a reasonable probability that such incapability will continue throughout the minority of the child. Rather, the trial court properly found that there is a reasonable probability that such incapability will continue for the foreseeable future.

Respondent also argues that the trial court erred in concluding that the ground of dependency existed where DSS presented no evidence of mental illness or disability that would render her incapable of parenting in the foreseeable future. In support of her argument, respondent cites *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012), which relies on *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

In *Clark*, this Court reversed a trial court’s order terminating parental rights on the ground of dependency where there was “no evidence

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at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for [the juvenile], nor did the trial court make any findings of fact regarding such a condition[.]” and where “there was no clear and convincing evidence to suggest that respondent was incapable of arranging for appropriate supervision for the child.” *In re Clark*, 151 N.C. App. at 289, 565 S.E.2d at 247-48. Relying on *Clark*, in *J.K.C.*, this Court then affirmed the dismissal of a termination petition on the ground that, although the respondent was incarcerated, “the trial court did not find respondent was incapable of providing care and supervision.” *In re J.K.C.*, 218 N.C. App. at 41, 721 S.E.2d at 277. In *J.K.C.*, this Court further noted that “[s]imilar to the facts in *Clark*, the guardian ad litem . . . did not present any evidence that respondent’s incapability of providing care and supervision was due to one of the specific conditions or any other similar cause or condition.” *Id.*

In *Clark*, however, this Court again applied a prior version of the statute setting forth the ground of dependency, which stated that a trial court could terminate parental rights where it found:

That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other *similar* cause or condition.

In re Clark, 151 N.C. App. at 288, 565 S.E.2d at 247 (emphasis added); see also N.C. Gen. Stat. § 7B-1111(a)(6) (2001). As this Court recently discussed in an instructive unpublished opinion, see *In re G.L.K.*, COA 13-92, 2013 WL 3379750 (N.C. App. July 2, 2013), effective 1 December 2003, the North Carolina General Assembly modified the ground of dependency by removing the requirement that “other” causes or conditions resulting in dependency be “similar” to substance abuse, mental retardation, mental illness, or organic brain syndrome. 2003 N.C. Sess. Laws ch. 140, §§ 3, 11. The statute now permits dependency to be based on “substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile” N.C. Gen. Stat. § 7B-1111(a)(6).

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In contrast to *J.K.C.*, in the present case, the trial court found that due to her extended incarceration, respondent would be unable to parent Lilly, and that this inability would continue for the foreseeable future. The court found that in January 2013, respondent was sentenced to an active term of 38 months imprisonment, and that her projected release date was 13 September 2014. Thus, at the time of the hearing in August 2013 respondent was not scheduled to be released from federal custody for at least 13 additional months, and potentially faced up to 30 additional months imprisonment. Respondent's extended incarceration is clearly sufficient to constitute a condition that rendered her unable or unavailable to parent Lilly.

Respondent further contends the trial court erred in finding that she had not proposed an appropriate alternative child care arrangement for Lilly. Respondent argues that she repeatedly offered a married couple (the "Martins"), who had previously adopted another of respondent's children, as appropriate alternative caregivers. Respondent's argument is misplaced.

Respondent first indicated to the trial court that the Martins were willing to accept placement of Lilly and were interested in adopting her at the 11 January 2013 permanency planning hearing. Mrs. Martin testified at that hearing that she and her husband were willing to care for Lilly, however, she also acknowledged that they had previously declined placement of Lilly in April 2012. At the termination hearing, a DSS social worker testified that although respondent had repeatedly recommended placement of Lilly with the Martins, DSS did not recommend the placement. Moreover, no evidence was presented at the termination hearing that the Martins continued to agree to be considered a placement option for Lilly. Given the Martins' prior decision to decline the placement and lack of evidence at the termination hearing that they were willing and able to care for Lilly, we cannot say the trial court erred in finding that respondent had not proposed an alternative child care arrangement for her child. Accordingly, we hold the trial court's findings of fact support its conclusion that grounds to terminate respondent's parental rights existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

Because the evidence and findings of fact support the conclusion that grounds existed to terminate respondent's parental rights on the basis of dependency, we need not address respondent's arguments regarding the court's conclusion that grounds also existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006).

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Respondent has not challenged the dispositional ruling that termination of her parental rights was in Lilly's best interests, and we thus affirm the trial court's order terminating respondent's parental rights.

Affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
ANTOINETTE NICOLE DAVIS

No. COA14-258

Filed 21 October 2014

1. Appeal and Error—writ of certiorari—notice

A defendant's petition for writ of certiorari to reach the merits of her appeal was granted in the discretion of the Court of Appeals even though defendant did not give notice during plea negotiations of her intent to appeal the denial of her motion to suppress and even though the notice of appeal failed to identify the specific court to which the appeal was taken.

**2. Confessions and Incriminating Statements—interrogation—
not custodial**

The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding that defendant was not subject to custodial interrogation under the totality of the circumstances where a reasonable person in defendant's position would not have believed that she was formally arrested or restrained at the time she gave incriminating statements. There was no indication that the trial court utilized a subjective rather than objective test, the trial court did not operate under a misapprehension of law, and competent evidence supported the trial court's factual findings that defendant was neither threatened nor restrained during a fourth interview.

**3. Confessions and Incriminating Statements—statement not
coerced—officer's false promise**

The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding

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that defendant's statements were freely and voluntarily given. An officer's promise that defendant would "walk out" regardless of her statements did not render defendant's confession involuntary.

Appeal by defendant from judgment entered 18 October 2013 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 27 August 2014.

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

Amanda S. Zimmer for defendant-appellant.

HUNTER, Robert C., Judge.

Antoinette Nicole Davis ("defendant") appeals from judgment entered pursuant to her *Alford* plea to two counts of felonious child abuse and one count each of second degree murder, human trafficking, conspiracy to commit sexual offense of a child by an adult offender, first degree kidnapping, first degree sexual offense, sexual servitude, and taking indecent liberties with a minor. On appeal, defendant challenges the trial court's denial of her motion to suppress incriminating statements made to law enforcement personnel during interviews conducted in November 2009. Specifically, defendant argues that the trial court erred by concluding that: (1) defendant was not subject to custodial interrogation during these interviews, and (2) her confession was voluntarily and understandingly made.

After careful review, we affirm the trial court's denial of defendant's motion to suppress.

Background

From 10 November 2009 through 14 November 2009, defendant was interviewed four times by law enforcement personnel at the Fayetteville City Police Department. She went to the police department voluntarily for each of the four interviews, with the stated purpose of helping the officers find her missing five-year-old daughter, S.D.¹

A. The First Interview

On 10 November 2009, defendant called 911 to report that S.D. was missing. She went to the police station and spoke with Detective Tracey

1. To protect the privacy of the minor victim, we will refer to her using her initials.

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Bowman (“Detective Bowman”). The first interview began at 8:54 a.m. and lasted approximately six hours and nine minutes. Defendant was left alone in the interview room for long periods of time, with the door closed but unlocked. Detective Bowman told defendant that she was keeping the door closed as a safety precaution because criminal suspects were inside the building. Defendant was allowed to take bathroom and cigarette breaks, but was accompanied by Detective Bowman during each. Detective Bowman explained that a Police Department safety code required that she escort defendant. Defendant was offered beverages several times throughout the interview and was given food to eat.

In the first interview, defendant told Detective Bowman that she did not know what happened to S.D. or who could have taken her. At the time, defendant and S.D. were living in a trailer with defendant’s sister, Brenda. Defendant claimed to have put S.D. to sleep in S.D.’s brother’s bedroom at around 5:00 a.m. that morning, and that at around 6:00 a.m., S.D.’s brother told defendant that S.D. was no longer in the bed with him. When defendant discovered that no one in the trailer had seen S.D., she searched the front part of her neighborhood then called the police.

Towards the end of the interview, defendant expressed frustration at being at the police station for so long, because she wanted to be out looking for S.D. Detective Bowman told her she could leave if she really wanted to, but defendant declined. Defendant left the station approximately six hours after arriving.

B. The Second Interview

The second interview began at 5:25 p.m. on 11 November 2009 and lasted approximately thirty minutes. During this interview, defendant told Detective Bowman that her boyfriend, Clarence Coe (“Coe”), had taken S.D. She claimed that he hit S.D. twice in the face in the early morning hours of 10 November 2009 after having an intense argument with defendant. Although defendant claimed that she tried to stop him, Coe “took off” in a car with S.D. Defendant told Detective Bowman that she believed S.D. to be somewhere around the Murchison Road area. After taking defendant’s statement, Detective Bowman checked to see if there were any new developments in the case. Soon thereafter, defendant left the station.

C. The Third Interview

The third interview began at 8:38 p.m. on 12 November 2009 and lasted approximately forty-six minutes. Detective Bowman initiated the interview by telling defendant that she knew defendant had been lying

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about what happened to S.D. Detective Bowman yelled and cursed at defendant, repeatedly accusing her of lying. Defendant began to cry. Detective Bowman showed defendant a photograph of S.D. with Mario McNeil, also known as “Mono,” and asked defendant what she thought Mono would say when he was caught. Defendant then admitted that she had lied the previous day and that Coe had nothing to do with S.D.’s disappearance. Detective Bowman told defendant that her false statements lead to Coe’s arrest and incarceration and that lying to a federal agent is a federal offense punishable by up to five years in prison.

During the interview, Detective Bowman left the room and closed the door as a safety precaution due to other prisoners being in the building. Defendant asked for and received a glass of water, at which time Detective Bowman told defendant that they needed to work together to get S.D. back safely. Defendant told Detective Bowman that Mono had a relationship with defendant’s sister, Brenda. Defendant was then allowed to take a bathroom break and was left alone in the interview room. Before defendant left the police station, Detective Bowman told her that she did not know what would happen as a result of defendant’s lies, and that “[a]ll we care about right now is finding your daughter.” Defendant thanked Detective Bowman and left the police station.

D. The Fourth Interview

The fourth and final interview began at 11:53 a.m. on 14 November 2009 and lasted approximately five hours and thirty minutes. Rather than speaking with Detective Bowman, defendant was interviewed by Detective Carolyn Pollard (“Detective Pollard”) and Sergeant Chris Corcione (“Sgt. Corcione”). Defendant was seated in the back corner of the interview room, with Detective Pollard and Sgt. Corcione between her chair and the door. After approximately two hours of discussing defendant’s personal background, defendant indicated that her stomach hurt. She told the officers that she was pregnant. Detective Pollard suggested that defendant go to the Health Department for an examination, but defendant refused and said “[m]y next step is to finish trying to find my daughter.”

Defendant then began recounting the events surrounding S.D.’s disappearance. She awoke on the morning of 10 November 2009 to find S.D. gone. Defendant asked her sister’s boyfriend if anyone had been in the house, and he replied “Mono.” However, defendant claimed that she did not see or hear anyone in the house and reiterated that she had nothing to do with S.D.’s disappearance. Defendant admitted to Detective Pollard and Sgt. Corcione that she lied in previous interviews and “put

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it all on [Coe].” However, defendant said that she lied because Detective Bowman scared her and “tried to make her know something she didn’t know.” Detective Pollard asked defendant if she was scaring her, and defendant said that she was not. Defendant then said that she wanted to tell the truth after she learned that Coe had been arrested because of her previous lies.

Sgt. Corcione told defendant that he wanted her to tell the truth, because Mono was in jail and had already informed the police that defendant knew what happened to S.D. The officers told defendant that they already knew what happened but that they needed to hear it from her; they repeatedly asked defendant to stay on the “right track” by telling the truth. Defendant told the officers that Mono came to the trailer because he wanted to have sex with her. Sgt. Corcione advised defendant to stay on the right track, and said that no matter what she said she would “walk out of here.”

Eventually, defendant said that she owed Mono \$200.00, and that he wanted either the money that was owed or sex to repay the debt. Sgt. Corcione told defendant that Mono was going to tell the truth to save himself, so she needed to be entirely truthful about what happened next. He told defendant “I got to hear it from you so we can put that monster away.” Defendant emotionally confessed to the officers that Mono took S.D. to a motel room with defendant’s consent with the understanding that “[a]ll he was supposed to do was have sex with her.” She said that this arrangement would settle her \$200.00 debt. Defendant then claimed that the plan was for Mono to take S.D. to a motel for another individual to have sex with her, but she did not know whom the third party was. After giving these statements to the officers, defendant requested and was allowed to take a cigarette break.

When she returned, defendant was asked for details regarding the arrangement she had with Mono. Defendant denied knowing the specifics of Mono’s plan for S.D. Defendant was then left in the interview room alone. She asked Sgt. Corcione how much longer she was going to be there, to which he responded “[n]ot too much longer.” Defendant took another bathroom and cigarette break and asked Detective Pollard to join her outside. After returning, defendant took one more bathroom break, then was left alone in the interview room for approximately thirty minutes. Detective Bowman then entered the room and advised defendant that she was under arrest and was no longer free to leave.

On 16 November 2009, S.D.’s body was found on the side of Walker Road outside of Fayetteville. Medical examiners concluded that S.D.’s

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cause of death was asphyxiation. Blood was found on anal and vaginal swabs, indicating sexual trauma.

Defendant was charged with human trafficking, felonious child abuse, felony conspiracy, first degree kidnapping, first degree murder, rape of a child by an adult offender, sexual servitude, and taking indecent liberties with a child. She filed a motion to suppress the incriminating statements made to Detective Pollard and Sgt. Corcione during the fourth interview, but did not move to suppress any statements made in the other three interviews. After hearing the parties on defendant's motion to suppress, the trial court entered an order denying the motion.

In exchange for dismissal of the rape charge and a reduction from first to second degree murder, defendant entered an *Alford* plea on 18 October 2013. Pursuant to the plea agreement, she was sentenced to 210 to 261 months imprisonment.

[1] Defendant timely appealed from judgment, but failed to give notice during plea negotiations as to her intent to appeal the denial of her motion to suppress. *See* N.C. Gen. Stat. § 15A-979 (2013). Furthermore, defendant's notice of appeal failed to identify the specific court to which the appeal was taken, in violation of Rule 4 of the North Carolina Rules of Appellate Procedure. In our discretion, we grant defendant's petition for writ of certiorari to reach the merits of her appeal. *See* N.C. R. App. P. 21(a)(1) (2013); *State v. Franklin*, __ N.C. App. __, __, 736 S.E.2d 218, 220 (2012).

Discussion

I. Custodial Interrogation

[2] Defendant first argues that the trial court failed to address whether a reasonable person in defendant's position would have believed she was under arrest or restrained to a significant degree, and therefore erred by concluding that defendant was not subject to custodial interrogation during the fourth interview. We disagree.

We review the trial court's legal conclusions in an order denying a motion to suppress *de novo*. *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000). We also review the legal conclusions for whether they are supported by the trial court's findings of fact. *State v. Waring*, 364 N.C. 443, 467, 701 S.E.2d 615, 631 (2010). "[A] trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* at 469, 701 S.E.2d at 632 (citation omitted). Unchallenged findings of fact are deemed supported by competent

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evidence and are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The Fifth Amendment to the United States Constitution guarantees that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The United States Supreme Court has held that the Fifth Amendment bars statements resulting from custodial interrogation from being used against a defendant unless the defendant was administered certain procedural safeguards before responding, specifically being advised of the “right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney[.]” *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706-07 (1966).

However, the Court has emphasized that

Police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.”

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam).

The “definitive inquiry” in determining whether a person is “in custody” for *Miranda* purposes is whether, based on the totality of the circumstances, there was a “formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997) (citing *Stansbury v. California*, 511 U.S. 318, 128 L.Ed.2d 293 (1994) (per curiam)). This determination involves “an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances.” *State v. Hall*, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998) (quotation marks omitted). While “no single factor controls the determination of whether an individual is ‘in custody’ for purposes of *Miranda*[.]” *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004), our appellate courts have “considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect,” *State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010) (internal citations omitted).

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Defendant argues that the trial court's conclusion of law that she was not subject to custodial interrogation during the fourth interview is erroneous for two reasons: (1) the trial court used a subjective rather than objective test, in contravention of long-standing precedent, and (2) the trial court's findings of fact are unsupported by competent evidence, and those findings in turn do not support the conclusion that a reasonable person in defendant's position would not have felt constrained to the same degree as with a formal arrest. We disagree with both contentions.

First, there is no indication that the trial court utilized a subjective rather than objective test in its conclusions of law regarding whether defendant was subject to custodial interrogation. The trial court concluded that:

The Defendant was not subjected to custodial interrogation during the interviews of November 10, 2009, November 11, 2009, November 12, 2009 and November 14, 2009 until about 5:25 p.m. on November 14, 2009 when Det. Bowman told her that she was under arrest. *The Defendant was not in custody until that point in time because the Defendant had not been formally arrested or otherwise deprived of her freedom of movement of the degree associated with a formal arrest until that moment.*

(Emphasis added.) This conclusion of law tracks verbatim language found in applicable opinions issued by this Court and our Supreme Court regarding the test for whether an individual was subject to custodial interrogation. *See State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (“[T]he appropriate inquiry in determining whether a defendant is ‘in custody’ for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a ‘formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’”) Although the trial court did find as fact that defendant believed she was free to leave at various points of the interview, it also entered numerous findings of fact detailing the objective circumstances of the interview. There is no indication that the trial court supported its conclusion that defendant was not subject to custodial interrogation with the finding of fact that she subjectively felt free to leave; that finding of fact could have properly been considered in the trial court's conclusion regarding the voluntariness of her confession.

Thus, because the trial court's conclusion that defendant was not subject to custodial interrogation makes no reference to defendant's subjective state of mind, but does determine the “appropriate inquiry”

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as set out in *Buchanan*, we conclude that the trial court did not operate under a misapprehension of law. Defendant's argument is overruled.

Additionally, we hold that the trial court's findings of fact are supported by competent evidence, and those findings support its conclusion of law that defendant was not subject to custodial interrogation.

First, the trial court's finding of fact that defendant was not threatened is supported by competent evidence. Although defendant was told by Detective Bowman in the third interview that lying to a federal officer was punishable by up to five years in prison, neither Detective Pollard nor Sgt. Corcione threatened her with arrest or imprisonment during the fourth interview. Rather, Detective Pollard and Sgt. Corcione told defendant that they were unconcerned with the potential consequences of her previous lies and wanted to get to the truth of what happened so that they could find S.D. Because the only interview subject to defendant's motion to dismiss was the fourth interview, Detective Bowman's prior statements to defendant do not render the trial court's finding of fact that defendant was not threatened erroneous.

Second, competent evidence supports the trial court's finding of fact that defendant was not restrained during the fourth interview. Defendant concedes that she was not handcuffed or physically restrained in any way. However, defendant contends that her freedom of movement was restricted to the degree associated with a formal arrest because she was seated in the corner of the interview room and was "crowded" by Detective Pollard and Sgt. Corcione, who were seated on either side of defendant, between her and the door. Although we do not dispute defendant's characterization of the seating arrangement inside the interview room, we do not find that these circumstances amounted to a "restraint" on her mobility. Defendant requested and was allowed to take multiple bathroom and cigarette breaks throughout each of the four interviews. Although she was escorted by an officer for each of these breaks, our Supreme Court has noted that it is "unlikely that any civilian would be allowed to stray through a police station," indicating an unwillingness to consider a police escort for a bathroom break as weighing in favor of a contention that a defendant was in custody. *Waring*, 364 N.C. at 472, 701 S.E.2d at 634. During the fourth interview, Detective Pollard even suggested that defendant leave and go to a medical center when defendant indicated that she felt pain and stomach illness due to her pregnancy. Defendant declined to leave; she elected to continue speaking to the officers with the hope that they would help her find S.D. Thus, because the record demonstrates that defendant could have left the fourth interview had she desired to do so and generally had the freedom to take

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breaks whenever she requested them, competent evidence supports the trial court's finding of fact that defendant's freedom of movement was not restrained.

Given that competent evidence supports the trial court's factual findings that defendant was neither threatened nor restrained during the fourth interview, we find no error in its legal conclusion that defendant was not in custody for the purposes of *Miranda*. In addition to the above, we find competent evidence to support the trial court's findings of fact that: (1) defendant voluntarily went to the police station for each of the four interviews; (2) she was allowed to leave at the end of the first three interviews; (3) the interview room door was closed but unlocked; (4) defendant was allowed to take multiple bathroom and cigarette breaks; (5) defendant was given food and drink; and (6) defendant was offered the opportunity to leave the fourth interview but refused. Our Courts have consistently held that similar circumstances do not amount to the level of custodial interrogation. *See, e.g., State v. Gaines*, 345 N.C. 647, 658-63, 483 S.E.2d 396, 402-06 (1997) (holding that a defendant was not in custody where he voluntarily went to the police station, was not told that he was under arrest, was interviewed in a room at the police station but was not handcuffed, was offered food, and the officer did not answer him when he asked if he could leave); *State v. Deese*, 136 N.C. App. 413, 417-18, 524 S.E.2d 381, 384-85 (2000) (holding that a defendant was not in custody where he was permitted to arrange the interview at a time convenient to him, was told that he was free to leave, was not physically threatened or restrained, and was left alone in the interview room for periods of time); *State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633-34 (2010) (holding that the defendant was not in custody where officers told him he was not under arrest, he voluntarily went with officers to the police station, was never restrained, was given bathroom breaks, was left alone in an unlocked interview room, and was not deceived, misled, or threatened).

We conclude that under the totality of the circumstances, a reasonable person in defendant's position would not have believed that she was formally arrested or restrained to the degree associated with a formal arrest at the time defendant gave incriminating statements during the fourth interview. Therefore, we affirm the trial court's conclusion that defendant was not subject to custodial interrogation.

II. Voluntariness of Confession

[3] Defendant next argues that the trial court erred by concluding that her statements made in the fourth interview were freely and voluntarily given, when in fact they were coerced by fear and hope. We disagree.

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The Fourteenth Amendment to the United States Constitution requires that a defendant's confession be voluntary for it to be admissible. *State v. Thompson*, 149 N.C. App. 276, 281, 560 S.E.2d 568, 572 (2002). "If, looking to the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, then he has willed to confess and it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quotations and brackets omitted). Our Supreme Court has identified a number of relevant factors to consider in this analysis, such as:

whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. However, "[t]he presence or absence of any one or more of these factors is not determinative." *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002).

Here, defendant argues that she was coerced into confessing because: (1) Sgt. Corcione promised her that she would "walk out" of the fourth interview regardless of what she said; (2) the officers lied to her about what information Mono had given them; and (3) she was mentally unstable and unfit to give a voluntary confession due to the stress of having a missing child, being pregnant, and being implicated in S.D.'s disappearance.

First, we do not believe that Sgt. Corcione's promise that defendant would "walk out" regardless of her statements rendered defendant's confession involuntary. This argument was previously addressed in *Thompson*, where the defendant argued that his confession was involuntary where the interviewing officer promised him that he would not be arrested regardless of what he said. *Thompson*, 149 N.C. App. at 282, 560 S.E.2d at 572. This Court held that the officer's promise did not make the confession involuntary because it could not have led the defendant "to believe that the criminal justice system would treat him more favorably if he confessed to the robbery." *Id.* at 282, 560 S.E.2d at 573. In so holding, the Court contrasted previous cases where officers' promises

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of assistance or leniency in future prosecutions were held to be unduly coercive. *See, e.g., State v. Fox*, 274 N.C. 277, 293, 163 S.E.2d 492, 503 (1968) (holding that a suggestion that the defendant might be charged with accessory to murder rather than murder if he confessed rendered the confession involuntary). Sgt. Corcione's statements are almost identical to those made in *Thompson*. Thus, in accordance with *Thompson*, we hold that Sgt. Corcione's promise that defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, Sgt. Corcione's statements could not have led defendant to believe that she would be treated more favorably by the criminal justice system if she confessed to her involvement in S.D.'s disappearance and subsequent death.

Second, there is no indication that the officers lied about what information Mono provided. No evidence was presented at the suppression hearing regarding what Mono told law enforcement, and there is nothing to support defendant's claim that Detective Pollard and Sgt. Corcione lied to defendant about the information Mono provided. However, even assuming that the officers were untruthful, the longstanding rule in this state is that "[t]he use of trickery by police officers in dealing with defendants is not illegal as a matter of law." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983). Specifically, our Supreme Court has held that "[f]alse statements by officers concerning evidence, as contrasted with threats and promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession." *Id.* Thus, because there is no indication that Sgt. Corcione or Detective Pollard lied to defendant regarding the information Mono provided law enforcement, we find her argument unpersuasive. Even assuming that they did lie, this interrogation tactic would not "affect the reliability of the confession," *id.*, and therefore would still be insufficient to support a conclusion that the confession was coerced or involuntary.

Finally, we do not believe that defendant's mental state rendered her confession involuntary and coerced. Although defendant did tell Detective Pollard and Sgt. Corcione that she had not slept in five days due to the stress of S.D. being missing, the trial court found as an uncontested finding of fact that defendant "appeared to be coherent, did not appear to be impaired in any way, . . . appeared to understand what was being said during the interview[,] and "the majority of her answers were reasonable and were being taken in relationship to the question." Detective Pollard offered defendant the opportunity to stop the interview and go to the Health Department, but defendant declined, indicating that her "next step" would be to help the officers find S.D.

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In sum, nearly all of the relevant factors identified by the *Hardy* Court weigh in favor of the State. As discussed above, defendant was not in custody when she made incriminating statements to Detective Pollard and Sgt. Corcione, and therefore, her *Miranda* rights were not implicated. See *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827. Furthermore, competent evidence supports the trial court's findings of fact that defendant was neither threatened with prosecution for lying nor physically restrained during the fourth interview. She was not held incommunicado, as demonstrated by the fact that she was able to access her cell phone multiple times during the fourth interview. She was offered water and food in addition to being allowed to take bathroom or cigarette breaks whenever she requested them. There were no threats of force or shows of violence used against her. She was a competent, literate, twenty-five-year-old woman who clearly understood the English language and responded clearly and reasonably to the questions asked. When given the opportunity to leave the fourth interview, she chose to stay in an effort to help the officers find her missing daughter.

Given the totality of these circumstances, we hold that defendant's confession was "the product of an essentially free and unconstrained choice by its maker," *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608, and we affirm the trial court's conclusion of law that defendant's statements "were not the product of hope or induced by fear."

Conclusion

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges DILLON and DAVIS concur.

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[237 N.C. App. 35 (2014)]

STATE OF NORTH CAROLINA

v.

THOMAS EVERETTE, JR., DEFENDANT

No. COA14-426

Filed 21 October 2014

1. Appeal and Error—preservation of issues—motion to dismiss—different grounds argued at trial—discretionary review

An argument concerning the denial of defendant's motion to dismiss a charge of obtaining property by false pretenses for a fatal variance was not properly preserved for appeal where defendant at trial based his motion solely on insufficient evidence. However, the issue was reviewed in the exercise of the Court of Appeals' discretion.

2. Indictment and Information—no fatal variance—obtaining property by false pretenses—forged deed

There was no fatal variance between the indictment and the evidence in a prosecution for obtaining property by false pretense where defendant contended that the indictment alleged that he had filed a forged and false deed. However, the indictment did not allege that the false pretense was forging the deed, nor was forgery an essential element of obtaining property by false pretenses.

3. Appeal and Error—preservation of issues—discretionary review denied

The Court of Appeals, in its discretion, did not review an improperly preserved issue concerning the sufficiency of the evidence in a prosecution for obtaining property by false pretenses. Nothing in the record or briefs demonstrated circumstances sufficient to justify suspending or varying the rules in order to prevent manifest injustice to defendant.

4. Sentencing—calculation of prior record points—clerical error—no change in sentence—jurisdiction

Defendant's prior record level points were incorrectly calculated where two of the misdemeanors listed on the worksheet had the same date of conviction and only one should have been counted. A new sentencing hearing was not necessary because the sentence imposed would not be affected by a recalculation of defendant's prior record points and the matter was treated as a clerical error and remanded to the trial court for correction. Whether the trial court

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would have had jurisdiction to amend defendant's prior record level points was inapposite because the trial court did not attempt to correct its own error while the case was on appeal.

Judge ERVIN concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 19 October 2013 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 8 September 2014.

Roy Cooper, Attorney General, by Harriet F. Worley, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Jillian C. Katz, Assistant Appellate Defender, for defendant-appellant.

BELL, Judge.

Thomas Everette, Jr. ("Defendant") appeals from his conviction for obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred by (1) denying his motion to dismiss because there was a fatal variance between the false pretense alleged in the indictment and the State's evidence at trial; (2) denying his motion to dismiss because there was no causal relationship between the false representation alleged and the value obtained; and (3) miscalculating Defendant's prior record points. After careful review, we conclude that Defendant received a fair trial free from prejudicial error, but remand for correction of a clerical error on Defendant's prior record level worksheet.

Factual Background

The State presented evidence tending to show the following facts: In 2010, a home located at 2401 Victoria Park Lane in Raleigh, North Carolina was vacant after a foreclosure. Veneta Ford ("Ms. Ford"), a realtor in Raleigh, was contacted by Bank of America, the new owner of the property, to prepare the home for re-sale. Ms. Ford put the utilities in her name and had the house re-keyed. She placed the house on the market on 12 July 2010.

Ms. Ford visited the house several times to clean and perform maintenance on the property. On one visit, she discovered that the for-sale sign she had placed on the property had been removed. Additionally, the house had been re-keyed so that her key did not work. On another occasion, Ms. Ford went to the property and discovered that the lockbox

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attached to the front door containing the keys to the house had been cut off. In January 2011, Ms. Ford noticed a professional-looking sign warning against trespassing on the property. Neighbors informed Ms. Ford that someone had moved into the home. She also discovered that someone had taken the utilities out of her name and put them in his own name. Ms. Ford contacted the Raleigh Police Department about this incident.

On 23 August 2011, Raleigh Police Department Sergeant Timothy Halterman (“Sergeant Halterman”) responded to a call for service at 2401 Victoria Park Lane after receiving a complaint from Ms. Ford that an unauthorized person was living on the property. Sergeant Halterman asked Defendant for documentation showing he was authorized to live in the home. Defendant retrieved a lease agreement from his safety deposit box and presented it to Sergeant Halterman. He informed Sergeant Halterman that the lease was from a company in Greenville, North Carolina and that he had been living in the house for months. After this encounter, Sergeant Halterman contacted his superior officer at the time, who advised him to contact Detective Terry Embler (“Detective Embler”), a Raleigh Police Department financial crimes investigator, to request that he further investigate the true ownership of 2401 Victoria Park Lane.

Ms. Ford eventually spoke with Defendant after leaving her card on the door of the house with a note requesting that someone call her. Defendant contacted her to tell her that he had bought the property and had a deed. Ms. Ford checked the Wake County public records and found that a general warranty deed had been recorded transferring title to the property from International Fidelity Trust (“IFT”) to itself, with Defendant listed as the trustee.

During this time, Detective Embler was investigating whether Defendant was validly living at the Victoria Park Lane property. He discovered that on 13 July 2011, a special warranty deed had been recorded at the Wake County Register of Deeds Office transferring title to the property at 2401 Victoria Park Lane from Bank of New York Mellon to IFT. This deed was signed by Keith Chapman as attorney-in-fact for the bank and had been notarized by Carolyn Evans (“Ms. Evans”).

Detective Embler testified that he was not able to find any information about IFT on the North Carolina Secretary of State’s website, at the South Carolina Secretary of State’s office, or through an Internet search. He discovered that the address given for the business corresponded to a P.O. Box at a UPS store in Greenville, North Carolina. Detective Embler

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learned that P.O. Box 250, the address listed as IFT's address on the general warranty deed, actually belonged to Defendant, and that Defendant had recorded a vast number of deeds and other paperwork with the Edgecombe County Register of Deeds Office using P.O. Box 250 as his address. In particular, Detective Embler testified that Defendant had recorded a special warranty deed with the Edgecombe County Register of Deeds Office that looked remarkably similar to the special warranty deed for the property at 2401 Victoria Park Lane that had been recorded in Wake County.

After collecting this information, Detective Embler contacted Secret Service Agent Michael Southern ("Special Agent Southern") to assist in the investigation. On 24 August 2011, Detective Embler and Special Agent Southern went to the Victoria Park Lane property with an arrest warrant for Defendant. Defendant was arrested and charged with breaking and entering and obtaining property by false pretenses. The next day Defendant was also charged with forgery of deeds.

On 28 November 2011 a grand jury indicted Defendant for breaking and entering, obtaining property by false pretenses, and forgery of a deed. A jury trial commenced on 14 October 2013 in Wake County Superior Court.

At trial, Defendant testified on his own behalf and presented the following account of the events leading up to his arrest: Defendant was facing potential foreclosure on his house which was under construction in Edgecombe County. In an effort to prevent his house from being foreclosed on, Defendant contacted a company he found on Craigslist called International Fidelity Trust and spoke with someone named John Kenny about using IFT's services to improve his credit score.

Defendant also testified that IFT told him that it owned several properties in Wake County at which he could live in exchange for performing work on the property. According to Defendant, he chose to live at 2401 Victoria Park Lane, a property purportedly owned by IFT. In December 2010, at IFT's direction, Defendant recorded several documents, including a common law lien and a general warranty deed, related to the Victoria Park Lane property as "trustee" for IFT. However, Defendant testified that he did not remember recording the general warranty deed specifically, because it was allegedly part of a package that contained the common law lien and other documents.

According to Defendant, on 15 December 2010, IFT had the property rekeyed and he began performing maintenance on the property. In May 2011, Defendant entered into a lease agreement with IFT for the

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Victoria Park Lane property set to begin on 31 May 2011. Defendant and his family moved into the house on 10 June 2011. Around that time, he also applied for utility services in his name at 2401 Victoria Park Lane. Defendant testified that he was paying taxes on the property by making payments to IFT in monthly installments.

At trial, the State introduced a copy of the special warranty deed recorded with the Wake County Register of Deeds Office. Detective Embler testified that he discovered another deed similar to this special warranty deed through which Defendant and his wife had received title to a home in Edgecombe County in 2006. Both deeds contained the same formatting, were signed by the same individual as attorney-in-fact for the lender that had foreclosed on each of the properties despite the fact that the lenders transferring title on the two deeds were different, and the same out-of-state law firm was purported to have prepared both deeds. Defendant denied having recorded the special warranty deed with the Wake County Register of Deeds Office.

Ms. Evans, the notary public who had purportedly notarized the special warranty deed for 2401 Victoria Park Lane, testified at trial that she was a licensed notary in South Carolina, not North Carolina. She testified that she did not notarize the special warranty deed and that the signature on the document was not hers. She further stated that the notary stamp on the special warranty deed was the stamp she used when she worked at Wells Fargo, but that she was not working for Wells Fargo or any other lender at the time this deed was notarized. She also observed that the special warranty deed was not properly notarized because the signature was not hand-dated, and a notary is required to hand-date her signature.

Dawn Hurley (“Ms. Hurley”), a Bank of America banking officer, testified that Bank of America acquired the home at 2401 Victoria Park Lane in February 2010 through a foreclosure sale. Ms. Hurley also testified that the title to the property was legally in the name of Bank of America, not Bank of New York Mellon, as indicated on the special warranty deed.

Veronica Gearon (“Ms. Gearon”), Wake County Register of Deeds recording supervisor, testified that by virtue of the recording of the special warranty deed, ownership of the property was transferred from Bank of New York Mellon to IFT. Ms. Gearon stated that she was unsure whether the recording of the earlier warranty deed in December 2010 that Defendant admitted he had prepared and signed as trustee for IFT would have transferred ownership of the property because the grantor and grantee were listed as the same entity — IFT — on that deed.

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On 19 October 2013, the jury returned a verdict finding Defendant guilty of obtaining property by false pretenses, but deadlocked with respect to the breaking and entering and forgery of deeds charges. As a result, the trial court declared a mistrial with respect to these two charges. That same day, the trial court sentenced Defendant to a term of 110 to 141 months imprisonment. Defendant gave notice of appeal in open court.

AnalysisI. Fatal Variance

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of obtaining property by false pretenses because there was a fatal variance between the indictment and the State's evidence. Specifically, Defendant contends that the indictment alleged that he had "filed a forged and false Special Warranty Deed," but that the State did not present sufficient evidence at trial to establish that he forged or was involved in forging the special warranty deed. We find Defendant's contentions to be without merit.

To preserve a fatal variance argument for appellate review, a defendant must state at trial that an allegedly fatal variance is the basis for his motion to dismiss. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). At trial, Defendant based his motion to dismiss solely on the grounds of insufficient evidence. Therefore, Defendant did not properly preserve for appellate review his argument that there was a fatal variance between the indictment and the evidence presented for appellate review. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review.") (citation omitted). However, Defendant asks this Court to review his argument in our discretion pursuant to Rule 2 of the Rules of Appellate Procedure. *See* N.C.R. App. P. 2. We elect to do so and conclude that Defendant has not shown a variance between the indictment and the evidence presented.

[2] "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted). The elements of obtaining property by false pretenses are

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(1) [a] false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.

State v. Saunders, 126 N.C. App. 524, 528, 485 S.E.2d 853, 856 (1997) (citation omitted); *see* N.C. Gen. Stat. § 14-100(a)(2013).

Here, Defendant contends that the State's evidence at trial was insufficient to establish that he forged the special warranty deed or took part in preparing this document. However, the indictment states, in pertinent part, as follows:

2. And the jurors for the State upon their oath present that on or about July 13, 2011, in Wake County, the Defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain the house and real property located at 2401 Victoria Park Lane, Raleigh, North Carolina from Bank of New York Mellon Corporation . . . by means of a false pretense which was calculated to deceive and did deceive.

The false pretense consisted of the following: the Defendant *presented and filed* a forged and false Special Warranty Deed in the Wake County Register of Deeds office purporting to transfer ownership of this foreclosed property from the mortgage holding bank to an apparent false trust in which the Defendant is the trustee.

(Emphasis added).

The indictment does not allege that the false pretense at issue is that Defendant forged the special warranty deed, nor is forgery an essential element of the offense of obtaining property by false pretenses. Defendant has shown no fatal variance between the indictment and the evidence presented. At trial, the State presented ample evidence that Defendant presented and recorded a forged deed — the precise representation that was charged. As such, Defendant's argument on this issue is without merit.

II. Causal Relationship Between False Representation Alleged
and the Value Obtained

[3] Defendant next contends that the trial court erred by denying his motion to dismiss the charge of obtaining property by false pretenses for

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insufficient evidence because the State failed to show that the alleged false pretense — the forgery of the special warranty deed — caused Defendant to obtain the house at 2401 Victoria Park Lane.

Defendant acknowledges that his trial counsel failed to specifically preserve this argument at trial. However, Defendant again asks this Court to invoke Rule 2 to reach the merits of his argument. Under Rule 2, this Court may suspend the rules of appellate procedure in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” N.C.R. App. P. 2 (2013).

“Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted). “[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions.” *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted).

Nothing in the record or briefs demonstrates “exceptional circumstances” sufficient to justify suspending or varying the rules in order to prevent “manifest injustice” to Defendant. *Id.* at 315, 644 S.E.2d at 205. The State presented evidence at trial that the special warranty deed was a forgery and that Defendant was the one who filed the forged deed. The natural consequence of filing the forged deed was that Defendant secured possession of the house, thereby implying causation. *State v. Dale*, 218 N.C. 625, 641, 12 S.E.2d 556, 565 (1945) (“The facts alleged in the indictment here, relating to the misrepresentation . . . are such as to imply causation, since they are obviously calculated to produce the result.”). In the exercise of our discretionary authority, we decline to invoke Rule 2. Therefore, this argument is dismissed.

III. Miscalculation of Defendant’s Prior Record Level Points

[4] Defendant’s final argument on appeal is that the trial court incorrectly calculated his prior record level points. Defendant acknowledges that a recalculation of his prior record points will not alter his sentence, but asks that a new prior record level worksheet be completed to accurately reflect his record. We agree.

Defendant contends that he should only have 10 prior record level points, rather than 11, because two of the misdemeanors listed on the worksheet and used in calculating Defendant’s prior record level

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had the same date of conviction. As such, only one may be counted for purposes of determining prior record points. N.C. Gen. Stat. §15A-1340.14(d) (2013).

Because the sentence imposed will not be affected by a recalculation of Defendant's prior record points, it is not necessary that there be a new sentencing hearing. Rather, we treat this as a clerical error and remand this matter to the trial court for its correction. *State v. Dobbs*, 208 N.C. App. 272, 274, 702 S.E.2d 349, 350-51 (2010) (finding judgment erroneously designating defendant's offense as Class G felony rather than Class H felony to be clerical error and remanding to trial court for correction where sentence unaffected by error).

The dissent relies on *State v. Jarman* for the proposition that while a trial court may "amend its records to correct clerical mistakes or supply defects or omissions therein", it lacks the authority, "under the guise of an amendment of its records, to correct a judicial error." 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *State v. Davis*, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996)). We note, however, that *Jarman* and *Davis* can be distinguished from the present case. In both *Jarman* and *Davis*, the distinction between clerical and judicial errors was of importance because it was the *trial court* that, upon its own initiative (through a hearing or motion), sought to correct an error.

In *Davis*, we held that the trial court "impermissibly corrected a judicial error," and thus "was without jurisdiction to amend the judgments in the course of settling the record on appeal" where the trial court entered an amended judgment after conducting a hearing to settle the record on appeal. 123 N.C. App. 240 at 242-43, 472 S.E.2d 392 at 393-94. On the other hand, in *Jarman*, we held that the trial court's correction of an order resulting from inaccurate information inadvertently provided by the deputy clerk was a clerical error, and therefore proper, because "the trial judge did not exercise any judicial discretion or undertake any judicial reasoning" when signing an order providing credit against service of sentence that the deputy clerk prepared. 140 N.C. App. at 203, 535 S.E.2d at 879.

In the case at bar, the trial court's error was brought to this Court by Defendant on appeal. "Where there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to err on the side of caution and resolve the discrepancy in the defendant's favor." *Jarman* at 203, 535 S.E.2d at 879 (citation and internal quotation marks omitted). In *Jarman*, we stated that "the judge's action in signing the order giving defendant credit to which he believed she was legally entitled was

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a mechanical and routine, though mistaken, application of a statutory mandate.” *Id.* Here, the assistant district attorney prepared Defendant’s prior record level worksheet for the trial judge’s signature by filling in the blanks on a standard AOC form and presenting it to the trial judge. As in *Jarman*, the record in the case *sub judice* “demonstrates that the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing” the prior record level worksheet. *Id.*

Further, because the trial court did not attempt to correct its own error while the case was on appeal, whether the trial court *would* have had jurisdiction to amend Defendant’s prior record level points is inapposite. Therefore, we find it proper to treat Defendant’s miscalculation of prior record level points as a clerical error and remand to the trial court for correction. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (“When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.”) (citation and internal quotation marks omitted).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error, but remand for correction of the clerical error found in his prior record level worksheet.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judge McCULLOUGH concurs.

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

Although I concur in my colleagues’ conclusion that Defendant received a fair trial that was free from prejudicial error and that his convictions should remain undisturbed, I am unable to agree with the Court’s determination that the trial court’s apparent miscalculation of Defendant’s prior record level points for sentencing purposes constitutes a clerical error that should be corrected on remand. On the contrary, I believe that this miscalculation constitutes judicial error and conclude, given the fact that this error had no impact on the calculation of Defendant’s prior record level, that there is no need for us to remand this case to the trial court for the correction of Defendant’s prior record worksheet. As a result, I concur in the Court’s opinion in part and dissent from the Court’s opinion in part.

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According to N.C. Gen. Stat. § 15A-1340.14(a), a defendant's prior record level is determined "by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." In addition, N.C. Gen. Stat. § 15A-1340.14(d) provides that:

For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

In the present case, the trial court calculated Defendant's prior record level by assigning a single point each for six of Defendant's seven prior eligible misdemeanor convictions, two of which occurred in the Edgecombe County District Court on 10 February 2005 and one of which stemmed from a charge that appears to have been voluntarily dismissed after the defendant noted an appeal to the Edgecombe County Superior Court. As a result of the fact that two of Defendant's seven eligible misdemeanor convictions appear to have occurred during a single session of court and the fact that one of Defendant's seven eligible misdemeanor convictions appears to have been overturned on appeal to the Superior Court, I agree with Defendant's contention, which my colleagues have accepted, that the trial court erred by calculating Defendant's prior record level using six, rather than five, misdemeanor convictions. However, as Defendant has candidly acknowledged, the erroneous inclusion of an additional prior record point based upon Defendant's convictions for committing misdemeanor offenses had no impact upon the calculation of Defendant's prior record level given that Defendant would still have been subject to being sentenced as a Level IV offender even after the removal of the erroneously assigned prior record point.

Although my colleagues acknowledge that the trial court's apparent error had no effect upon the calculation of Defendant's prior record level, they have concluded that the trial court should be required to correct Defendant's prior record level worksheet to eliminate any trace of this error from the court records on the basis of our authority to order the correction of clerical errors. According to well-established North Carolina law, "a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein," *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation

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omitted), with a “clerical error” being defined as “[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.” *Id.* (quoting Black’s Law Dictionary 563 (7th ed. 1999)). However, a trial court lacks the authority, “under the guise of an amendment of its records, [to] correct a judicial error.” *Id.* (citation omitted).¹

In *State v. Smith*, 188 N.C. App. 842, 844-45, 656 S.E.2d 695, 696 (2008), this Court found that a clerical error had occurred in an instance in which, after correctly identifying the aggravating factors to be utilized for the purpose of sentencing Defendant, the trial court misread the form used for the purpose of determining the aggravating and mitigating factors utilized in sentencing convicted impaired drivers and checked the wrong box on that form. In the present case, by contrast, the record contains no indication that the trial court did anything other than make a legally erroneous decision concerning the number of prior record points that Defendant had accumulated. In other words, instead of making an inadvertent clerical error, the trial court made an erroneous judicial determination concerning the number of prior record points that Defendant had accumulated for felony sentencing purposes.² As a

1. As my colleagues correctly note, the decision in *Jarman* refers to the power of the trial court, rather than an appellate court, to correct clerical errors. The distinction upon which my colleagues rely strikes me as of little importance given that the decisions remanding cases to the trial courts for the correction of clerical errors do not appear to assert a separate, and superior, authority possessed by appellate courts to require the correction of clerical errors. Instead, those decisions appear to me to reflect instructions delivered by the appellate courts to the trial courts to exercise their authority to correct clerical errors in particular circumstances. As a result, the fact that the error correction authority referenced in *Jarman* and similar cases is possessed by the trial courts does not mean that appellate courts have the authority to order the trial courts to correct errors that trial courts lack the authority to correct on their own.

2. The Court appears to suggest that the miscalculation of Defendant’s prior record level constituted a clerical, rather than a judicial, error by asserting that “the assistant district attorney prepared Defendant’s prior record level worksheet for the trial court’s signature by filling in the blanks on a standard AOC form and presenting it to the trial judge” and arguing that, “[a]s in *Jarman*, the record in the case *sub judice* demonstrates that the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing the prior record level worksheet.” I am unable to accept the notion that the trial court is engaged in the merely ministerial act of signing off on a prior record level determination made by the prosecutor during the sentencing process given the clear command of N.C. Gen. Stat. § 15A-1340.14 that the trial court, rather than the prosecutor, be responsible for correctly calculating a convicted criminal defendant’s prior record level and the numerous decisions of the Supreme Court and this Court evaluating the extent to which particular trial judges carried out that responsibility in accordance with the applicable law. As a result, the determination at issue here is a far cry from the relatively ministerial calculation of the amount of credit for time served in pretrial confinement at issue in

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result, given that no clerical error, as compared to an erroneous judicial determination, appears to have been made and given Defendant's concession, which is clearly correct, that rectification of the trial court's error in calculating the number of prior record points that Defendant had accumulated for felony sentencing purposes would not result in a reduction in Defendant's sentence,³ I am unable to agree with my colleagues' determination that this case should be remanded to the trial court for the correction of Defendant's prior record level worksheet and respectfully dissent from my colleagues' determination to the contrary.⁴ I do, however, concur in the remainder of the Court's opinion.

Jarman. State v. Mason, 295 N.C. 584, 594, 248 S.E.2d 241, 248 (1978), *cert. denied*, 440 U.S. 984, 99 S. Ct. 1797, 60 L. Ed. 2d 246 (1979) (describing the determination of the amount of credit for pretrial confinement to which a convicted criminal defendant is entitled as "a matter for administrative action").

3. Although my colleagues correctly note our prior statement in *Jarman* to the effect that, "[w]here there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted 'to err on the side of caution and resolve [the discrepancy] in the defendant's favor,'" *Jarman*, 140 N.C. App. at 203, 535 S.E.2d at 879 (alteration in original) (quoting *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994)), they overlook the context in which that statement was made. Aside from the fact that the error at issue here is clearly judicial rather than clerical in nature, the manner in which the court resolved the matter at issue in the decision from which the *Jarman* court derived the language on which my colleagues rely, which was whether the trial court found the existence of one or multiple aggravating factors for sentencing purposes, was critical to a determination of whether or not the defendant had to be resentenced. As a result, since the manner in which the present dispute is resolved will have no practical impact on Defendant, I question whether the principle upon which my colleagues rely has any relevance in the present case.

4. I concede that the decision that the Court has reached in this case will have little immediate practical impact, when considered in the narrow context in which it has been made. However, the effect of substantially broadening the extent to which litigants are able to obtain appellate decisions requiring the correction of non-clerical errors on remand will, over time, add to the burdens that are already faced by our trial courts and trial court staffs without adding anything of substance to the quality of justice provided in the General Court of Justice.

STATE v. McCrARY

[237 N.C. App. 48 (2014)]

STATE OF NORTH CAROLINA

v.

RONALD MICHAEL McCrARY, DEFENDANT

No. COA13-1059

Filed 21 October 2014

1. Search and Seizure—motion to suppress evidence—warrantless blood test—exigent circumstances—additional findings of fact required

The trial court erred in a driving while impaired and communicating threats case by denying defendant's motion to suppress the evidence that resulted from a warrantless blood test. The case was remanded to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed.

2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of evidence—warrantless blood draw—suppression of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. While defendant's motion asserted that the warrantless blood draw was a flagrant violation of his constitutional rights, his motion in no way detailed how there was irreparable damage to the preparation of his case. The only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as the proper remedy if a constitutional violation was found.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered on or about 21 March 2013 by Judge W. Osmond Smith in Chatham County Superior Court. Heard in the Court of Appeals 20 February 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine F. Jordan, for the State.

Wait Law, P.L.L.C., by John L. Wait for defendant-appellant.

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STROUD, Judge.

Ronald Michael McCrary (“defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of driving while impaired (“DWI”) and communicating threats. Defendant argues that the trial court erred by (1) denying his motion to suppress the evidence that resulted from a warrantless blood test; and (2) denying his motion to dismiss. We affirm the trial court’s order denying defendant’s motion to dismiss, but, as to defendant’s motion to suppress, we remand for additional findings of fact.

I. Background

We will summarize the relevant facts based upon the trial court’s findings of fact, which are not challenged by defendant. At 6:34 p.m. on 28 December 2010, Deputy Justin Fyle of the Chatham County Sheriff’s Office responded to a report of suspicious activity at the home of Marshall Lindsey. Upon his arrival at 7:01 p.m., Deputy Fyle observed a red Isuzu Trooper parked in a driveway near Lindsey’s garage.

Deputy Fyle approached the vehicle and discovered defendant seated in the driver’s seat. The vehicle’s engine was not operating, and defendant appeared to be asleep. Deputy Fyle attempted to get defendant’s attention, but defendant did not respond. Shortly thereafter, defendant began looking at his cell phone, which was upside down, but he continued to ignore Deputy Fyle.

Deputy Fyle then opened the vehicle’s door to investigate further. When he opened the door, Deputy Fyle detected a strong odor of alcohol and noticed that defendant’s eyes were red and glassy. There was a nearly empty vodka bottle in the vehicle. Deputy Fyle administered an Alcosensor test, and the results were “so high that Deputy Fyle determined that there may be a need for medical attention for the defendant.”

Deputy Fyle also spoke to Lindsey, who stated that he had witnessed defendant make multiple attempts to turn into his driveway from the road. When defendant finally was able to enter the driveway, he ran over one of Lindsey’s potted plants and a landscape light. Deputy Fyle observed tracks in the snow at the end of Lindsey’s driveway that were consistent with Lindsey’s statement.

Deputy Fyle returned to defendant and attempted to administer several field sobriety tests, but defendant was unable to stand up to perform them. Deputy Fyle arrested defendant for DWI at 7:34 p.m. Upon his arrest, defendant began complaining of chest pains and requested

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to be taken to the hospital. Deputy Fyle contacted emergency medical services (EMS) personnel, who arrived at 7:39 p.m. While EMS personnel examined defendant, Deputy Fyle determined that he would bring defendant to the Sheriff's Office for processing after he was released by EMS personnel. However, Deputy Fyle also decided that if defendant needed to be taken to the hospital, he would obtain a blood sample without a warrant.

While the EMS personnel tried to evaluate defendant's medical condition, defendant was "continually yelling and uncooperative" and would not permit them to properly examine him. Instead, defendant requested transport to the hospital. At the direction of his sergeant, Deputy Fyle directed EMS personnel to comply with defendant's request. Deputy Barry Ryser, a police officer assisting Deputy Fyle, accompanied defendant inside the EMS vehicle, and Deputy Fyle followed them in his patrol car.

Defendant arrived at the hospital emergency room at 8:39 p.m. Deputy Fyle removed defendant's handcuffs so that he could be examined, but defendant refused to cooperate with the medical staff and did not consent to any medical treatment. He was "extremely belligerent, yelling at officers and medical personnel" and he insulted the officers as well as others. "The defendant's continued uncooperative conduct . . . led Deputy Fyle to conclude that the defendant was intentionally delaying the investigation." Prior to defendant's discharge from medical care, Deputy Fyle asked defendant to submit to a blood test and informed defendant of his rights regarding a blood test at 8:51 p.m. Defendant refused to consent to a blood test, and his "belligerent conduct accelerated." "He issued vile insults and threats to Deputy Fyle and others, including threatening to spit on Deputy Fyle and others." After emergency room personnel concluded their examination of defendant, he was discharged at 9:13 p.m. Therefore, Deputy Fyle decided to have defendant's blood drawn without a warrant.

Deputy Fyle requested that hospital personnel assist him with obtaining defendant's blood sample. Deputy Fyle required the assistance of the other officers and used restraints to protect both the officers and hospital staff from defendant while his blood was drawn at 9:16 p.m., almost 3 hours after Lindsey's call. Deputy Fyle and defendant subsequently left the hospital at 9:29 p.m. and arrived at the magistrate's office for further processing at 9:43 p.m.

Defendant was charged with DWI, possession of an open container, assault on a government official, communicating threats, resisting

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a public officer, and injury to personal property. After a bench trial in Chatham County District Court, defendant was found not guilty of possession of an open container and injury to personal property and guilty of all other charges. Defendant appealed to the Chatham County Superior Court for a trial *de novo*.

On 12 September 2012, defendant filed a motion to dismiss the charges against him, contending that the warrantless blood draw was flagrantly unconstitutional. At a hearing in which the trial court treated defendant's motion as both a motion to dismiss and a motion to suppress, Deputy Fyle testified that he called Magistrate Tyson at 7:15 p.m., before he arrested defendant, to seek his opinion about the situation. Deputy Fyle also testified that he called the magistrate after defendant's blood draw. Deputy Fyle further testified that he waited at the magistrate's office less than thirty minutes before meeting with the magistrate. Deputy Fyle finally testified that, at the time, he determined that it would be unreasonable to seek a warrant before conducting a blood draw given the circumstances. The trial court denied defendant's motion to dismiss. Beginning 18 March 2013, defendant was tried by a jury in superior court.

On 21 March 2013, the jury returned verdicts finding defendant guilty of DWI and communicating threats and not guilty of all other charges. For the DWI offense, the trial court sentenced defendant to an active term of six months. For the communicating threats offense, the trial court sentenced defendant to an active term of 120 days. The sentences were to be served consecutively in the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

II. Exigent Circumstances for a Warrantless Blood Test

[1] Defendant argues that the trial court erred by denying his motion to suppress the evidence that resulted from the warrantless blood test because, under *Missouri v. McNeely*, Deputy Fyle "had ample time and ability to secure a search warrant" while defendant was in custody. See ___ U.S. ___, 185 L.Ed. 2d 696, 702 (2013). We remand for additional findings of fact on this issue.

In ruling upon a motion to suppress evidence, "the [trial court] must set forth in the record [its] findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2013). "[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980); see also *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012). "The standard of review in evaluating the denial of a motion to suppress is

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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). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878.

Findings and conclusions are required in order that there may be a meaningful appellate review of the decision on a motion to suppress. . . . [W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court. Remand is necessary because it is the trial court that 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.

Salinas, 366 N.C. at 124, 729 S.E.2d at 66-67 (citations and quotation marks omitted). Deputy Fyle performed a warrantless blood draw on defendant under the provisions of North Carolina General Statutes, section 20-139.1(d1), which provides that

[i]f a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

N.C. Gen. Stat. § 20-139.1(d1) (2009). This statutory procedure is also subject to limitations on searches imposed by the state and federal constitutions. "Our courts have held that the taking of blood from a person constitutes a search under both" the United States and North Carolina Constitutions. *State v. Barkley*, 144 N.C. App. 514, 518, 551 S.E.2d 131, 134 (2001). Accordingly, "a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988). The issue in cases of this sort normally depends upon the findings and conclusions as to the existence of "exigent circumstances" as our case law has defined that term, considering the "totality of the circumstances" in each case. *State v. Dahlquist*,

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___ N.C. App. ___, ___, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 755 S.E.2d 614 (2014).

In *State v. Fletcher*, this Court held that the trial court properly found that exigent circumstances existed for the arresting officer to obtain a blood sample from the defendant without a warrant, where the evidence showed that the defendant had “failed multiple field sobriety tests” and was unsuccessful in “producing a valid breath sample using the Intoximeter at the police station.” 202 N.C. App. 107, 111, 688 S.E.2d 94, 97 (2010). The officer testified about “the distance between the police station and the magistrate’s office, her belief that the magistrate’s office would be busy late on a Saturday night, and her previous experience with both the magistrate’s office and hospital on weekend nights[,]” all of which supported a “probability of significant delay” to obtain a warrant. *Id.* at 111, 688 S.E.2d at 97. This Court held in *Fletcher* that these circumstances supported a finding of exigent circumstances and affirmed the trial court’s denial of the defendant’s motion to suppress. *Id.* at 113, 688 S.E.2d at 98.

More recently, the United States Supreme Court has addressed the issue of obtaining warrantless blood tests from defendants suspected of impaired driving. In *Missouri v. McNeely*, the United States Supreme Court held that “the natural metabolization of alcohol in the bloodstream” does not create a “a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.” ___ U.S. at ___, 185 L.Ed. 2d at 702. In *McNeely*, the Supreme Court noted, however, that “some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test.” *Id.* at ___, 185 L.Ed. 2d at 707. Such circumstances “may arise in the regular course of law enforcement due to delays from the warrant application process.” *Id.* at ___, 185 L.Ed. 2d at 709. The Supreme Court noted that

while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber [v. California]*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966)], it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id. at ___, 185 L.Ed. 2d at 709. Thus, the circumstances that may make obtaining a warrant impractical may in some cases support the trial

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court's finding of an exigent situation in which a warrantless blood draw is proper. *Id.* at ___, 185 L.Ed. 2d at 709. "Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Dahlquist*, ___ N.C. App. at ___, 752 S.E.2d at 667.

Defendant does not challenge the trial court's findings of fact but argues only that his case is similar to the situation presented in *Missouri v. McNeely*, which was decided by the United States Supreme Court just over a month after the trial court ruled upon his motion to suppress. Defendant focuses on the lack of findings of fact as to the time that it would have taken Deputy Fyle to obtain a search warrant for the blood test. Defendant argues that "Officer Fyle's testimony is strikingly similar to the testimony found insufficient in *McNeely*." The Supreme Court noted that

[i]n his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant.

___ U.S. at ___, 185 L.Ed. 2d at 714 (citations omitted).

But the factual circumstances presented by this case and *McNeely* are quite different. *McNeely* involved a DWI stop described as "unquestionably a routine DWI case" involving a cooperative defendant with no need for medical treatment and no need for "police to attend to a car accident." *Id.* at ___, 185 L.Ed. 2d at 714. As the unchallenged findings of fact in this case as noted above demonstrate, this case was not "a routine DWI case." From the moment that Deputy Fyle placed defendant into custody, at 7:34 p.m., defendant claimed to have chest pain and to require medical assistance, which he then refused and actively fought. He became increasingly belligerent and threatened Deputy Fyle and

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others.¹ Ultimately Deputy Fyle determined that defendant was intentionally delaying his investigation. Also unlike the officer in *McNeely*, Deputy Fyle testified at the suppression hearing as to the time it would have taken to obtain a warrant, as follows:

Considering that this is Chatham County and we don't have as many magistrates as other places on duty and all the time, a lot of times when you need a search warrant and somebody is placed in custody during nighttime hours, we have to actually call out the magistrate and at times wait for them to arrive and sometimes wait for other people to process prisoners before we can see them. So I was not aware of there being a magistrate in Siler City, which is where we were, because, like I said, during nighttime hours, they are not there. And I was unaware if in Pittsboro there was a magistrate on duty at the time. I felt that it was unreasonable for me to load him up, go back to Pittsboro, possibly wait for the magistrate to get there, draw up the search warrant, get the magistrate to sign it, load him back up, go back to Siler City, and then do the blood draw when we were losing evidence.

Defendant asks us to second-guess the officer's determinations about how long it might have taken to obtain a warrant and whether it would have been reasonable for him to take the increasingly belligerent defendant, "load him up, go back to Pittsboro, possibly wait for the magistrate to get there, draw up the search warrant, get the magistrate to sign it, load him back up, go back to Siler City, and then do the blood draw when [he was] losing evidence." Defendant claims that the dispositive question, under *McNeely* and *Schmerber*, is "Did Officer Fyle have the time and ability to seek out a warrant?" Defendant argues that he did, and that the trial court failed to address the availability of a magistrate or "whether Officer Fyle should have sought a warrant since Officer Ryser was accompanying [defendant] in the EMS vehicle." Yet all of these questions are squarely within the authority of the trial court to make the factual findings as to these issues and to make the appropriate legal conclusions upon those facts. It is the trial court that "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

1. Defendant did not challenge on appeal his conviction of communicating threats.

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violation of some kind has occurred.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982).

We find this case to be more similar to *State v. Granger* than to *McNeely*. See ___ N.C. App. ___, 761 S.E.2d 923 (2014). In *Granger*, this Court found that the trial court properly concluded that the totality of the circumstances showed exigent circumstances that justified the warrantless blood draw. *Id.* at ___, 761 S.E.2d at 928. There, the defendant was injured in a wreck and required medical care. *Id.* at ___, 761 S.E.2d at 924. The officer was investigating the case alone and would have had to wait for another officer to come to the hospital so that he could travel to the magistrate to obtain a warrant. *Id.* at ___, 761 S.E.2d at 928. The trial court also noted the officer’s “knowledge of the approximate probable wait time” and travel time to the magistrate. *Id.* at ___, 761 S.E.2d at 928. In addition, the officer was concerned that medications could have been administered to the defendant as part of his treatment that could contaminate the blood sample. *Id.* at ___, 761 S.E.2d at 928.

Although the situation here is different from *Granger* in that the defendant here only feigned a need for medical care and in fact needed none, they are otherwise similar. Obtaining a warrant may have required an officer to either leave the defendant, which in this case may not have been a reasonable option even with more than one officer present, considering defendant’s threats to Deputy Fyle and others, or take the defendant with him to Pittsboro and then back to Siler City. The evidence and uncontested findings of fact show that several officers were needed to control the defendant and ensure the safety of the hospital personnel.² In Conclusion of Law No. 6, the trial court concluded that

[b]ased upon the time elapsed to that point and the additional time and uncertainties in how much additional time would be needed to obtain a search warrant or other court order for defendant’s blood and all other attendant circumstances, the same gave rise to the existence of exigent circumstances and supported the officer’s reasonable belief

2. The dissent would find that even taking into account defendant’s belligerent behavior, the presence of so many officers would lead to the conclusion that there was no plausible justification for an exception to the warrant requirement under the totality of the circumstances. See *McNeely*, ___ U.S. at ___, 135 S.Ct. 2131 at 2148. We believe that this sort of determination is a factual determination that can be made only by the trial court that heard the evidence and observed all of the witnesses. An appellate court, far removed from the real physical dangers presented by a combative, highly intoxicated defendant, is in a poor position to make a finding of fact about how many officers are reasonably needed to protect themselves and others in that moment. That is the job of the trial judge.

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that the additional delay necessary to obtain a search warrant or court order under the circumstances would result in the dissipation of the percentage of alcohol in the defendant's blood.

Defendant is correct that the trial court did not make any specific findings addressing the availability of a magistrate at the time of the incident and the probable delay in seeking a warrant, although Deputy Fyle did testify about this matter, but it seems from the above conclusion of law that the trial court considered the time factor in mentioning the "additional time and uncertainties in how much additional time would be needed to obtain a search warrant." Without findings of fact on these details, however, we cannot properly review this conclusion. We must therefore remand this matter to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed.

III. Motion to Dismiss

[2] Defendant's motion before the trial court was styled as a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-954(a)(4), which requires dismissal of criminal charges if "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2013). However, at the hearing on defendant's motion, both parties agreed to treat the motion as both a motion to dismiss and a motion to suppress. Both of these motions were subsequently denied by the trial court. On appeal, defendant requests that this Court reverse the trial court's order as to both motions.

In *State v. Wilson*, the trial court found that a warrantless blood draw had violated the defendant's constitutional rights and dismissed the charges against him. ___ N.C. App. ___, ___, 736 S.E.2d 614, 616 (2013). On appeal, this Court held that dismissal was an inappropriate remedy:

In his motion to dismiss, defendant argued the officer's conduct flagrantly violated his constitutional rights "and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." While defendant's motion addresses the alleged flagrant violation of his constitutional rights, his motion in no way details how there was irreparable

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damage to the preparation of his case as a result. Indeed, the trial court made no such finding or conclusion, and defendant has made no such argument on appeal. Thus, we fail to see how the alleged constitutional violation at issue here irreparably prejudiced the preparation of defendant's case, and section four of the dismissal statute likewise does not apply to the present case.

Id. at ____, 736 S.E.2d at 617-18. Instead, "the appropriate argument by defendant was for suppression of the evidence, and the only appropriate action by the trial court under the circumstances of the present case was to consider suppression of the evidence as the proper remedy if a constitutional violation was found." *Id.* at ____, 736 S.E.2d at 618.

Likewise, in the instant case, while defendant's motion to dismiss asserts that the warrantless blood draw was a flagrant violation of his constitutional rights, "his motion in no way details how there was irreparable damage to the preparation of his case as a result" and "defendant has made no such argument on appeal." *See id.* Thus, pursuant to *Wilson*, "the only appropriate action by the trial court under the circumstances of the present case was to consider suppression of the evidence as the proper remedy if a constitutional violation was found." *See id.* Accordingly, we affirm the trial court's order denying defendant's motion to dismiss.

IV. Conclusion

We affirm the trial court's order denying defendant's motion to dismiss. However, we remand to the trial court to make additional findings of fact addressing the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that bear upon the conclusion of law that exigent circumstances existed that justified the warrantless blood draw.

AFFIRMED, in part, and REMANDED.

Judge DAVIS concurs.

CALABRIA, Judge, dissenting.

Because I believe that, based upon the testimony presented below, remanding this case for further findings would be futile, I must respectfully dissent from the majority's opinion. I would reverse the trial court's denial of defendant's motion to suppress and remand for a new trial.

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As an initial matter, I agree with the majority that defendant's self-styled "Motion to Dismiss" based upon the warrantless blood draw is most properly treated as a motion to suppress. *See State v. Wilson*, ___ N.C. App. ___, ___, 736 S.E.2d 614, 618 (2013). "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). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878. For a properly filed motion to suppress, "the burden is upon the [S]tate to demonstrate the admissibility of the challenged evidence[.]" *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636 (1983).

"Our courts have held that the taking of blood from a person constitutes a search under both" the United States and North Carolina Constitutions. *State v. Barkley*, 144 N.C. App. 514, 518, 551 S.E.2d 131, 134 (2001). This is because the drawing of blood "involve[s] a compelled physical intrusion beneath [a suspect]'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. ___, ___, 185 L. Ed. 2d 696, 704 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, 84 L. Ed. 2d 662, 668 (1985)). Accordingly, our Supreme Court has specifically held that "a search warrant *must be issued* before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (emphasis added).

The United States Supreme Court recently held that "the natural metabolization of alcohol in the bloodstream" does not create "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases[.]" *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 702. "Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *State v. Dahlquist*, ___ N.C. App. ___, ___, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 755 S.E.2d 614 (2014).

In *McNeely*, a Missouri law enforcement officer initiated a traffic stop of the defendant for speeding and crossing the centerline. 569 U.S. at ___, 185 L. Ed. 2d at 702. The defendant displayed obvious signs of impairment and failed various field-sobriety tests. *Id.* As a result, the

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officer arrested the defendant and began to transport him to the station house. *Id.* While in transit, the defendant informed the officer he would not submit to a breath test. *Id.* Consequently, the officer took the defendant directly to a nearby hospital for a blood test. *Id.* The officer never attempted to obtain a warrant, but sought defendant's consent for the blood test, which defendant refused. *Id.* at ___, 185 L. Ed. 2d at 702-03. The United States Supreme Court concluded that the results of this blood test were required to be suppressed pursuant to the Fourth Amendment because "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at ___, 185 L. Ed. 2d at 715. In support of this conclusion, the Court provided the following example:

Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id. at ___, 185 L. Ed. 2d at 708.

In the instant case, the trial court's unchallenged findings demonstrate that Deputy Fyle's actions fall squarely within the ambit of the example articulated by *McNeely*. The trial court found that Deputy Fyle had determined that he would seek to obtain a blood sample from defendant at 7:39 p.m. However, Deputy Fyle made no attempt to secure a warrant for this blood draw. Instead, Deputy Fyle followed defendant to the hospital, despite the fact that Deputy Ryser was already traveling with the handcuffed defendant in the ambulance. There is nothing in the court's order or in the transcript which provides any explanation for the reason Deputy Fyle followed defendant rather than using the time to seek a warrant. Pursuant to *McNeely*, "[i]n such a circumstance, there [is] no plausible justification for an exception to the warrant requirement." *Id.*; *cf. State v. Granger*, ___ N.C. App. ___, ___, 761 S.E.2d 923, 928 (2014) (upholding a warrantless blood draw in part because "unlike the example in *McNeely*, [569] U.S. at ___, 185 L. Ed. 2d at 708, Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant.").

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Nonetheless, the majority contends that Deputy Fyle's actions were appropriate under this Court's decision in *Granger*. In that case, a law enforcement officer responded to the report of an accident in which the defendant had rear-ended another vehicle. *Granger*, ___ N.C. App. at ___, 761 S.E.2d at 924. When the officer arrived at the scene, he observed that the defendant was in pain and emanated a moderate odor of alcohol. *Id.* The defendant was transported to the hospital before the officer could perform any sobriety tests. *Id.* Upon arrival, the defendant admitted to the officer that he had consumed alcohol and displayed clear signs of impairment. *Id.* The officer administered two portable breath tests, and both tests indicated the presence of alcohol on defendant's breath. *Id.* As a result, the officer obtained a warrantless blood sample from the defendant. *Id.* at ___, 761 S.E.2d at 925. This Court held that, under the totality of the circumstances, there was a sufficient exigency to support a warrantless blood draw. *Id.* at ___, 761 S.E.2d at 928. Specifically, the Court noted that (1) the officer was concerned about the dissipation of alcohol from the defendant's blood, because over an hour had elapsed since the accident occurred before the officer established sufficient probable cause to seek the blood draw; (2) the officer estimated that the time it would take to travel to the magistrate's office, obtain a warrant, and return to the hospital would be at least forty minutes; (3) the officer was investigating the matter alone, which would have required him to wait for another officer to arrive before he could travel to the magistrate's office to obtain a warrant; and (4) the officer was concerned that if he left the defendant unattended or waited any longer for a blood draw, the hospital might have administered pain medication to the defendant that could contaminate his blood sample. *Id.*

Granger is distinguishable from the instant case. First and foremost, unlike the officer in *Granger*, Deputy Fyle was not the sole officer who accompanied defendant to the hospital. Instead, Deputy Ryser accompanied defendant in the ambulance, while Deputy Fyle followed behind the ambulance in his patrol car, despite the fact that he had already determined that he would seek to draw defendant's blood. Moreover, unlike the officer in *Granger*, Deputy Fyle had already completed his investigation and placed defendant under arrest on suspicion of DWI prior to defendant's transportation to and arrival at the hospital. The circumstances which this Court found justified the warrantless blood draw in *Granger* are simply not present in this case.

The majority contends that the appropriate disposition for this case is to remand for additional findings of fact regarding the availability of a magistrate and the additional time and uncertainties in obtaining a

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warrant. However, the trial court's conclusion of law reflects that the court considered these factors and applied the appropriate totality of the circumstances test required by *McNeely*:

Based upon the time elapsed to that point and the additional time and uncertainties in how much additional time would be needed to obtain a search warrant or other court order for the defendant's blood and all other attendant circumstances, the same gave rise to the existence of exigent circumstances and supported the officer's reasonable belief that the additional delay necessary to obtain a search warrant or court order under the circumstances would result in the dissipation of the percentage of alcohol in the defendant's blood.

While the majority is correct that the trial court could have made more explicit findings from Deputy Fyle's testimony regarding the availability of a magistrate and the ease of obtaining a warrant, there is a fundamental flaw in the premise that these additional findings could support the trial court's denial of the motion to suppress. The trial court's findings clearly indicate that Deputy Fyle determined he would obtain a sample of defendant's blood at approximately 7:39 p.m. Accordingly, any determination of exigent circumstances must be based upon whether, under the facts that existed at that time, Deputy Fyle could have reasonably taken the appropriate steps to secure a warrant while defendant was transported to the hospital by Deputy Ryser.

However, there is no evidence on this question in the record, because Deputy Fyle's testimony unequivocally indicates that he only considered whether exigent circumstances existed *after defendant was discharged from the hospital and refused to consent to the blood draw*. At that time, approximately ninety minutes had already elapsed since Deputy Fyle had arrested defendant on suspicion of DWI and determined that he would seek to obtain a sample of defendant's blood. Despite the fact that Deputy Ryser was with defendant, who was restrained in handcuffs in the back of the ambulance, and the additional fact that at least two other deputies were dispatched to the hospital to assist with defendant when he arrived, there is nothing in the record to suggest that Deputy Fyle ever attempted, or even considered attempting, taking steps to obtain a warrant in the time between defendant's arrest and his discharge from the hospital.

The majority speculates that it may still have not been reasonable for Deputy Fyle to seek a warrant while Deputy Ryser transported him to

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the hospital because “several officers were needed to control defendant and ensure the safety of the hospital personnel.” This speculation into Deputy Fyle’s motives at the time he followed defendant to the hospital is not supported by any evidence that was presented during the hearing. Deputy Fyle restrained defendant in handcuffs without any physical altercation, deemed it unnecessary to travel together in the ambulance with Deputy Ryser and defendant, and never indicated at any point during his testimony that he went directly to the hospital due to safety concerns. Moreover, it was not until Deputy Fyle ordered the warrantless “invasion of [defendant’s] bodily integrity,” *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 704, that defendant resisted sufficiently to require several officers to help control him.¹

Ultimately, I conclude that the trial court’s findings demonstrate that Deputy Fyle never considered whether a warrant was necessary during the ninety minutes after placing defendant in custody and determining that he would seek to draw defendant’s blood. Therefore, “there [was] no plausible justification for an exception to the warrant requirement” under the totality of the circumstances. *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 708. Deputy Fyle simply ignored our Supreme Court’s long-established directive that “a search warrant must be issued before a blood sample can be obtained[.]” *Carter*, 322 N.C. at 714, 370 S.E.2d at 556. He then sought to impermissibly benefit from his failure to seek a warrant by asserting that an exigency existed at the moment the blood draw was to occur. At this point, it was far too late for Deputy Fyle to consider, for the first time, whether a warrant could reasonably be obtained.

Since neither the trial court’s findings of fact nor any other evidence presented at the hearing support its conclusion of law that, based upon the totality of the circumstances, exigent circumstances existed to support defendant’s warrantless blood draw, the trial court erred by denying defendant’s motion to suppress the results of the blood test. The trial court’s order should be reversed and remanded for the entry of an order suppressing this evidence. I respectfully dissent.

1. Defendant’s conviction for communicating threats was based upon his belligerent behavior during the blood draw.

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STATE OF NORTH CAROLINA

v.

ELLIS EUGENE ROYSTER

No. COA14-100

Filed 21 October 2014

1. Evidence—relevancy—ammunition in defendant’s house

The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning 9 millimeter ammunition during a search of defendant’s house. The evidence concerning the ammunition was relevant because it tended to link defendant to the scene of the crime and its probative value was not outweighed by its prejudicial value.

2. Evidence—testimony elicited by defendant—opened door

The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning a 9 millimeter gun found during a search of defendant’s house. He cannot challenge the admission of testimony that he first elicited.

3. Appeal and Error—preservation of issues—mistrial not sought at trial—no plain error review

Defendant did not preserve for appeal the issue of whether the trial court erred by failing to declare a mistrial after an outburst by the victim’s father in the presence of the jury. Defendant did not seek a mistrial and plain error review is not available on this issue.

4. Constitutional Law—right to confrontation—out-of-state witness—released from summons

The trial court did not err or violate defendant’s confrontation rights by releasing a witness from his summons after he testified as a witness for the State. Although defendant argued that the trial court forced the defense to elect whether to call him as a witness with only a few hours’ notice, the witness was available at trial and defendant had the opportunity to conduct a cross-examination. Moreover, the subpoena served upon the witness during trial was invalid because the witness was in North Carolina pursuant to the State’s summons.

5. Criminal Law—third-party flight—instruction denied—not prejudicial error

There was no prejudicial error where defendant argued that the trial court erred in refusing his request to instruct the jury

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concerning third-party flight. The witness testified that he left the scene of the crime after the shooting because he was in possession of crack, the defense requested a special instruction concerning flight, and the trial court denied the request for the instruction but allowed the defense to argue the point, and the record was replete with evidence from which a jury could find defendant guilty of first-degree murder.

6. Evidence—phone calls by witness—not hearsay—not cumulative

The trial court did not abuse its discretion by admitting evidence of phone calls made by a witness for the State to his friends. The recordings were admissible for the non-hearsay purpose of corroborating the witness's testimony and were not a needless presentation of cumulative evidence. The statements in the recordings corroborated the witness's testimony, excluded him as a suspect, and established defendant as the perpetrator of the crime.

Appeal by defendant from judgment entered 29 May 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

Law Office of Margaret C. Lumsden PLLC, by Margaret C. Lumsden, for defendant-appellant.

McCULLOUGH, Judge.

Defendant Ellis Eugene Royster appeals from a judgment entered based upon his conviction for first degree murder. For the following reasons, we find no error in part and no prejudicial error in part.

I. Background

On 1 November 2010, a Mecklenburg County Grand Jury indicted defendant on a charge of murdering Amias Bernard Robinson on 12 August 2010.

Defendant's case came on for trial during the 20 May 2013 Criminal Session of Mecklenburg County Superior Court, the Honorable W. Robert Bell, Judge presiding.

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The State's evidence at trial tended to show the following: Alvin Alexander testified that at 4:00 p.m. on 12 August 2010, he met his friend Randall Henry (otherwise known as "Randy") at defendant's residence on Eastbrook Road in Charlotte, North Carolina. Defendant lived with his grandmother "Miss D" and grandfather "Mr. D." "Miss D" was known in the neighborhood as the "Candy Lady." Alvin went into defendant's bedroom where defendant and Randy played a video game while Alvin smoked marijuana. Sometime thereafter, Alvin, Randy, and defendant went outside to the end of defendant's driveway to smoke cigarettes. Shariff Baker, a resident of defendant's neighborhood, approached Alvin, Randy, and defendant and told them that "a couple guys took his money from him." Alvin testified that Shariff had stated that "[h]e was going to buy some weed from them, and they just pulled off with his money."

Shariff testified that on 12 August 2010, he tried to buy \$10.00 worth of marijuana from Jadarius McCall, otherwise known as "J.D." Shariff was standing in front of a house on Eastbrook Road when J.D. drove by in a blue car. Three other people were in the car with him – a man by the name of Delehay, Tim, and an unidentified male. Shariff gave \$10.00 to Delehay, the group told Shariff to get out of their way, and J.D. drove off without giving Shariff marijuana or returning his money. Shariff was upset and began walking towards defendant's residence. Once Shariff saw defendant, he told defendant that J.D., Delehay, and Tim had taken his money. Defendant told Shariff that he "would get it back for me."

Alvin testified that he knew Tim's stepfather, Chris, and that he told Shariff that he would talk with Chris. Alvin drove to Chris' house, "told Chris that his stepson had just took one of the guy's money out of the neighborhood. And [Chris] said he would take care of it." After their conversation, Alvin then drove back to defendant's residence. Several people from the neighborhood were standing outside. A group of three to four teenage girls, including the victim's cousins, were pushing a baby stroller holding the victim, Amias Robinson.

Alvin testified that while he was in the driveway of defendant's residence, he saw a blue Oldsmobile drive past them. Shariff also testified that "J.D.'s car came down the street." Randy pointed out the vehicle and stated, "[t]here he go right there." Shariff testified that Randy's comment meant, "[t]hat those are the people that took my money."

Defendant was standing at the end of the driveway when he pulled a gun from his rear waistband area. Alvin and Shariff witnessed defendant start firing shots "up the street" towards J.D.'s vehicle. Alvin heard approximately ten shots and then heard a girl scream "[y]ou shot my

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cousin; you shot my cousin.” Defendant repeatedly stated “I’m going to jail” and Randy asked defendant, “[w]hy did you start shooting[?]” Shariff testified that, after the shooting, defendant stated, “I f***ed up.” Thereafter, defendant walked quickly down the street and returned within a couple of minutes without a gun. Alvin left the scene in his vehicle soon after the shooting.

Sergeant Michael Abbondanza with the Charlotte Mecklenburg Police Department (“CMPD”) testified that, on 12 August 2010, he was dispatched in response to a call that a baby had been shot and was the first officer to arrive on the scene. Sergeant Abbondanza testified that, when he arrived at a residence on Eastbrook Road, there were fifteen to twenty people in the street. Thereafter, he found the victim lying on the front porch with what appeared to be a gunshot wound through his neck.

The victim of the stray bullet, Amias Robinson, was born on 8 July 2008. In August 2010, Amias’ mother had made arrangements with her cousins to watch Amias in Charlotte, North Carolina. She received a phone call on 12 August 2010, urging her to go to the hospital because Amias had been shot after he had been taken to the “Candy Lady.” Amias died on 16 August 2010 as the result of a gunshot wound to the neck.

Todd Norhoff, an expert in the field of firearms and tool mark analysis with the Charlotte-Mecklenburg Crime Laboratory, testified that he analyzed eleven (11) spent shell casings found at the scene of the crime. The casings were 9 millimeter Luger Remington Peters casings. All eleven casings were found to have been discharged from the same firearm.

Defendant testified on his own behalf. On 12 August 2010, defendant lived with his grandmother, the “Candy Lady,” at 5826 Eastbrook Road. Defendant picked up Randy and Alvin and went to defendant’s residence to play video games. Around 5:00 p.m. or 6:00 p.m., the three went outside and stood in the driveway, waiting on someone to bring them marijuana. The “weed man” came by defendant’s residence, sold them \$80.00 worth of marijuana, and left. Defendant testified that he gave Randy half of the marijuana and then went inside his house, leaving Randy and Alvin outside. Defendant was inside the house with his baby’s mother, uncle, grandmother, and grandfather. Twenty-five minutes later, defendant testified that he heard 10 gunshots. He had not seen Randy or Alvin during this period of time. After he heard the gunshots, defendant, his baby’s mother, uncle, grandmother, and grandfather met at the front door of the house. Defendant’s grandmother saw the victim bleeding and started to perform CPR on the victim.

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Defendant testified that earlier that day, he had had a conversation with Shariff. Shariff told defendant that he had been robbed by J.D. Defendant tried to call J.D. to get Shariff's money back but because J.D. did not answer his phone calls, defendant sent him a text message that read "Man, I ain't about to be blowing up your phone like a b****. Bring that n**** money back or stay out of my hood." Defendant denied shooting a gun at J.D., shooting a gun at J.D.'s vehicle, or shooting a gun "up in the air or down on the ground to scare J.D."

Testimony from the following witnesses demonstrated that they had initially implicated Alvin Alexander as the shooter: Shariff Baker; Porchia Glenn; Kyshonna Williams; and Kourtney Williams.

On 29 May 2013, the jury returned a verdict finding defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole.

Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) allowing the admission of testimony about 9 millimeter ammunition and a gun found in defendant's grandmother's house; (B) not ordering a mistrial after a profane outburst from the victim's father in the presence of the jury; (C) releasing an out-of-state witness from his subpoena and forcing defense counsel to elect whether to call the witness with only a few hours' notice; (D) refusing defendant's request to instruct the jury concerning flight as an indication of the guilt of another person; and (E) allowing the admission of inadmissible hearsay and cumulative evidence consisting of a witness' self-serving statements implicating defendant.

A. Weapon and Ammunition Testimony

[1] In his first argument on appeal, defendant contends that the trial court erred by allowing the admission of testimony concerning 9 millimeter ammunition and a gun found during the search of defendant's house. Specifically, defendant argues that the challenged evidence was not relevant, in violation of Rule 401 of the North Carolina Rules of Evidence. Defendant also asserts that, if the evidence was relevant, the prejudice to defendant outweighed the probative value of the evidence under Rule 403 of the North Carolina Rules of Evidence. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being

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litigated.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 401 (2013) (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.” N.C. Gen. Stat. § 8C-1, Rule 402 (2013). Nevertheless, under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

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

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

At trial, a hearing was held prior to admission of the challenged evidence. Detective Miguel Santiago, a witness for the State, found a 9 millimeter machine-gun style pistol during a search of defendant’s home. The gun had nineteen (19) Winchester 9 millimeter bullets and fifteen (15) Remington 9 millimeter bullets. The State wanted to introduce evidence regarding the 9 millimeter ammunition that was found at defendant’s house to show that defendant possessed the same caliber and brand of ammunition as the shell casings that had been found at the crime scene and were used to kill the victim. The State did not intend to introduce the 9 millimeter gun. Over defendant’s objection, the trial court allowed the State to present the following evidence about the 9 millimeter ammunition found in the house:

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[State:] . . . Did you assist with executing a search warrant on [defendant's] home on October 27th, 2010?

[Santiago:] Yes, I did.

[State:] And yes or no, Detective, during that search, did you find any 9 millimeter ammunition?

[Santiago:] Yes, I did.

In order to dispel any suggestion that defendant possessed the 9 millimeter gun used in the shooting, defendant elicited testimony that a 9 millimeter gun also found in his house, in which the 9 millimeter ammunition was found, was not the murder weapon. Thereafter, based on a trial court ruling that defendant had “opened the door”, on re-direct the State introduced further evidence concerning the gun found in the house, including photographs. Defendant later testified that he only owned the 9 millimeter gun found during the search.

After thoughtful review, we hold that the evidence concerning the 9 millimeter ammunition that was found in defendant's home was relevant because it tended to link defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that defendant was the perpetrator of the crime. Because evidence of the 9 millimeter ammunition was probative of defendant's connection to the crime and the danger of unfair prejudice did not outweigh the probative value of the evidence, we hold that the trial court did not err by admitting this evidence.

[2] Next, we address the admission of evidence regarding the gun that was found pursuant to a search of defendant's home. We note that the trial court ruled that evidence of the gun found in defendant's home would not be admissible. However, defendant “opened the door” to the admission of this evidence. “The State has the right to introduce evidence to rebut or explain evidence elicited by defendant although the evidence would otherwise be incompetent or irrelevant.” *State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996) (citation omitted). “The law has long been that, even where [t]he type of testimony is not allowed[,] . . . when a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the subject raised.” *State v. Wilson*, 151 N.C. App. 219, 226, 565 S.E.2d 223, 228 (2002) (citations and quotation marks omitted). Since he first introduced evidence about the gun found in his residence, defendant cannot now challenge the admission of testimony that he first elicited. Defendant's arguments are overruled.

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B. Mistrial

[3] In his second argument on appeal, defendant contends that the trial court erred by failing to declare a mistrial after an outburst by the victim's father in the presence of the jury.

During the testimony of Sergeant Abbondanza of the CMPD describing the victim's injuries, the victim's father, stated "[m]otherf***** – my baby. You shot my mother f***** baby – (unintelligible)." Shortly thereafter, as the court concluded for the day, the trial judge addressed the jury concerning the outburst:

Finally, I can't let go – or can't let it go without saying something about the outburst of the gentleman a moment ago. If you'll recall before we started, I said, you know, this is when we start; this is when we end; that these trials take on a life of their own. We're dealing with – this is not television. These are the real facts and real tragedies. He clearly was emotional. But it's your responsibility as a juror and as a finder of fact to base your decision on the law and on the evidence and not on emotion. I don't know whether this gentleman will be back. I can promise you if he is back, he will not act like that again in this courtroom.

The following morning, the trial judge again addressed the issue with the jury at the request of the defense.

We're going to start in just a moment with the cross-examination of this witness by the defendant. But I do have one final instruction for you concerning the incident that occurred yesterday afternoon. I'm not sure exactly what Mr. Robinson said. But regardless of what he said or what you may have thought he said or remember him to have said, that is not evidence and should not be considered by you as evidence and should have no bearing upon your deliberations.

Defendant concedes in his brief that "defense counsel failed to seek a mistrial" and thus contends that the proper standard of review is plain error. The North Carolina Supreme Court has restricted review for plain error to issues "involv[ing] either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997) (citation omitted). Because plain error review is not available to defendant, this issue is not properly preserved for appeal. *See State v. McCall*, 162 N.C.

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App. 64, 70, 589 S.E.2d 896, 900 (2004) (where the defendant failed to move for a mistrial after individuals in the courtroom signaled to the victim during her testimony, plain error review was not available and the argument was waived).

C. Defendant's Sixth Amendment Rights

[4] Defendant next argues that the trial court erred by releasing an out-of-state witness, Shariff Baker, from his subpoena, forcing the defense to elect whether to call him as a witness with only a few hours' notice. Specifically, defendant argues that the trial court violated his confrontation rights as secured by the Sixth Amendment of the United States Constitution and Article I Section 23 of the North Carolina Constitution. We find defendant's arguments meritless.

Defendant relies on *State v. Barlowe*, 157 N.C. App. 249, 578 S.E.2d 660 (2003) to support his argument. Our Court in *Barlowe* stated the following:

The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court . . . [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. In addition, the right to face one's accusers and witnesses with other testimony is guaranteed by the sixth amendment to the federal constitution, applicable to the states through the fourteenth amendment, and by Article I, sections 19 and 23 of the North Carolina Constitution.

Id. at 253, 578 S.E.2d at 663 (citations and quotation marks omitted).

"The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007) and N.C. Gen. Stat. § 15A-1443(b)).

In the case *sub judice*, the State, pursuant to N.C. Gen. Stat. § 15A-811 et seq., summoned Shariff Baker from New York to testify at the trial. On 22 - 23 May 2013, Baker testified and defendant had an opportunity to cross-examine him. After Baker stepped down from the witness stand,

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the State informed the trial court judge that the defense had attempted to serve a subpoena on Baker the day before. The State argued that the subpoena was invalid. Baker refused to speak with the defense out-of-court and the trial court required the defense to decide whether to call Baker as a witness before 2:00 p.m. that day. When the defense indicated it had not yet decided whether it would be calling Baker as a witness at 2:00 p.m., the trial court judge released Baker from the summons.

After reviewing the record, we are unable to agree with defendant that his confrontation rights regarding the State's witness, Shariff Baker, were violated. Baker was available at trial and defendant had the opportunity to conduct a cross-examination of Baker. Moreover, we note that Baker was summoned as an out-of-state witness by the State. Pursuant to N.C. Gen. Stat. § 15A-814,

[i]f a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

N.C. Gen. Stat. § 15A-814 (2013). Thus, the subpoena served upon Baker during trial was invalid because Baker was in North Carolina pursuant to the State's summons. As such, we hold that the trial court did not err by releasing Baker from his summons after he testified as a witness for the State. Based on the foregoing reasons, we reject defendant's contentions.

D. Jury Instruction Concerning Flight

[5] In the fourth issue raised by defendant on appeal, defendant argues that the trial court erred in refusing his request to instruct the jury concerning flight as an indication of Alvin Alexander's guilt. Defendant contends that the failure of the trial court to deliver the requested instruction concerning flight was a violation of his constitutional rights pursuant to the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 18, 19, 24, and 27 of the North Carolina Constitution.

“[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citation omitted).

In the present case, Alvin testified that he left the scene of the crime after the shooting because he “didn't want to be around when

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the police showed up” since he was in possession of “crack.” The defense requested a special instruction concerning the flight of Alvin from the crime scene. The trial court denied the request for the instruction, but allowed the defense to argue the point.

Defendant now argues that the trial court should have delivered an instruction concerning the flight of Alvin as an indication of his guilt. Defendant contends that the evidence at trial suggested that Alvin “might have been the shooter” and that his flight from the scene of the crime “in fear of the police is particularly incriminating.”

It is well established that “[e]vidence of a defendant’s flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt.” *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996) (citation omitted).

Assuming *arguendo* that it was error for the trial court to refuse to instruct the jury that it would consider Alvin’s flight as evidence that he, rather than defendant, was the perpetrator of the crime, we do not believe that this decision amounted to prejudicial error. According to N.C. Gen. Stat. § 15A-1443(a), “[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a) (2013).¹ Here, the record is replete with evidence from which a jury could find defendant guilty of first degree murder. At trial, several witnesses testified that defendant fired the shots that resulted in the victim’s death. Witnesses also testified that defendant made highly incriminating statements after the shooting. On the other hand, although several witnesses initially told officers that Alvin fired the shots that killed the victim, the testimony at trial was devoid of any direct evidence tending to show that Alvin was the perpetrator of the crime. In addition, despite the fact that Alvin testified that he left the scene of the crime after the shooting because he had drugs on his person, he testified that he returned after

1. Although defendant argues in his brief that his constitutional rights were violated, he failed to advance any constitutionally based arguments in support of his request for the delivery of a third party flight instruction before the trial court. Because our Court does not consider constitutional issues raised for the first time on appeal, *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (stating that “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal”), we apply the applicable prejudice standard applicable to non-constitutional errors to defendant’s claim.

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learning that officers were searching for him. Based on the foregoing, we are unable to hold that there is a reasonable possibility that a different result would have been reached at trial had the trial court delivered defendant's requested third party flight instruction. Therefore, we find no prejudicial error.

E. Admission of Alvin Alexander's Testimony

[6] In the final issue that he has raised on appeal, defendant argues that the trial court erred by admitting evidence of phone calls made by Alvin Alexander to his friends which were "self-serving statements implicating defendant." Defendant argues that this evidence amounted to hearsay and was cumulative. We disagree.

"Hearsay" is defined 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) (2013). Hearsay is not admissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2013). The trial court's determination about whether an out-of-court statement constitutes hearsay is reviewed *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552 (2009). The trial court's determination concerning whether there is a "needless presentation of cumulative evidence" pursuant to Rule 403 of the North Carolina Rules of Civil Procedure is reviewed for an abuse of discretion. *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010).

The challenged evidence, which consisted of recordings of phone calls made by Alvin while he was in jail, was admitted during Alvin's testimony. The substance of the recordings indicated that Alvin did not shoot at the vehicle and that defendant was the shooter on 12 August 2010.

Defendant argues that Alvin's credibility was a key issue at trial and that allowing the tapes to bolster his testimony was prejudicial to defendant. Without the repeated statements by Alvin, defendant argues that the jury could have reached a different result.

After conducting *de novo* review of the challenged evidence, we hold that the recordings of Alvin's conversations did not amount to hearsay. In order to constitute hearsay, it must be "[a]n assertion of one other than the presently testifying witness" and must be offered for the truth of the matter asserted. *State v. Sibley*, 140 N.C. App. 584, 587-88, 537 S.E.2d 835, 838 (2000) (citation omitted). In the case *sub judice*, the recordings were admissible for the non-hearsay purpose of corroborating Alvin's testimony, which means that they were not used for the truth

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of the matter asserted. In addition, the recordings were not a needless presentation of cumulative evidence because the statements Alvin made in the recordings corroborated his testimony, excluded him as a suspect, and established defendant as the perpetrator of the crime. For these reasons, we are unable to hold that the trial court abused its discretion by admitting the challenged testimony as a needless presentation of cumulative evidence.

III. Conclusion

Based on the reasons discussed above, we find no error in part and no prejudicial error in part.

Judges ERVIN and DILLON concur.

STATE OF NORTH CAROLINA
v.
MATTHEW HAGERT SALENTINE

No. COA14-63

Filed 21 October 2014

1. Jury—misconduct—denial of mistrial not arbitrary—inquiry sufficient

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial based on juror misconduct and refusing defendant's request to make further inquiry into the misconduct. The trial court's decision to credit the testimony of a live witness over vague, partially substantiated hearsay was not so arbitrary that it could not have been the result of a reasoned decision. Furthermore, it was well within the trial court's discretion to end its inquiry and proceed with sentencing based upon the juror's responses and the court's own observations.

2. Criminal Law—prosecutor's closing argument—supported by evidence—proper purpose

The trial court did not err in a first-degree murder case by improperly overruling defendant's objections to three portions of the State's closing argument. The full context of the prosecutor's closing argument demonstrated that the challenged remarks were supported by the evidence and had a proper purpose.

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Appeal by Defendant from judgment entered 25 October 2012 by Judge William R. Bell in Johnston County Superior Court. Heard in the Court of Appeals 10 September 2014.

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

David L. Neal for Defendant.

STEPHENS, Judge.

Defendant Matthew Hagert Salentine was convicted in Johnston County Superior Court of first-degree murder, first-degree burglary, and robbery with a dangerous weapon, and was sentenced to life imprisonment without parole for the first-degree murder conviction, with judgment arrested on the other two charges. Defendant appeals from the trial court's order denying his motion for a mistrial based on allegations of juror misconduct, contending that the trial court erred in failing to conduct a further inquiry after removing the juror in question, and in overruling Defendant's objections to the State's closing argument. After careful review, we hold that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial, limiting the scope of its juror misconduct inquiry, or overruling Defendant's objections to the State's closing argument.

Facts and Procedural History

The evidence at trial showed that early on the morning of 23 June 2010, Defendant broke into the home of 74-year-old Smithfield resident Patricia Warren Stevens. Defendant later admitted that he intended to steal money and valuables in order to purchase crack cocaine, and that his neighbor, Mrs. Stevens, seemed like an "easy" target because he knew she had been living alone since her dog died several months previously. Contrary to Defendant's expectations, Mrs. Stevens put up a fight and began screaming when she caught him rummaging through her purse. Frightened by the prospect of being recognized, Defendant struck Mrs. Stevens at least thirty-three times with a tire iron, including at least eight blows to her head. When he realized Mrs. Stevens was dead, Defendant attempted to conceal her body by rolling it up in a carpet and moving furniture around. He then continued to search the home for additional items to steal, ultimately leaving with Mrs. Stevens's Visa credit card, several boxes of her checks, and a pillowcase stuffed with jewelry. Defendant was arrested two days later on 25 June 2010 as he sat

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in his truck after attempting to deposit into his bank account over \$2,000 in checks made payable to him and purportedly signed by Mrs. Stevens. Defendant confessed to the killing later that afternoon during an interview with SBI agents. Subsequent DNA testing revealed that blood found on checkbooks and flip-flops seized from Defendant's vehicle and a tire iron found near the back door of his apartment matched Mrs. Stevens's DNA profile.

Defendant was tried capitally and pled not guilty, arguing diminished capacity and voluntary intoxication as his defense to the charge of premeditated and deliberate first-degree murder. Although he admitted killing Mrs. Stevens after breaking into her house, Defendant contended that he could not have formed the requisite intent to commit the offense due to a combination of crack cocaine addiction, alcohol abuse, and bipolar disorder. During his SBI interview, Defendant claimed he "fell off the wagon" after nearly five years of being sober and admitted to consuming nearly \$10,000 worth of crack cocaine in the weeks preceding Mrs. Stevens's murder, financing his binge with an inheritance from the estate of his grandmother. In addition to being strung-out on crack cocaine, Defendant also consumed a fifth of vodka and some beers shortly before breaking into Mrs. Stevens's home. At trial, mental health experts for the State and the defense diagnosed Defendant with cocaine dependence. Defendant's experts testified that he also suffered from bipolar disorder, that his substance abuse represented a misguided attempt to self-medicate his depression, and that it would be impossible for a person to think or act rationally after consuming so much crack cocaine and alcohol. The State's expert testified that although cocaine can affect one's judgment, it does not completely overwhelm the capacity to reason. He pointed to Defendant's decision to break into Mrs. Stevens's home to obtain money to get more crack and Defendant's actions designed to avoid detection in support of his conclusion that at the time of the offense, Defendant was able to perform intentional acts and make rational decisions. Moreover, the State's expert disputed the bipolar diagnosis, noting that although prolonged cocaine use can cause what appear to be symptoms of mental disorder, Defendant exhibited a clear pattern of functional, stable behavior when not using drugs, thus making a personality disorder with antisocial features the more appropriate diagnosis. Nonetheless, in light of Defendant's diminished capacity defense, the trial court included an instruction on second-degree murder as a lesser-included offense in its charge to the jury.

On 25 October 2012, after deliberating eleven hours over the course of three days, the jury found Defendant guilty of first-degree murder

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based on theories of malice, premeditation and deliberation, and felony murder. On 2 November 2012, prior to the conclusion of Defendant's capital sentencing hearing, the trial court received a letter from Jeffrey Saunders, a Florida attorney whose brother-in-law, Brian Scott Lloyd, was a forty-eight-year-old long-haul truck driver who served on Defendant's jury. In his letter, Mr. Saunders informed the court:

During deliberations, [Lloyd] contacted my wife complaining about one of the female jurors, because she would not agree to find the Defendant guilty. He further informed my wife that the same juror failed to disclose during voir dire that her brother was addicted to drugs. He also stated to my wife that he went online and found out certain information about the Defendant. I informed my wife to tell her brother that he was prohibited from speaking to her or anyone else regarding the case, and he must comply with the Court's instructions. Thereafter, he called my wife on another day and told her that he and the other jurors did not know what the term "malice" meant and asked her to ask me to explain the same. I refused to provide any information to my wife and I never spoke to her brother about the case.

Upon learning of these allegations of juror misconduct, the trial court informed both parties that it intended to remove Lloyd from the jury and that it was going to make an inquiry of him. Defendant's counsel noted that Lloyd had been seen smoking cigarettes during breaks with two other jurors and stated that inquiry of them also seemed appropriate. Defendant also moved for a mistrial, which the trial court denied, explaining that even if a juror had violated the court's rules, the ultimate inquiry was whether that violation was prejudicial to Defendant.

During the inquiry that followed, Lloyd confirmed that he had spoken to his sister after the jury retired to its deliberations, but could not recall the precise date of their conversation. Lloyd initially denied discussing any details about the case with his sister, but eventually acknowledged he had shared with her his frustrations with another juror, explaining, "I told her I had a rough day, we was [sic] deliberating the case. It was getting heated in there basically. That's all I said. No details." When the trial court confronted Lloyd with the Saunders letter, he eventually confirmed that he had told his sister the jury had been at an 11-to-1 standoff, and that the hold-out juror was a female whose brother was addicted to drugs and was "having a little trouble, crying a lot." Early in the inquiry,

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the trial court expressed frustration with Lloyd's initial reluctance to answer questions candidly, stating:

THE COURT: Why do I feel like I'm having to drag this out of you?

[Lloyd]: You're not.

THE COURT: I started out by asking you if you'd talked to anybody about this and you said no and then I'm asking you particular things that were disclosed in this letter –

[Lloyd]: I was thinking around here.

THE COURT: Let me finish. And that as I started asking you about specific things, you then remembered them.

However, as the inquiry continued, Lloyd repeatedly denied the remaining allegations contained in the Saunders letter. Lloyd denied conducting any online research about Defendant or the case, and claimed that he did not know how to use a computer. Lloyd also denied having asked his sister about "malice," and stated instead that he had been having trouble with the word "mitigating" but never specifically asked her to ask Mr. Saunders for assistance. Lloyd further denied having spoken to any other member of the jury, including the two men he had been seen smoking with, about any of these issues.

Following the inquiry, the trial court removed Lloyd from the jury and replaced him with an alternate. Defendant again moved for a mistrial and, alternatively, requested that the trial court make further inquiries of the other jurors. The court denied Defendant's motion for a mistrial and explained that, based on Lloyd's answers, it did not believe there was any need to conduct any further inquiry. Defendant's sentencing hearing resumed shortly thereafter, and the jury ultimately recommended a sentence of life imprisonment without parole, which the trial court imposed on 2 November 2012.

Juror Misconduct

[1] Defendant first argues that the trial court abused its discretion by denying his motion for a mistrial based on juror misconduct and refusing Defendant's request to make further inquiry into whether other jurors received prejudicial outside information from Lloyd. We disagree.

A mistrial must be declared "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the

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defendant's case." N.C. Gen. Stat. § 15A-1061 (2013). In examining a trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct, we review for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). An abuse of discretion occurs "only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996).

When juror misconduct is alleged, it is the trial court's responsibility "to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant." *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634, *appeal dismissed and disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000). "Misconduct is determined by the facts and circumstances in each case," *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976), and this Court has held that "[n]ot every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial." *State v. Wood*, 168 N.C. App. 581, 584, 608 S.E.2d 368, 370 (citation omitted), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 923 (2005). The trial court is vested with the "discretion to determine the procedure and scope of the inquiry." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996). On appeal, we give great weight to its determinations whether juror misconduct has occurred and, if so, whether to declare a mistrial. *State v. Boyd*, 207 N.C. App. 632, 640, 701 S.E.2d 255, 260 (2010). Its decision "should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *State v. Gurkin*, __ N.C. App. __, __, 758 S.E.2d 450, 454 (2014)(quoting *Bonney*, 329 N.C. at 73, 405 S.E.2d at 152).

In the present case, Defendant contends that the combination of the Saunders letter, Lloyd's initial reluctance to testify candidly, and the possibility of a hold-out juror provides substantial reason to believe that prejudicial outside information was brought into the jury's deliberations. This means that, according to Defendant's interpretation of our Supreme Court's decision in *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991), the trial court was required to either declare a mistrial or continue its inquiry by questioning the entire jury to determine whether the other jurors were exposed to outside prejudicial information. Therefore, Defendant argues, the trial court abused its discretion by accepting "at face value" Lloyd's denials of Mr. Saunders's allegations that he

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conducted online research and asked for clarification about the meaning of “malice.” As a result, Defendant claims his fundamental constitutional right to an impartial jury was denied.

At the outset, we note it is well established that “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted), *overruled in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). Thus, because Defendant did not raise his constitutional arguments at trial, we lack jurisdiction to consider them now as they have not been preserved for appellate review.

Defendant’s argument that the trial court abused its discretion in denying his motion for a mistrial and declining to conduct further inquiry essentially revolves around questioning the credibility of Lloyd’s testimony. This argument ignores the broad deference we are compelled to apply when reviewing the trial court’s credibility determinations. As this Court has repeatedly recognized in the context of juror misconduct inquiries, “[t]he trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.” *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001) (quoting *Drake*, 31 N.C. App. at 190, 229 S.E.2d at 54).

Furthermore, a careful review of the record does not support Defendant’s assertion that the trial court simply accepted Lloyd’s testimony “at face value.” In order to cast doubt on Lloyd’s testimony and, by extension, the trial court’s decision to believe it, Defendant emphasizes Lloyd’s initial reluctance to admit that he had discussed the case with his sister, and selectively highlights a quote from the bench expressing frustration with having to “drag” the truth out of Lloyd. But viewed in its full context, the trial court’s frustration with Lloyd actually shows that it engaged in a searching, skeptical inquiry. Rather than blindly accepting Lloyd’s answers, the trial court pushed back repeatedly to demand further clarification. Nevertheless, Lloyd did not waver in denying that he conducted online research, asked about “malice,” and discussed outside information with other jurors, and the trial court was ultimately satisfied that no prejudice resulted from his misconduct.

Apart from the Saunders letter, there was no evidence that Lloyd obtained any outside information about the case. Moreover, this Court’s prior decisions indicate that, even if taken as true, the allegations in the Saunders letter would not amount to prejudicial misconduct. On the one

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hand, the Saunders letter does not allege that either Mr. Saunders or his wife provided Lloyd with any information about “malice,” whereas Lloyd testified that he actually asked about the definition of “mitigating,” but denied finding any outside information about either term. In any event, this Court has previously held that the definitions of legal terms do not constitute outside prejudicial information. *See State v. Patino*, 207 N.C. App. 322, 329–30, 699 S.E.2d 678, 684 (2010). On the other hand, the vague allegation that Lloyd “conducted online research about Defendant” is not sufficient to support a claim that prejudicial juror misconduct occurred. In *Aldridge*, this Court held that the trial court did not abuse its discretion in failing to hold an inquiry into allegations of juror misconduct based solely on hearsay from an anonymous telephone call. 139 N.C. App. at 713, 534 S.E.2d at 635. In *State v. Rollins*, we held that the trial court did not abuse its discretion when it declined to hold an inquiry based on allegations that a juror had been exposed to prejudicial outside information by watching an unidentified television newscast. ___ N.C. App. ___, 734 S.E.2d 634 (2012), *affirmed per curiam*, 367 N.C. 114, 748 S.E.2d 146 (2013).

In the present case, the Saunders letter is itself hearsay, given that it describes what Mr. Saunders said his wife said Lloyd told her, and is similarly vague insofar as it does not identify any specific source for Defendant’s online research. Lloyd repeatedly denied conducting any online research about Defendant, and testified that he did not know how to use a computer. Although Defendant complains this is simply unbelievable four decades after the advent of the personal computer, we give the trial court’s determinations great deference on appeal and, based on the record before us, we do not believe its decision to credit the testimony of a live witness over vague, partially substantiated hearsay was “so arbitrary that it could not have been the result of a reasoned decision.” *See Dial*, 122 N.C. App. at 308, 470 S.E.2d at 91. We therefore hold that the trial court did not abuse its discretion when it denied Defendant’s motion for a mistrial.

Defendant also puts great emphasis on Lloyd’s testimony that there had been a hold-out juror, and contends the trial court abused its discretion in failing to question the other jurors as to whether they were exposed to prejudicial outside information. In support of this argument, Defendant relies on *Black*, where our Supreme Court held that, “[w]hen there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.” 328 N.C. at 196, 400 S.E.2d at 401 (citation

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omitted). Thus, in the present case, Defendant argues the trial court violated an absolute duty to conduct a further inquiry.

However, Defendant's reliance on *Black* is misplaced. First, it ignores the fact that, in *Black*, our Supreme Court upheld the trial court despite the court's failure to conduct any sort of inquiry into the allegations of juror misconduct before it, explaining that the trial court has "broad discretion to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion." *Id.* (citation and internal quotation marks omitted). Moreover, Defendant's argument appears to be based on a common misunderstanding that this Court recently addressed in *Gurkin*. As in the present case, the defendant in *Gurkin* selectively cited our prior holdings to argue that any allegation of juror misconduct creates an absolute duty for the trial court to investigate. However, as we explained, "there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation." __ N.C. App. at __, 758 S.E.2d at 454 (quoting *Harris*, 145 N.C. App. at 576–77, 551 S.E.2d at 503). While affirming the trial court's duty to conduct an inquiry where there is substantial reason to fear prejudicial misconduct, *Gurkin* made clear that "[a]n examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous." *Id.* (quoting *Harris*, 145 N.C. App. at 577, 551 S.E.2d at 503). As this Court previously explained,

[t]he circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely [a] matter of suspicion, it is purely a matter in the discretion of the presiding judge.

Aldridge, 139 N.C. App. at 713, 534 S.E.2d at 634. In the present case, the trial court did not issue written findings. This Court has held, however, that "[a] denial of motions made because of alleged juror misconduct is equivalent to a finding that no prejudicial misconduct has been shown." *Id.* Furthermore, the record supports such a finding. There was no evidence that Lloyd ever discussed outside information with other jurors: Lloyd testified that he did not, and the Saunders letter does not allege otherwise. If the trial court was satisfied, based upon Lloyd's responses and its own observations, that there was no substantial reason to fear that the jury was exposed to prejudicial outside information, then it was well within the trial court's discretion to end its inquiry and proceed to sentencing. *See Burke*, 343 N.C. at 149, 469 S.E.2d at 910. Thus, Defendant's argument fails.

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Finally, Defendant urges this Court to consider the harm that juror misconduct threatens to the judicial system as a whole, citing as support our decision in *Drake*. While it is true that, in *Drake*, we recognized that “[b]asic principles of proper juror conduct should not be ignored by the trial court” and that “[r]eversible error may include not only error prejudicial to a party but also error harmful to the judicial system,” the present case is easily distinguishable. 31 N.C. App. at 192–93, 229 S.E.2d at 55. In *Drake*, we held that the trial court abused its discretion where it neither questioned the juror who allegedly engaged in misconduct, nor made any other investigation into the claim of juror misconduct. Here, by contrast, the trial court conducted an investigation and determined after questioning Lloyd that there was no danger of prejudicial misconduct to Defendant. As we do not believe the trial court abused its discretion in reaching this determination, we do not agree that Lloyd’s misconduct harmed the judicial system as a whole. Defendant’s arguments based upon juror misconduct are overruled.

Closing Argument

[2] Defendant next argues that the trial court improperly overruled his objections to three portions of the State’s closing argument, which he contends were prejudicial.

The standard of review for assessing an alleged improper closing argument where opposing counsel lodged a timely objection is whether the trial court abused its discretion by failing to sustain the objection. *State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d 61, 73 (2008), *cert. denied*, 556 U.S. 1190, 173 L. Ed. 2d 1099 (2009). When applying the abuse of discretion standard in this context, we determine first whether the challenged remarks were improper, and, if so, whether they were “of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.” *State v. Peterson*, 361 N.C. 587, 607, 652 S.E.2d 216, 229 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008).

Here, Defendant argues that the trial court abused its discretion by allowing the prosecutor to repeatedly emphasize the crime’s brutality and characterize it as one of the most “brutal” and “gruesome” murder cases in the history of the community. Defendant’s first objection came near the beginning of the State’s closing argument. After insisting that the case was about the decisions and choices Defendant made, the prosecutor argued:

[Defendant’s] acts and his decisions resulted in the murder of Patricia Stevens, 74-year[-] old woman of dignity and

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grace who was absolutely vulnerable and his acts caused one of the most gruesome and violent murders this community has ever seen.

After the trial court overruled Defendant's objection, the prosecutor reiterated that this case was about the decisions and choices Defendant made. Defendant objected again as the prosecutor was arguing that the facts showed Defendant acted with premeditation and deliberation. Specifically, regarding Defendant's use of grossly excessive force and the infliction of wounds even after the victim was felled, the prosecutor argued:

Use of grossly excessive force. Let's just stop on that one for a second and think about it. I want that to sink in — use of grossly excessive force. Infliction of lethal wound after the victim is felled. Think about that. These are the circumstances that you can infer premeditation and deliberation specifically.

You heard what — even he said that he got on top of her and beat her in the back of the head with that tire iron until she stopped. He crushed her skull. Brutal or vicious circumstances of the killing. This is one of the most brutal murders this community has seen.

Defendant objected but was once again overruled. Taken together, Defendant claims, these challenged remarks amounted to an improper infusion of the prosecutor's personal opinion, driven by reference to matters outside the record to appeal to the jury's passion and prejudice. This, Defendant contends, is reversible error in light of *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), where our Supreme Court recognized it was improper for a prosecutor to describe the crime as "a first degree murder of one of the most heinous kind I have ever come into contact with." *Id.* at 186, 400 S.E.2d at 419. While acknowledging that the *Small* Court ultimately concluded that the statement at issue was not so grossly improper as to require a new trial, Defendant contends that a different result is warranted here because, unlike the defendant in *Small*, he timely objected to these remarks at trial and thus the more rigorous *ex mero motu* standard applied in *Small* is inapplicable.

Defendant is correct that the *ex mero motu* standard does not apply here. Nevertheless, this does not automatically mean that the trial court's ruling "could not have been the result of a reasoned decision." *See Dial*, 122 N.C. App. at 308, 470 S.E.2d at 91. In the present case,

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based on the record before us and in light of our prior decisions, we do not believe that the trial court abused its discretion when it overruled Defendant's objections.

First, as our Supreme Court has recognized, "prosecutors are given wide latitude in the scope of their argument" and may "argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation and internal quotation marks omitted), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Furthermore, "[s]tatements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." *Id.* (citation and internal quotation marks omitted). Our Supreme Court has also held that "hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper." *State v. Lloyd*, 354 N.C. 76, 115, 552 S.E.2d 596, 623 (2001) (citation omitted).

Here, the full context of the prosecutor's closing argument demonstrates that the challenged remarks were supported by the evidence and had a proper purpose. Indeed, the evidence introduced at trial supported the prosecutor's assertion that this murder of a 74-year-old woman by tire iron was, in fact, brutal. *See Small*, 328 N.C. at 186, 400 S.E.2d at 419 (ruling that prosecutor's description of the murder as "a first degree murder of one of the most heinous kind I have ever come into contact with" was not so grossly improper as to require a new trial, in part because the evidence in the record supported the characterization of the murder as "heinous"). Further, these challenged remarks related to the State's theory of the case — that Defendant acted intentionally and with premeditation and deliberation — which Defendant put directly at issue by claiming he lacked capacity. As our Supreme Court has recognized, the brutality of the crime and the infliction of blows after the victim was felled are both circumstances to consider regarding issues of premeditation and deliberation. *See State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003). Thus, we hold the trial court acted within its discretion in overruling Defendant's first two objections.

Finally, Defendant argues the trial court abused its discretion by overruling his objection during the State's closing argument when the prosecutor argued:

At a minimum, 30 blows to Patricia Stevens and he's aiming for her head and she's trying to fend him off. And then at least eight blows to the head, and you saw the pictures, he was on top of her and he crushed her skull in. And he

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wants to come in and say, “I’m sorry, I didn’t mean it, it was an accident”? That’s an insult to the law, it’s an insult to these family members, it’s an insult to your intelligence.

On appeal, Defendant argues that this remark improperly commented on his decision not to testify and, by using the word “accident,” attributes to him a defense he did not raise. We note first that while it is indeed improper for a prosecutor to comment on a defendant’s decision not to testify, it is difficult to discern how this remark could be construed as such. Further, our prior decisions make clear that, as a general matter, “a trial court cures any prejudice resulting from a prosecutor’s misstatements of law by giving a proper instruction to the jury.” *Goss*, 361 N.C. at 626, 651 S.E.2d at 877. However, we need not reach the merits of Defendant’s claims because this issue has not been properly preserved for appellate review. The record shows that at trial, Defendant’s counsel explained that the basis for his objection to this remark was the reference to the “insult to the family.” Since “[t]he theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions,” Defendant cannot now change the basis of his objection and assert a new theory for the first time on appeal. *Benson*, 323 N.C. at 322, 372 S.E.2d at 535. Defendant’s challenges based upon the prosecutor’s closing argument are overruled.

We hold that Defendant received a fair trial free from reversible error.

NO ERROR.

Judges CALABRIA and ELMORE concur.

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[237 N.C. App. 89 (2014)]

STATE OF NORTH CAROLINA

v.

MALIK JAQUEZ WALTON, DEFENDANT

No. COA14-402

Filed 21 October 2014

1. Evidence—expert testimony—sexual assault—physical evidence consistent with

The trial court did not commit plain error in a sexual offense case by allowing two medical witnesses to testify that the victim's history was consistent with sexual assault. The expert witnesses testified that the physical evidence they observed was consistent with the victim's allegations of abuse; the witnesses did not state that the victim's allegations were credible.

2. Sexual Offense—jury instruction—use of the term victim

The trial court did not commit plain error in a sexual offense case by referring to the complainant as the victim. The physical evidence of the victim's injuries corroborated her testimony and the jury would not reasonably have reached a different verdict if the reference to "victim" in the jury instructions had not occurred.

Appeal by defendant from judgments entered 10 July 2013 and 30 July 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General William V. Conley, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of first degree sexual offense and second degree kidnapping. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that in May of 2011, Stacy¹ was in a bedroom with defendant and her fifteen-month old son.

1. A pseudonym will be used to protect the identity of those involved.

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Defendant was the father of Stacy's son. Defendant slapped Stacy and began repeatedly choking her and threatened to kill her as he held a knife to her neck. Defendant then put both his fingers and his penis in Stacy's vagina and her anus. Defendant was indicted for second degree rape, first degree kidnapping, and first degree sexual offense. Defendant was tried by a jury, and the jury found him guilty of second degree kidnapping and first degree sexual offense. The trial court entered judgments accordingly. Defendant appeals.

II. Medical History Testimony

[1] Defendant first contends that “the trial court committed plain error in allowing two medical witnesses to testify that [Stacy]’s history was consistent with sexual assault.” (Original in all caps.) Defendant argues that “Emergency Room Nurse Tonia Nowak testified that [Stacy]’s injuries were consistent with her history. . . . Emergency Room Physician Dr. Brendan Berry testified that [Stacy]’s demeanor, history and examination, was ‘consistent with the sexual assault that she described.’ . . . This was reversible error.” As defendant did not object to the testimony, he now asks that we review his contentions for plain error. *See State v. Harding*, 110 N.C. App. 155, 161, 429 S.E.2d 416, 420 (1993) (“Due to defendant’s failure to object at trial, we must review this objection under the plain error rule.”)

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). Furthermore, our Supreme Court has established that “[a] prerequisite to our engaging in a plain error analysis is the determination that the instruction complained of constitutes error at all.” *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, (quotation marks omitted), *cert. denied*, 479 U.S. 836, 93 L.Ed. 2d 77 (1986).

Here, both Nurse Nowak and Dr. Berry testified as expert witnesses. “An expert witness may not testify as to the credibility of a witness. Nonetheless, an expert witness may testify, upon a proper foundation,

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as to . . . whether a particular complainant has symptoms or characteristics consistent therewith.” *State v. Khouri*, 214 N.C. App. 389, 401, 716 S.E.2d 1, 9-10 (2011) (citations and quotation marks omitted), *disc. review denied*, 365 N.C. 546, 742 S.E.2d 176 (2012). Here, even by defendant’s own summary in his brief, the expert witnesses testified that the *physical evidence* they observed was consistent with Stacy’s allegations of abuse; the witnesses did not state that Stacy’s allegations were credible. Defendant directs this Court to *State v. Frady*, but in that case the testifying witness had not examined the individual alleging sexual abuse, but here both Dr. Brown and Nurse Nowak examined Stacy and testified regarding the examination; accordingly, *Frady* is not applicable. See *State v. Frady*, ___ N.C. App. ___, ___, 747 S.E.2d 164, 167 (“It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness. However, those cases in which the disputed testimony concerns the credibility of a witness’s accusation of a defendant must be distinguished from cases in which the expert’s testimony relates to a diagnosis based on the expert’s examination of the witness. With respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved, upon a proper foundation, the admission of expert testimony with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics. In order for an expert medical witness to render an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse.” (citations, quotation marks, and brackets omitted)), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). This argument is overruled.

III. Trial Court’s Instructions

[2] Defendant next contends that “the trial court erred or committed plain error in identifying . . . [Stacy] as a ‘victim.’” (Original in all caps.) Defendant did not object to the jury instructions, so we review for plain error. See *Harding*, 110 N.C. App. at 161, 429 S.E.2d at 420. This Court has previously determined that use of the word ‘victim’ by the trial court is generally not plain error, see *State v. Surratt*, 218 N.C. App. 308, 309-10, 721 S.E.2d 255, 256, *disc. review denied*, 365 N.C. 559, 722 S.E.2d 600 (2012). We agree that in a case where there is a jury question as to whether an act is actually a criminal offense or as to whether the alleged act actually happened to the complaining witness, there is technically a question of whether there was a “victim.” See *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 727 (2013) (“The issue of whether sexual offenses occurred and whether E.C. and J.C. were ‘victims’ were issues

WHITEHURST INV. PROPS., LLC v. NEWBRIDGE BANK

[237 N.C. App. 92 (2014)]

of fact for the jury to decide.”), *disc. review denied*, 367 N.C. 290, 753 S.E.2d 666 (2014). Black’s Law Dictionary defines “victim” as “[a] person harmed by a crime, tort, or other wrong.” Black’s Law Dictionary 1703 (9th ed. 2009). So use of the word “victim,” both in denotation and connotation, means that the complaining witness was “harmed by a crime, tort, or other wrong.” *Id.*

But in this case, defendant did not object to use of the term “victim.” Stacy testified that defendant choked her, threatened to kill her as he held a knife to her neck, and then inserted both his fingers and penis into her vagina and anus. In addition, the physical evidence of Stacy’s injuries corroborated her testimony. We cannot determine that the jury might reasonably have reached a different verdict if the reference to “victim” in the jury instructions had not occurred, so we do not find plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges McGEE and BRYANT concur.

WHITEHURST INVESTMENT PROPERTIES, LLC, PLAINTIFF
v.
NEWBRIDGE BANK AND HENRY PROPERTIES, LLC, DEFENDANTS

No. COA14-257

Filed 21 October 2014

Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—no substantial right

Although defendant NewBridge Bank appealed from the trial court’s order denying its motion to dismiss plaintiff’s claims for breach of contract, unjust enrichment, and declaratory judgment on *res judicata* and collateral estoppel grounds, the appeal was from an interlocutory order and thus dismissed. Defendant failed to demonstrate how a substantial right would be lost absent immediate review.

WHITEHURST INV. PROPS., LLC v. NEWBRIDGE BANK

[237 N.C. App. 92 (2014)]

Appeal by defendant NewBridge Bank from order entered 22 October 2013 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 27 August 2014.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for plaintiff-appellee.

Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for defendant-appellant NewBridge Bank.

HUNTER, Robert C., Judge.

Whitehurst Investment Properties, LLC (“plaintiff” or “Whitehurst”) filed this action against NewBridge Bank (“NewBridge”) and Henry Properties, LLC (“HP”) (collectively “defendants”), asserting claims for breach of contract, unjust enrichment, and declaratory judgment. NewBridge appeals from the trial court’s order denying defendants’ motion to dismiss.¹ On appeal, NewBridge argues that the trial court erred in denying the motion to dismiss because the doctrines of *res judicata* and collateral estoppel bar plaintiff’s claims.

After careful review, we dismiss this appeal from the trial court’s interlocutory order.

Background

On 5 December 2001, Starmount Company (“Starmount”) and Henry James Bar-Be-Que, Inc. (“HJBBQ”) executed a Ground Lease Agreement (“Ground Lease”). Under the Ground Lease, Starmount assumed a landlord position, leasing to HJBBQ a 2.28 acre property (the “property”) in Greensboro, North Carolina. The Ground Lease also provided that if the tenant decided to sublease the property, the Landlord (Starmount) would be entitled to any excess rent payments. HJBBQ contracted with NewBridge’s predecessor in interest to finance construction of a building on the property, which was required under the Ground Lease. HJBBQ and NewBridge entered into a Leasehold Deed of Trust (“the Deed of Trust”) as security for the loans made to HJBBQ. However, the Deed of Trust provided that NewBridge was entitled to any excess rents that may be produced by sublease. NewBridge entered into a Landlord’s Consent agreement with Starmount, in which Starmount consented to this amendment to the Ground Lease.

1. HP did not appeal from the trial court’s order.

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Starmount sold the property to Whitehurst in December 2007, making Whitehurst the successor to all of Starmount's interests as landlord under the Ground Lease. In October and November 2008, Whitehurst forwarded notices of lease default to NewBridge. In August 2009, NewBridge created HP as its wholly owned subsidiary. HJBBQ then assigned its interest in the Ground Lease to HP through an Assignment in Lieu of Foreclosure, through which HP assumed every obligation as tenant under the Ground Lease.

HP was obligated to pay plaintiff \$4,965.84 per month under the terms of the Ground Lease. On 20 August 2009, HP executed a sublease to another restaurant, REFS, LLC. Pursuant to the sublease, REFS agreed to pay HP rent in the amount of \$9,500 per month from 20 December 2009 to 19 April 2010, later increasing to \$14,000 per month from 20 April 2010 to 19 November 2010. The parties disputed who was entitled to the rent payments in excess of the \$4,965.84 set forth in the Ground Lease.

On 31 August 2009, NewBridge and HP sued Whitehurst alleging, among other claims, breach of contract ("the First Action"). On 31 December 2009, Whitehurst counterclaimed for a declaratory judgment asserting its right to the excess rent payment. Following dismissal of all other claims, Whitehurst's declaratory judgment counterclaim was the only matter still before the trial court.

On 14 March 2011, the Honorable John O. Craig entered judgment in favor of NewBridge and HP. This Court reversed on appeal, holding that the Deed of Trust executed by HJBBQ and NewBridge was cancelled in exchange for the Assignment in Lieu of Foreclosure. *See NewBridge Bank v. Kotis Holdings, LLC*, No. COA11-1016, 2012 WL 3570377 (Aug. 21, 2012) ("*NewBridge I*"). Therefore, the Ground Lease became the controlling contract, which awarded any excess rent payment to Starmount, and therefore Whitehurst, by its plain language. On remand, the trial court granted summary judgment in favor of Whitehurst as ordered by this Court.

Whitehurst thereafter demanded payment of excess rent, which HP refused to pay. Whitehurst commenced the current action against NewBridge and HP on 11 July 2013 for breach of contract, unjust enrichment, and declaratory judgment. In its complaint, Whitehurst alleged that HP was the legal alter ego of NewBridge, and therefore, NewBridge was liable for the excess rents paid to HP. On 14 August 2013, defendants moved to dismiss plaintiff's claims on *res judicata* and collateral estoppel grounds, which was denied on 22 October 2013. NewBridge filed timely notice of appeal from the trial court's order.

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Discussion**I. Grounds for Appellate Review**

NewBridge first contends that the trial court's interlocutory order is immediately appealable because a substantial right would be deprived without immediate review. We disagree.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review. *See N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995); N.C. Gen. Stat. § 1-277(a) (2013).

NewBridge argues that immediate review is appropriate because the trial court's order affects a substantial right. However, at no point in NewBridge's brief does it attempt to identify this right or explain how it would be deprived without immediate review of the trial court's order. Rather, it provides a conclusory statement that the denial of a motion to dismiss based on the defenses of *res judicata* or collateral estoppel "is immediately appealable as affecting a substantial right."

This Court has held that denial of a motion to dismiss premised on *res judicata* and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[W]e hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." (emphasis added)); *see also Williams v. City of Jacksonville Police Dept.*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004) (stating that "the denial of a motion for summary judgment based on the defense of collateral estoppel *may* affect a substantial right[.]" (emphasis added)). As this Court has previously noted:

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We acknowledge the existence of an apparent conflict in this Court as to whether the denial of a motion for summary judgment based on *res judicata* affects a substantial right and is immediately appealable. However, our Supreme Court has addressed this issue in *Bockweg*, and, like the panel in [*Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999)], “we do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* ‘may affect a substantial right.’”

Heritage Operating, L.P. v. N.C. Propane Exch., LLC, __ N.C. App. __, __, n.2, 727 S.E.2d 311, 314, n.2 (2012). Thus, to meet its burden of showing how a substantial right would be lost without immediate review, the appealing party must show that “(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.” *Id.* at __, 727 S.E.2d at 314 (quotation marks omitted).

First, we overrule NewBridge’s argument that the trial court exposed defendants to the possibility of inconsistent verdicts when it rejected their argument that plaintiff’s cause of action is barred by *res judicata*. *Res judicata* prevents litigation of the same legal claims, not the same legal issues. *Foreman v. Foreman*, 144 N.C. App. 582, 587, 550 S.E.2d 792, 796, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001); *see also State ex. rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (“For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits [and] *that the same cause of action is involved*[.]” (emphasis added)). In the First Action, the sole claim before the trial court was a request for a declaratory judgment to determine which party was entitled to excess rent payments. Here, Whitehurst is suing NewBridge and HP in order to collect those payments after declaratory judgment in the First Action was entered in its favor. Thus, because the claims asserted here are distinct from those litigated in the First Action, NewBridge has failed to demonstrate the existence of the risk of an inconsistent verdict and consequently fails to show how a substantial right would be deprived without immediate appellate review of the trial court’s order.

Additionally, NewBridge argues that Whitehurst is collaterally estopped from arguing that NewBridge and HP are the same legal entity. Collateral estoppel is a companion doctrine of *res judicata* and serves

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to promote judicial efficiency and to protect litigants from having to relitigate issues that were previously decided. *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161. For purposes of collateral estoppel, “the prior judgment serves as a bar *only as to issues actually litigated* and determined in the original action.” *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (quotation marks omitted) (emphasis in original), *disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009).

In support of its argument, NewBridge points to this Court’s opinion in *NewBridge I*, where the Court noted that “[HJBBQ] never transferred its leasehold interest to [NewBridge]; rather, the leasehold interest was transferred to HP, a limited liability company owned wholly by [NewBridge.]” *NewBridge I* at *4. However, the basis of the Court’s holding in *NewBridge I* was not the legal relationship between HP and NewBridge, but the language of the contracts involved in the case. As the Court noted, the Assignment in Lieu of Foreclosure read: “WHEREAS, in order to avoid foreclosure under the Deed of Trust, [HJBBQ] has agreed to assign, grant, convey and transfer to [HP], as the designee of the Bank, all right, title and interest in and to the Lease and the Property in exchange for, among other things, *the cancellation of the Deed of Trust[.]*” *Id.* (emphasis in original). The Court concluded that “[t]he language of the assignment is clear and unambiguous” and “in partial consideration of the assignment, it was agreed the Deed of Trust was to be cancelled.” *Id.* Therefore, “with a cancelled Deed of Trust and a voided amendment,” the Court determined that “the [Ground Lease] again became the controlling contract.” The Court ultimately held that the Ground Lease, “in clear and unambiguous language, plainly provides that the excess rents were payable to Starmount in the event that the property was subleased.” *Id.* at *5. Because Whitehurst was the successor to Starmount’s interests in the Ground Lease, the Court reversed the trial court’s order and remanded for entry of judgment in favor of Whitehurst. *Id.*

Therefore, the issue of whether HP and NewBridge were the same legal entity was not necessary to the Court’s determination in the First Action. NewBridge contends that “[t]he fact that [NewBridge] and HP were separate entities prevented HP from asserting [NewBridge’s] rights under the Ground Lease to any excess payments from the Sublease Agreement, effectively eliminating [NewBridge’s] ability to be repaid the loan to [HJBBQ].” We do not find this argument persuasive. The *NewBridge I* Court explicitly held that the Ground Lease, “in clear and unambiguous language, plainly provides that the excess rents were payable to Starmount in the event that the property was subleased.” *Id.* at

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*5. Thus, the legal relationship between HP and NewBridge was irrelevant to the Court's decision. The result would have been the same regardless of whether HP could have asserted NewBridge's rights under the Ground Lease, because under that document's "clear and unambiguous language," the excess rents were payable to Starmount.

Accordingly, NewBridge has failed to carry its burden of demonstrating that the possibility of inconsistent verdicts exists on the issue of whether HP and NewBridge are the same legal entity. *See Heritage Operating, L.P.*, __ N.C. App. at __, 727 S.E.2d at 314. Thus, because NewBridge cannot show how a substantial right would be affected without immediate appellate review, we dismiss its appeal from the trial court's interlocutory order. *See id.* at __, 727 S.E.2d at 316 ("Although the verdicts may be different, there is no possibility of a verdict in the instant case being inconsistent with any previous judicial determinations. Accordingly, we conclude this appeal does not affect a substantial right and dismiss it as interlocutory.").

Conclusion

Because NewBridge has failed to demonstrate how a substantial right would be lost without immediate review of the trial court's interlocutory order, we dismiss the appeal.

DISMISSED.

Judges DILLON and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 OCTOBER 2014)

BOYKIN v. SELCO CONSTR., INC. No. 14-405	Johnston (13CVS531)	Dismissed
BRANCH BANKING & TR. v. KEESEE No. 14-328	New Hanover (13CVS966)	Affirmed
CASHION v. LEXINGTON MEM'L HOSP., INC. No. 14-120	Davidson (11CVS3202)	Reversed and Remanded
CHAPPELL v. WYNGATE HOMEOWNERS ASS'N, INC. No. 14-285	Wake (12CVS11260)	Affirmed
CUMBERLAND CNTY. HOSP. SYS., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 14-161	N.C. Dept. of Health & Human Servs. (12DHR12090)	Affirmed
DIGH v. DIGH No. 14-241	Burke (98CVD89)	Affirmed
IN RE J.K. No. 14-381	Lee (13JA15-16)	Affirmed
IN RE J.K.U. No. 14-511	Guilford (12JT168)	Affirmed
ROOKS v. BLAKE No. 14-486	Pender (12CVS142)	Dismissed
STATE v. BASS No. 14-492	Wake (12CRS222166) (13CRS181)	No Error
STATE v. DAVIS No. 14-392	Buncombe (12CRS64142-43)	No plain error
STATE v. GEORGE No. 14-497	Surry (12CRS53852)	No Error
STATE v. GRAHAM No. 14-423	Richmond (10CRS52627)	No Error
STATE v. JETER No. 14-337	Mecklenburg (11CRS242221-22) (11CRS242224)	No Error

STATE v. MCGEE No. 14-339	Davie (11CRS50117)	Affirmed, in part, no prejudicial error, in part
STATE v. PAGE No. 14-16	New Hanover (10CRS55472-74) (11CRS10750)	No Error
STATE v. PEOPLES No. 14-416	Mecklenburg (12CRS54391) (12CRS54395)	No Error
STATE v. REMBERT No. 14-522	Iredell (11CRS53453)	Reversed
STATE v. ROBINSON No. 14-391	Mecklenburg (11CRS203106)	No Error
STATE v. SANDERS No. 14-532	Gaston (09CRS57022-23) (10CRS2984) (10CRS8273)	No Error
STATE v. SAUNDERS No. 14-400	Johnston (12CRS3322) (12CRS54989)	No prejudicial error
STATE v. SCOTT No. 14-450	Vance (13CRS1308)	Affirmed
STATE v. SELLAS No. 14-489	Buncombe (12CRS50309)	No Error
STATE v. VANDYKE No. 14-414	Rutherford (04CRS55985) (04CRS55989-91)	No Prejudicial Error
STATE v. VAUGHN No. 14-364	Wilson (11CRS55061)	Affirmed in part; vacated and remanded in part.
STATE v. RAZO No. 13-1435	Guilford (13CRS071104) (13CRS071106)	No Error in Part; New Trial in Part; and Remanded for Resentencing
TESTER v. DELIA No. 13-1130	Watauga (12CVS232)	Affirmed

COMMSCOPE CREDIT UNION v. BUTLER & BURKE, LLP

[237 N.C. App. 101 (2014)]

COMMSCOPE CREDIT UNION, PLAINTIFF

v.

BUTLER & BURKE, LLP, A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP, DEFENDANT AND
THIRD-PARTY PLAINTIFF

v.

BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL
HOLLAR, JOE CRESIMORE, MARK HONEYCUTT, ROSE SIPE, TODD POPE, JASON
CUSHING, AND SCOTT SAUNDERS, THIRD-PARTY DEFENDANTS

No. COA14-273

Filed 4 November 2014

**Contracts—breach of contract—breach of fiduciary trust—claims
sufficient to withstand dismissal—no affirmative defenses
established—material issue of fact**

The trial court erred in a breach of contract, negligence, breach of fiduciary trust, and professional malpractice case by granting defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). Plaintiff stated its claims sufficiently to withstand defendant's motion to dismiss, defendant did not establish any affirmative defenses which would entitle it to dismissal, and defendant failed to clearly establish that no material issue of fact remained to be resolved and that it was entitled to judgment as a matter of law.

Appeal by Plaintiff from order entered 26 September 2013 by Judge Richard L. Doughton in Catawba County Superior Court. Heard in the Court of Appeals 27 August 2014.

Patrick, Harper & Dixon, LLP, by Michael J. Barnett and L. Oliver Noble, Jr., and Carlton Law PLLC, by Alfred P. Carlton, Jr., for Plaintiff.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for Defendant and Third-Party Plaintiff.

No brief for Third-Party Defendants.

STEPHENS, Judge.

COMMSCOPE CREDIT UNION v. BUTLER & BURKE, LLP

[237 N.C. App. 101 (2014)]

Factual and Procedural Background

Plaintiff Commscope Credit Union is a North Carolina chartered credit union which retained Defendant Butler & Burke, LLP, a certified public accountant firm, in 2001 to provide professional independent audit services. Defendant represented to Plaintiff that it had special expertise in providing auditing services to credit unions and other non-profit entities. Defendant's engagement letters between 2001 and 2010 asserted that it would, *inter alia*,

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Each year from 2001 to 2009, Plaintiff's general manger, Mark Honeycutt, failed to file with the Internal Revenue Service ("IRS") a Form 990, Return of Organization Exempt From Income Tax Returns¹ ("the tax forms"). In the course of its audits, Defendant never requested copies of the tax forms, and, as a result, did not discover Plaintiff's failure to file them. In April 2010, the IRS notified Plaintiff of its filing deficiency and later informed Plaintiff that a penalty of \$424,000 had been assessed against it. The penalty was subsequently reduced to \$374,200.

On 8 November 2012, Plaintiff filed a complaint in Catawba County Superior Court against Defendant alleging claims for breach of contract, negligence, breach of fiduciary trust, and professional malpractice.² On 28 January 2013, Defendant answered, asserting several affirmative defenses. Defendant filed a third-party complaint on 25 February 2013 against various individuals who had been directors, officers, and supervisory committee members of Plaintiff.³ That complaint included

1. No copy of a Form 990 is included in the record on appeal, but we take judicial notice that this lengthy, multi-page form requires tax-exempt entities to provide detailed information about their governance, assets, revenue, and expenses, and depending on their specific organizational structure and activities, additional tax schedules may be required to be filed as well. See <http://www.irs.gov/pub/irs-pdf/f990.pdf> (last visited 22 October 2014).

2. On 27 February 2013, the Chief Justice designated the matter as a complex business case and assigned the Honorable Richard L. Doughton to preside over it.

3. Among the third-party defendants was Honeycutt, the general manager for Plaintiff who was alleged to have had the responsibility to file the tax forms and to have failed to do so.

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claims for contribution, indemnity, negligent misrepresentation, and fraud. The third-party defendants answered and asserted various affirmative defenses. Three of the third-party defendants moved to dismiss pursuant to Rule of Civil Procedure 12(b)(6). On 6 June 2013, Defendant moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and 12(c). On 26 September 2013, the trial court granted Defendant's motion and dismissed the case. This action rendered the third-party defendants' motion to dismiss moot, and the trial court did not consider or rule on that motion. From the order granting Defendant's motion to dismiss, Plaintiff appeals.

Discussion

Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). We agree.

I. Standards of review

When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Sharp v. CSX Transp., Inc., 160 N.C. App. 241, 243, 584 S.E.2d 888, 889 (2003) (citations and internal quotation marks omitted). "When the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, however, the motion will be granted and the action dismissed." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) (citation omitted).

"A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted *unless the movant clearly establishes that no material issue of fact remains to be resolved* and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted; emphasis added).

The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving

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party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review *de novo* a trial court's grant of a motion to dismiss under both Rule 12(b)(6) and 12(c). *Id.*; *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, __ N.C. App. __, __, 752 S.E.2d 661, 663-64 (2013).

II. Breach of fiduciary duty

In its motion to dismiss, Defendant argued that Plaintiff had failed to allege facts or circumstances that, if true, would show the existence of a fiduciary duty Defendant owed to Plaintiff. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002) (citation omitted). In this State, fiduciary relationships may arise as a matter of law because of the nature of the relationship, "such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). However, "[o]nly when one party figuratively holds all the cards — all the financial power or technical information, for example — have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347-48 (4th Cir. 1998) (internal quotation marks omitted). Thus, our courts have declined to find the existence of a fiduciary relationship between "mutually interdependent businesses," such as a distributor and a manufacturer, or a retailer and its main supplier. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990).

Even where a fiduciary relationship does not arise as a matter of law, such a relationship does exist

when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. It extends to any possible case in which a fiduciary relation exists in fact, and in which there is

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confidence reposed on one side, and resulting domination and influence on the other.

Harrold, 149 N.C. App. at 784, 561 S.E.2d at 919 (citations, internal quotation marks, and brackets omitted). For example, in *Harrold*, this Court concluded that no fiduciary relationship existed between a pair of optometrists and an accounting firm hired “to advise them on business opportunities, including mergers and acquisitions.” *Id.* at 779, 561 S.E.2d at 917. However, the Court went on to contrast this situation with one in which the accountant defendants “had done accounting . . . and had prepared tax filings” such that they “obviously had acquired a special confidence in preparing tax documents for the trusts, corporations, and individual plaintiffs.” *Id.* at 784, 561 S.E.2d at 919 (discussing *Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997)). Thus, while this Court in *Harrold* was correct in stating that no North Carolina case has held that an accounting firm and its clients are *per se* in a fiduciary relationship, that case did not concern accountants and their *audit clients*. That is, in *Harrold*, the accounting firm was not providing auditing or accounting services to its clients, but rather was acting as a consultant on mergers and acquisitions. *Id.* at 779, 561 S.E.2d at 917. In *Smith*, on the other hand, where the accountants were providing accounting and tax-related services, a fiduciary relationship *did* exist. 127 N.C. App. at 10, 487 S.E.2d at 813. We would observe that, in using its specially trained professionals to perform comprehensive audits for credit unions, accounting firms such as Defendant would appear “to hold all the . . . technical information” *Broussard*, 155 F.3d at 348. In our view, the relationship between Plaintiff and Defendant appears much more like that between “attorney and client, broker and principal,” *see Abbitt*, 201 N.C. at 598, 160 S.E. at 906, than that between “mutually interdependent businesses,” like distributors and manufacturers, or retailers and suppliers. *See Tin Originals, Inc.*, 98 N.C. App. at 666, 391 S.E.2d at 833.

More importantly, even if the relationship between an accounting firm and its audit clients is not a fiduciary one as a matter of law, Plaintiff’s complaint alleges that Defendant pledged to

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

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In assuring Plaintiff that it had the expertise to review financial statements to identify “errors [and] fraud[,]” even by Plaintiff’s own management and employees, Defendant sought and received “special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *See Harrold*, 149 N.C. App. at 784, 561 S.E.2d at 919. We conclude that, in the light most favorable to Plaintiff, the allegations of the complaint are sufficient to state a claim for breach of fiduciary duty. Accordingly, the trial court erred in dismissing Plaintiff’s claim.

III. Plaintiff’s remaining claims

As for Plaintiff’s claims for breach of contract, negligence, and professional malpractice, Defendant moved to dismiss under the doctrines of (1) *in pari delicto* and (2) contributory negligence, as well as upon contentions that these claims are (3) barred by the explicit terms of Defendant’s engagement letter. We are not persuaded.

A. *In pari delicto*

“The common law defense by which [Defendant] seek[s] to shield [itself] from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [defendentis] or ‘in a case of equal or mutual fault the condition of the party in possession [or defending] is the better one.’” *See Skinner*, 314 N.C. at 270, 333 S.E.2d at 239 (citation and ellipsis omitted). “Our courts have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains.” *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has observed “that the *in pari delicto* defense traditionally has been *narrowly limited* to situations in which the plaintiff was *equally at fault* with the defendant.” *Skinner*, 314 N.C. at 272, 333 S.E.2d at 240 (emphasis in original); *see also Cauble v. Trexler*, 227 N.C. 307, 313, 42 S.E.2d 77, 81-82 (1947) (noting that where “the parties are to some extent involved in the illegality, — in some degree affected with the unlawful taint, — but are not *in pari delicto*, — that is, both have not, with *the same knowledge, willingness, and wrongful intent* engaged in the transaction, or *the undertakings of each are not equally blameworthy*, — a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent”) (citation and internal quotation marks omitted; emphasis added).

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The courts of our State have not yet addressed the applicability of *in pari delicto* as a defense by accountants to the malpractice-related claims of their auditing clients, but, in *Whiteheart*, this Court considered the doctrine's applicability as a defense in legal malpractice cases. There, the plaintiff, who was in the business of billboard advertising,

sent a letter to his various competitors "alerting" them about Ms. Payne. In this letter, [the] plaintiff asserted that Ms. Payne was a "lease jumper" and that she and her business practices were unprofessional, unethical, and despicable. [The p]laintiff also referred to Ms. Payne personally in additional derogatory terms. Although [the] plaintiff's attorney, Betty Waller ("the] defendant"), reviewed the letter before it was sent, she failed to advise [the] plaintiff of the potential liability that could result from sending such a *per se* defamatory document.

199 N.C. App. at 282, 681 S.E.2d at 420. After Ms. Payne and another entity successfully sued the plaintiff and received judgments totaling over \$700,000, the plaintiff sued Betty Waller and her law firm "for legal malpractice, seeking to recover damages sufficient to cover the judgments" against him. *Id.* at 283, 681 S.E.2d at 421. This Court noted that the successful tort cases against the plaintiff had "establish[ed] as a matter of law [the plaintiff's] *intentional wrongdoing*" in sending the letters. *Id.* at 284, 681 S.E.2d at 421 (emphasis added). This Court also cited the reasoning of other state courts in cases where the doctrine was applied to bar claims against attorneys when their clients had knowingly engaged in intentional wrongdoing:

Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996) (plaintiffs' malpractice claim dismissed because they acted *in pari delicto* with defendant law firm in *knowingly making false statements in affidavits* submitted to Patent and Trademark Office); *Evans v. Cameron*, 121 Wis. 2d 421, 360 N.W.2d 25 (1985) (plaintiff's malpractice action barred by defense of *in pari delicto* where the client *lied under oath* in a bankruptcy proceeding about transferring money to her mother, even though she claimed her testimony was based upon the advice of her attorney); *Robins v. Lasky*, 123 Ill. App.3d 194, 201-02, 462 N.E.2d 774, 779, 78 Ill. Dec. 655 (1984) (plaintiff's malpractice action barred by defense of *in pari delicto* when he followed defendant attorneys' advice to

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relocate and establish his permanent residence in another state *in order to avoid service of process* in Illinois).

Id. at 285, 681 S.E.2d at 422 (emphasis added). Noting with approval that “some courts have distinguished between *wrongdoing* that would be obvious to the plaintiff and legal matters so complex that a client could follow an attorney’s advice, do wrong[,] and still maintain suit on the basis of not being equally at fault[,]” the panel in *Whiteheart* held that such fine distinctions were not necessary in that case because the plaintiff had engaged in intentional wrongdoing, to wit, knowingly lying in an affidavit filed in the courts of our State and knowingly spreading lies about Ms. Payne among the business community in an effort to harm her. *Id.* at 285-86, 681 S.E.2d at 422-23 (citation and internal quotation marks omitted).

Here, Defendant urges that the doctrine applies because the action of Honeycutt, Plaintiff’s general manager, in failing to file the tax forms (1) may be imputed to Plaintiff and (2) was an equal and mutual wrong to any negligence, breach of contract, or malpractice in Defendant’s auditing process and procedures. However, unlike in *Whiteheart* or the other cases cited *supra*, nothing in Plaintiff’s complaint establishes that Honeycutt’s failure to file the tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that Honeycutt’s alleged failure was not excusable conduct.⁴

Nor do the allegations in the complaint establish as a matter of law that Honeycutt’s failure to file the tax forms may be imputed to Plaintiff.

As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent’s act is expressly authorized by the principal; (2) when the agent’s act is committed within the scope of his employment and in furtherance of the principal’s business; or (3) when the agent’s act is ratified by the principal.

4. We note that a copy of the complaint filed by Plaintiff against Honeycutt in a separate legal action alleges, *inter alia*, both negligence and fraud in connection with his failure to file the tax forms. This complaint, however, appears in the record on appeal as an attachment to Defendant’s response to Plaintiff’s motion for exceptional case designation and assignment of this matter to the North Carolina Business Court and was not part of Plaintiff’s complaint for consideration under Rule 12(b)(6) nor part of the pleadings before the trial court in considering Defendant’s motion to dismiss under Rule 12(c). In any event, even were it part of the pleadings properly before and considered by the trial court in deciding Defendant’s motion to dismiss, the alternate allegations in Plaintiff’s complaint against Honeycutt standing alone would not support the application of *in pari delicto* as a defense by Defendant against Plaintiff.

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Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (citation omitted), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In addition,

[w]here the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply.

Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 482, 124 S.E.2d 365, 368 (1962) (citation and internal quotation marks omitted).

Here, the complaint certainly does not establish that Plaintiff expressly authorized Honeycutt's failure to file the tax forms nor that it ratified this omission after the fact. To the extent any inference is raised by the facts alleged in Plaintiff's complaint, it would be that Honeycutt's failure to file the tax forms did not further Plaintiff's business, and Honeycutt's conduct raises a clear presumption that he would not communicate the situation to Plaintiff. If Plaintiff was exempt from paying taxes by the filing of the tax forms and if the failure to file the forms has resulted in a nearly \$400,000 penalty assessment, Honeycutt's conduct not only did not further Plaintiff's business, it actively harmed Plaintiff. In sum, at the present stage of the case, Defendant is not entitled to a dismissal of Plaintiff's breach of contract, malpractice, and negligence claims on the basis of *in pari delicto*.

B. Contributory negligence

Defendant also moved to dismiss based upon an argument that Plaintiff's claims were barred by its own contributory negligence, as imputed from Honeycutt's failure to file the tax forms and his lies and omissions to Defendant and others about Plaintiff's tax compliance.

Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint, but presupposes or concedes such negligence by him. *Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint.*

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Jackson v. McBride, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (citations, internal quotation marks, and emphasis omitted). Contributory negligence will act as a complete defense to malpractice claims against accountants. See *Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997). However, in considering the propriety of submission of the issue of contributory negligence to the jury, our Supreme Court has observed:

The allegation in an answer that the [tort] was caused by [the plaintiff's] own negligence and not by any negligence of the defendant is not a sufficient plea of contributory negligence. For the same reason, evidence by the defendant to the effect that the plaintiff was injured not by the negligence of the defendant, as alleged in the complaint, but by the plaintiff's own negligence, as alleged in the answer, would not justify the submission to the jury of an issue of contributory negligence.

Jackson, 270 N.C. at 372, 154 S.E.2d at 471-72 (citation and internal quotation marks omitted; emphasis omitted).

Plaintiff cites *Smith* for the proposition that contributory negligence is inapplicable given the facts here. That case held that, “[i]n an action by a principal against an agent, the agent cannot impute his own negligence to the principal. Where the negligence of two agents concurs to cause injury to the principal, the agents cannot impute the negligence of the fellow agent to bar recovery.” 127 N.C. App. at 14, 487 S.E.2d at 816 (citations omitted). Plaintiff fails to cite the next sentence in that opinion: “However, if either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to [the] plaintiff.” *Id.* (citation omitted). The allegations of Plaintiff's complaint, taken as true, establish *prima facie* that Defendant is an independent contractor. See *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 345, 601 S.E.2d 915, 923 (2004) (“An independent contractor . . . is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.”) (citations and internal quotation marks omitted).

However, we agree with Plaintiff's assertion that the doctrine of contributory negligence is inapplicable here, albeit for a much simpler reason. As noted *supra*, nothing in the pleadings establishes either that Honeycutt's failure to file the tax returns was (1) negligent rather than intentional wrongdoing or excusable conduct or (2) imputed to Plaintiff

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as a matter of law. Further, Defendant's answer simply alleges that any harm to Plaintiff "was caused by [Plaintiff's] own negligence and not by any negligence of [D]efendant [which] is not a sufficient plea of contributory negligence." See *Jackson*, 270 N.C. at 372, 154 S.E.2d at 472.

C. Terms of the engagement letter

In its motion to dismiss, Defendant also argued that Plaintiff's claims were barred as attempts "to hold [D]efendant[] liable for matters which the parties expressly agreed [P]laintiff was responsible." We disagree.

A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. If the meaning of the contract is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 191 N.C. App. 163, 165-66, 662 S.E.2d 20, 22 (citations, internal quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 29 (2008).

The engagement letters sent by Defendant to Plaintiff each year used substantially identical language in describing Plaintiff's responsibilities:

Management is responsible for making all management decisions and performing all management functions; . . . for establishing and maintaining internal controls, including monitoring ongoing activities; . . . for making all financial records and related information available to us and for the accuracy and completeness of that information[;] and . . . for identifying and ensuring that the credit union complies with applicable laws and regulations.

However, as noted *supra*, in the same letters, Defendant explicitly took on the responsibility to

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of

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material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Thus, the plain language of the engagement letters appears to give the parties overlapping, if not conflicting, responsibilities for the very types of situations, actions, and omissions as lie at the heart of this case. This “writing leaves it uncertain as to what the agreement was” and when “the intention of the parties is unclear. . . , interpretation of the contract is for the jury.” *See id.* at 165, 662 S.E.2d at 22. Plaintiff and Defendant have made conflicting arguments about what various administrative code sections and standard auditing procedures require with respect to the duties of an auditor and its client, but, on the pleadings, and in the absence of expert testimony or *any* other evidence, we cannot evaluate their contentions.

In sum, Plaintiff has stated its claims sufficiently to withstand Defendant’s motion to dismiss, Defendant has not established any affirmative defenses which would entitle it to dismissal, and Defendant has failed to “clearly establish[] that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *See B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted). Accordingly, the trial court erred in granting Defendant’s motion to dismiss, and the order so doing is

REVERSED.

Judges CALABRIA and ELMORE concur.

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CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/B/A CAPE FEAR VALLEY
HEALTH SYSTEM, PETITIONER

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH
SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND
FIRSTHEALTH OF THE CAROLINAS, INC., RESPONDENT-INTERVENOR

No. COA14-160

Filed 4 November 2014

1. Hospitals and Other Medical Facilities—certificate of need—burden of proof—summary judgment

The Administrative Law Judge (ALJ) did not err by granting summary judgment in favor of respondent FirstHealth. N.C.G.S. § 131E-188(a) does not prevent an ALJ from entering summary judgment in a contested case challenging a certificate of need (CON) decision. Further, Cape Fear failed to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing.

2. Hospitals and Other Medical Facilities—certificate of need—no substantial prejudice of rights

Summary judgment was properly entered for respondents in a contested case hearing challenging a certificate of need (CON) decision because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights.

Appeal by petitioner from Final Decision entered 17 September 2013 by Administrative Law Judge Beecher R. Gray. Heard in the Court of Appeals 14 August 2014.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney and Steven G. Pine for petitioner-appellant.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, and Candace S. Friel, for respondent/intervenor-appellee FirstHealth.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell and Assistant Attorney General Scott T. Stroud for respondent-appellee DHHS.

STEELMAN, Judge.

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N.C. Gen. Stat. § 131E-188(a) does not prevent an administrative law judge from entering summary judgment in a contested case challenging a CON decision. Summary judgment was properly entered for respondents because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights.

I. Factual and Procedural Background

Respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital (FirstHealth) operates FirstHealth Moore Regional Hospital (FirstHealth Moore) in Moore County. In 2010 FirstHealth filed an application for a Certificate of Need (CON) to develop FirstHealth Hoke Community Hospital (FirstHealth Hoke) in Raeford, Hoke County, with eight acute care beds and one operating room (OR). At that time Hoke County was included in two service areas in the State Medical Facilities Plan (SMFP): the Moore/Hoke service area and the Cumberland/Hoke service area. Although there are several multi-county service areas, this was the only instance of a county being included in two service areas. In December 2012 Hoke County became a separate service area and the joint Moore/Hoke and Cumberland/Hoke service areas were eliminated. In April 2012, respondent North Carolina Department of Health and Services, Division of Health Service Regulation, Certificate of Need Section (DHHS), granted FirstHealth's application for a CON to develop FirstHealth Hoke.

On 15 June 2012, FirstHealth and petitioner Cumberland County Hospital System, Inc. d/b/a/ Cape Fear Valley Medical Center (Cape Fear) each filed CON applications to provide 28 acute care beds in the Cumberland/Hoke service area in accordance with the 2012 SMFP. Cape Fear's 28-Bed application proposed to add 28 acute care beds to its existing hospital in Fayetteville, and FirstHealth's 28-Bed application proposed to add 28 acute care beds to FirstHealth Hoke. These were competitive applications under 10A N.C.A.C. 14C.0202(f) ("Applications are competitive if . . . the approval of one or more of the applications may result in the denial of another application reviewed in the same review period."), because, under N.C. Gen. Stat. § 131E-183(a)(1) and the need determination in the 2012 SMFP, both 28-Beds applications could not be approved.

Also on 15 June 2012, FirstHealth submitted a CON application asking to relocate one of its ORs from FirstHealth Moore to FirstHealth Hoke, facilities that were both in the Moore/Hoke service area. The OR was pre-existing, and approval of FirstHealth's OR application would not

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cause the disapproval of any other CON applications. DHHS determined that it was a noncompetitive application under 10A N.C.A.C. 14C.0202(f).

On 27 November 2012 DHHS approved FirstHealth's 28-Bed application and its OR application, and denied Cape Fear's 28-Bed application. On 21 December 2012 Cape Fear filed petitions for contested case hearings to challenge DHHS's approval of FirstHealth's OR CON application and its decision to approve FirstHealth's 28-Bed application while denying Cape Fear's 28-Bed application.

On 25 February 2013 the Administrative Law Judge (ALJ) consolidated Cape Fear's petitions for contested case hearings in the 28-Bed and OR cases. Cape Fear's appeal from the decision of the ALJ in the 28-Bed case is currently pending before this Court, and the present appeal involves only FirstHealth's OR application.

On 17 May 2013 Cape Fear filed a motion for partial summary judgment in both cases, and FirstHealth and DHHS filed a joint motion for summary judgment in the OR case. FirstHealth and DHHS asserted that there were no genuine issues of material fact and that they were entitled to summary judgment on the grounds that Cape Fear could not demonstrate that its rights were substantially prejudiced by DHHS's decision to approve the OR application. ALJ Gray conducted a hearing on the parties' summary judgment motions on 31 May 2013. On 17 September 2013 ALJ Gray filed a Final Agency Decision granting summary judgment in favor of FirstHealth and DHHS with respect to Cape Fear's petition for a contested case hearing in the OR case. The ALJ ruled that FirstHealth and DHHS were entitled to summary judgment because Cape Fear had not shown that approval of FirstHealth's OR CON had substantially prejudiced its rights.

Cape Fear appeals.

II. Unconditional Right to Contested Case Hearing

[1] In its first argument, Cape Fear contends that the ALJ erred by granting summary judgment in favor of FirstHealth, on the grounds that it "is entitled to a full contested case hearing, pursuant to N.C. Gen. Stat. § 131E-188, to prove that it was substantially prejudiced." Cape Fear contends that N.C. Gen. Stat. § 131E-188 "guarantees" it a "full contested case hearing." We disagree.

A. Standard of Review

N.C. Gen. Stat. § 150B-151 governs our review of the ALJ's decision and provides in pertinent part that:

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...

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. . . .

(d) In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

In the present case, Cape Fear appeals from an order granting summary judgment. “Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered ‘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.’ ‘In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.’ *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014). “The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the

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burden then shifts to the non-movant to come forward with specific facts establishing the presence of a genuine factual dispute for trial.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

“We review a trial court’s order granting or denying summary judgment *de novo*. ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (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) (other citations omitted).

B. Burden of Proof

Preliminarily, Cape Fear argues that the ALJ applied an incorrect burden of proof by failing to first require FirstHealth and DHHS to demonstrate that Cape Fear could not establish a *prima facie* case before shifting the burden to Cape Fear to rebut the movant’s showing with specific facts establishing the presence of a genuine factual dispute for trial. Cape Fear bases this argument on the fact that the ALJ’s order includes the standard of proof for a contested case hearing. Cape Fear asserts that there “was no reason for the ALJ to recite the standard for a contested case hearing,” and that the “only logical conclusion” is that the ALJ employed an incorrect standard by “initially assigning Cape Fear the burden of proof[.]” Cape Fear fails to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing.

This argument lacks merit.

C. Analysis

Cape Fear argues that the ALJ erred by granting summary judgment for FirstHealth because, under N.C. Gen. Stat. § 131E-188(a), it has an absolute “unconditional” right to a full evidentiary hearing. We disagree.

N.C. Gen. Stat. § 131E-188(a) states in relevant part that:

After a decision of the Department to issue, [or] deny . . . a certificate of need . . . any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department makes its decision. . . .

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Cape Fear focuses on the phrase “shall be entitled to a contested case hearing.” However, given that the statute grants an affected person a contested case hearing “under Article 3 of Chapter 150B of the General Statutes,” we must consider the quoted phrase in the context of the provisions of Chapter 150B.

N.C. Gen. Stat. § 150B-23(a) states in relevant part that:

A contested case shall be commenced by filing a petition with the Office of Administrative Hearings[.] . . . A petition . . . shall state facts tending to establish that the agency named as the respondent has . . . substantially prejudiced the petitioner’s rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. . . .

The statute’s enumeration of specific requirements for a contested case petition indicates that the right to an evidentiary hearing is contingent upon a valid petition. In addition, N.C. Gen. Stat. § 150B-33(b)(3a) provides that an ALJ may “[r]ule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure[.]” N.C. Gen. Stat. § 1A-1, Rule 56 authorizes a party to move “for a summary judgment in his favor upon all or any part thereof[.]” and N.C. Gen. Stat. § 150B-34(e) expressly provides that an “administrative law judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case.” Moreover, N.C. Gen. Stat. § 150B-51(d) states the standard for a court “reviewing a final decision allowing judgment on the pleadings or summary judgment[.]”

Accordingly, Article 3 of Chapter 150B of the General Statutes generally authorizes an ALJ to resolve a contested case without a full evidentiary hearing by entering summary judgment in appropriate cases. Since N.C. Gen. Stat. § 131E-188(a) provides for the right to a contested case hearing “under Article 3 of Chapter 150B of the General Statutes,”

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we hold that, just as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision.

In arguing for a contrary result, Cape Fear relies primarily on the quoted excerpt from N.C. Gen. Stat. § 131E-188(a) stating that an affected person “shall be entitled to a contested case hearing,” and asserts that the “plain language” of the statute “grants any ‘affected person’ an unconditional statutory right to a contested case hearing under the APA.” Cape Fear fails to acknowledge that its right to a contested case hearing is explicitly made subject to Chapter 150B, or that similar language in N.C. Gen. Stat. § 150B-23(a), stating that “parties in a contested case shall be given an opportunity for a hearing,” does not bar an ALJ from entering summary judgment. Further, Cape Fear’s position would lead to the absurd result that an appellant would have an absolute right to a full evidentiary hearing, even if its petition were devoid of any allegations that might justify relief.

Cape Fear concedes that this Court has previously upheld an ALJ’s award of summary judgment in favor of a party to a CON appeal. *See, e.g., Presbyterian Hosp. v. N.C. Dep’t of Health & Human Servs.*, 177 N.C. App. 780, 783, 630 S.E.2d 213, 215 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 446 (2007), stating that:

This Court has previously held that, as genuine material issues of fact will always exist, summary judgment is never appropriate in an application for a CON where two or more applicants conform to the majority of the statutory criteria. *See Living Centers-Southeast, Inc. v. North Carolina HHS*, 138 N.C. App. 572, 580-81, 532 S.E.2d 192, 197 (2000). We find the facts of this case distinguishable. Here, unlike in *Living Centers-Southeast*, [the CON applicant] was the sole applicant for a non-competitive CON. Therefore, an award of summary judgment is permissible in this matter.

Cape Fear attempts to distinguish cases such as *Presbyterian Hosp.* on the grounds that these cases do not expressly analyze an ALJ’s authority to enter summary judgment in a CON case. Having completed such an analysis, we hold that in appropriate cases an ALJ may enter summary judgment on a petition for a contested case hearing to challenge a non-competitive CON decision.

This argument is without merit.

III. Substantial Prejudice

A. Relationship Between the 28-Bed and OR Cases

[2] In its second argument, Cape Fear contends that it “was substantially prejudiced as a matter of law by the Agency’s approval of the FirstHealth OR Application because the FirstHealth OR Application and the FirstHealth 28-Bed Application were essentially one, intertwined hospital expansion project.” For example, Cape Fear directs our attention to FirstHealth’s statement that approval of its 28-Bed CON application would result in its operating a 36 bed hospital for which a second OR would be needed. Cape Fear contends that because there was a “symbiosis” between FirstHealth’s 28-Bed application and its OR application, we should treat FirstHealth’s OR application as a part of its competitive 28-Bed application. We disagree.

As discussed above, a “competitive application” is defined in the North Carolina Administrative Code as follows:

Applications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.

10A N.C.A.C. 14C.0202(f). Cape Fear does not contend that it submitted a CON application to relocate an OR to Hoke County, but argues that, because FirstHealth’s OR application shares factual and legal circumstances with its 28-Bed application, we should deem the OR application to be competitive based on the alleged interconnection between the applications. As discussed above, the 28-Bed case is not before us. Moreover, Cape Fear is essentially asking us to apply a new, expanded definition of a competitive application. “[W]e must decline to, in effect, amend the Rules. ‘If changes seem desirable, it is a matter for the legislature.’” *Precision Fabrics Group v. Transformer Sales and Service*, 344 N.C. 713, 719, 477 S.E.2d 166, 169 (1996) (quoting *Powell v. State Retirement System*, 3 N.C. App. 39, 43, 164 S.E.2d 80, 83 (1968)). Because FirstHealth’s OR CON application was not “competitive” as defined in the Administrative Code, we do not reach Cape Fear’s argument that “a competitive applicant like Cape Fear is substantially prejudiced as a matter of law” by the entry of summary judgment.

B. Failure to Consider the Cumberland/Hoke Service Area

In its third argument, Cape Fear contends that it “was substantially prejudiced as a matter of law by the Agency’s failure to review whether

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FirstHealth satisfied the criteria for adding an OR to the Cumberland/Hoke Service Area. Hoke County [was] included in both the Cumberland/Hoke Service Area and the Moore/Hoke Service Area. Thus, by relocating an OR to Hoke County, FirstHealth proposed to add an OR to the Cumberland/Hoke Service Area.” We dismiss this argument as moot.

FirstHealth’s OR CON sought to relocate an existing OR from FirstHealth Moore to FirstHealth Hoke, medical facilities which were both in the Moore/Hoke service area as defined in the SMFP. At that time, Hoke County was also in the Cumberland/Hoke service area. Cape Fear argues that the ALJ erred by approving FirstHealth’s CON application without determining the effect of FirstHealth’s CON application on the Cumberland/Hoke service area. We do not reach this argument, because the Moore/Hoke and the Cumberland/Hoke service areas have been terminated.

On 15 April 2014 FirstHealth filed a motion in this Court requesting us to take judicial notice of the license issued to FirstHealth Hoke and the statement in the 2014 SMFP that:

On 12/21/12, for the 2013 State Medical Facilities Plan, Hoke County was designated as a single-county service area for the Operating Room need methodology. Therefore, Hoke, Moore, and Cumberland counties’ population growth rates were calculated as single-county operating room service areas.

Therefore, even if we were to reverse the ALJ’s approval of FirstHealth’s OR CON, there is no possibility that on remand the ALJ could assess the needs of the Cumberland/Hoke service area, because it no longer exists. As a result, analysis of whether or not the ALJ should have considered the former Cumberland/Hoke service area would have no practical effect on the outcome of this case. “‘A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.’” *Ass’n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) (quoting *Roberts v. Madison Cnty. Realtors Ass’n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)). We grant FirstHealth’s motion to take judicial notice and dismiss as moot Cape Fear’s argument concerning the former Cumberland/Hoke service area.

Cape Fear opposes FirstHealth’s motion for judicial notice, on the grounds that neither FirstHealth Hoke’s medical license nor the termination of the Cumberland/Hoke service area were before the ALJ at the

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time of the summary judgment hearing. However, we are not considering these documents in order to assess the correctness of the Final Decision, but to determine whether the appellate issue of the ALJ's obligation to consider FirstHealth's OR application in the context of the former Cumberland/Hoke service area remains extant. Cape Fear also argues that, in the event that we take judicial notice of the documents proffered by FirstHealth, we should also take judicial notice of certain documents pertaining to FirstHealth's request to use available rooms in FirstHealth Hoke for treatment of emergency room patients. We deny Cape Fear's request to take judicial notice of these documents, which are not relevant to our review of the ALJ's summary judgment order.

IV. DHHS Compliance with N.C. Gen. Stat. § 131E-183

In its fourth argument, Cape Fear asserts that, even if the ALJ concluded that Cape Fear had not produced evidence of substantial prejudice, it was still required to determine whether DHHS had properly applied the review criteria in N.C. Gen. Stat. § 131E-183(a) in its approval of FirstHealth's OR CON. Cape Fear argues that "agency error may result in substantial prejudice," and that "[b]ecause the Final Decision made no determination as to whether the Agency erred, or otherwise met the Section 150B-23 standards, genuine issues of material fact remain regarding whether Agency error substantially prejudiced Cape Fear." Cape Fear takes the position that, because it is possible, in a particular factual context, that substantial prejudice might result from agency error, that this possibility necessarily results in "genuine issues of material fact" unless the ALJ makes findings regarding DHHS's compliance with all pertinent statutory provisions in addition to its determination that Cape Fear failed to show prejudice. We disagree.

"This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute.

"Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule."

Parkway Urology, P.A. v. N.C. HHS, 205 N.C. App. 529, 536, 696 S.E.2d 187, 193 (2010) (quoting *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995)), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011) (emphasis in *Parkway Urology*).

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“In addition, in *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, this Court affirmed a grant of summary judgment against a non-applicant CON challenger specifically because it had failed to demonstrate any genuine issue of material fact as to whether it had been substantially prejudiced by the award of a CON to a nearby competitor.” *Id.* In *Parkway Urology*, after determining that the appellant had not shown substantial prejudice, we stated that “[s]ince [the appellant] failed to establish that it was substantially prejudiced by the awarding of the CON to [the appellee], it cannot be entitled to relief under N.C. Gen. Stat. § 150B-23(a). As a result, we decline to address [the appellant’s] additional challenges to the [agency decision].” *Id.* at 539, 696 S.E.2d at 195.

Cape Fear does not identify any specific right that it possesses which was prejudiced by a particular agency error and we decline to adopt the general rule proposed by Cape Fear that, before an ALJ may rule that an appellant has not shown substantial prejudice, it must make findings regarding the agency’s compliance with all pertinent statutory requirements.

Cape Fear also argues that it was “substantially prejudiced by the economic losses it will suffer as a result of the Agency’s decision” to approve FirstHealth’s OR CON application. However, “[t]his Court held in *Parkway Urology* that harm from normal competition does not amount to substantial prejudice:

[The non-applicant’s] argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a). . . . [The non-applicant] was required to provide specific evidence of harm resulting from the award of the CON to [the applicant] that went beyond any harm that necessarily resulted from additional [OR] competition . . . and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied [the non-applicant] relief due to its failure to establish substantial prejudice.

CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regulation, ___ N.C. App. ___, 751 S.E.2d 244, 251 (2013) (quoting *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195).

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For the reasons discussed above, we conclude that the ALJ did not err by granting summary judgment in favor of FirstHealth and DHHS, and that its Final Agency Decision should be

AFFIRMED.

Judges GEER and STROUD concur.

SHIRLEY LIPE, WIDOW AND EXECUTRIX OF THE ESTATE OF ROSS IDDINGS LIPE,
DECEASED EMPLOYEE, PLAINTIFF
v.
STARR DAVIS COMPANY, INC., EMPLOYER, TRAVELERS CASUALTY & SURETY (AS
SUCCESSOR TO AETNA CASUALTY & SURETY COMPANY), CARRIER, DEFENDANTS

No. COA14-90-2

Filed 4 November 2014

Workers' Compensation—occupational disease—asbestosis—calculation of average weekly wage—last year of employment

The Industrial Commission did not err in a workers' compensation case by ordering defendant Travelers Casualty & Surety to pay death benefits to plaintiff widow. Based on the facts of this case, the Full Commission did not err in calculating decedent's average weekly wages based on the wages during the last year of employment at SDC rather than on the statutory minimum.

This opinion supersedes the opinion *Lipe v. Starr Davis Company*, No. COA14-90, 2014 N.C. App. LEXIS 729 (2014) (unpublished) filed on 1 July 2014. This appeal by Defendant is from an opinion and award entered 30 September 2013 by the North Carolina Industrial Commission and was originally heard in the Court of Appeals on 5 May 2014. This appeal was reheard in the Court on 20 October 2014, pursuant to the Order entered 27 August 2014 allowing Defendant's Petition for Rehearing.

Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher Kincheloe, Sarah P. Cronin, and M. Duane Jones, for Defendant Travelers Casualty & Surety.

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[237 N.C. App. 124 (2014)]

DILLON, Judge.

Travelers Casualty & Surety (“Defendant”) appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission (“Full Commission” or “Commission”) ordering that Defendant pay death benefits to Shirley Lipe (“Plaintiff”), widow of Ross Iddings Lipe (“Decedent”). For the following reasons, we affirm.

I. Factual & Procedural Background

Decedent was employed by Starr Davis Company, Inc. (“SDC”)¹ in 10 March 1975. During his employment, he was exposed to asbestos. Decedent retired on 1 July 1991, at a time when his average weekly wage was \$606.36, when he became disabled due to multiple sclerosis, unrelated to his exposure to asbestos, and was no longer able to work.

In January 1994, Decedent was diagnosed with asbestosis. Decedent filed an occupational disease claim with the Commission. By opinion and award entered 24 August 1999, the Commission found that Decedent’s asbestosis was caused by his exposure to asbestos during his period of employment with SDC. The Commission awarded Decedent benefits of \$404.24 per week, which was based on 66 2/3% of what his average weekly wages were when he retired in 1991, rather than based on his average weekly wages at the time he was diagnosed with asbestosis in 1994 – which would have been zero, as Decedent had been out of work since July 1991. This Court affirmed the Full Commission’s 24 August 1999 opinion and award in *Lipe v. Starr Davis Co.*, 142 N.C. App. 213, 543 S.E.2d 533, 2001 N.C. App. LEXIS 52 (unpublished), *disc. review denied*, 354 N.C. 363, 556 S.E.2d 303 (2001).

In February 2010, Decedent was diagnosed with lung cancer. He died less than two months later, as a result of his lung cancer, on 11 April 2010. Plaintiff thereafter filed a claim with the Commission seeking death benefits based on Decedent’s development of lung cancer through his asbestos exposure while working at SDC. Defendant conceded the compensability of Plaintiff’s claim, but agreed to payments of only \$30.00 per week, the statutory minimum under N.C. Gen. Stat. § 97-38, arguing that the statutory minimum payout is appropriate in this case.

The Full Commission found that Decedent’s lung cancer was caused by the same exposure to asbestos that caused his asbestosis and awarded Plaintiff benefits equal to 66 2/3% of Decedent’s average weekly wages

1. SDC is no longer in existence, and is thus only nominally a Defendant for purposes of this appeal.

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for 400 weeks. The Commission determined Decedent's average weekly wages to be \$606.36, articulating two alternative bases for its decision: (1) that the question concerning the manner of calculating Decedent's average weekly wages had been previously raised and addressed in its 24 August 1999 opinion and award, and Defendant was thus collaterally estopped from re-litigating the issue; and (2) that, even if collateral estoppel did not apply, the fifth of the five permissible methods of calculating average weekly wages under N.C. Gen. Stat. § 97-2(5) permitted the Full Commission to reach the same result – specifically, to calculate Decedent's average weekly wages based on his last full year of employment with SDC. From this opinion and award, Defendant appeals.

II. Standard of Review

In reviewing an opinion and award of the Full Commission, this Court must determine whether competent evidence supports the Commission's findings of fact and whether those findings so supported are sufficient, in turn, to support the Commission's conclusions of law. *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 442, 640 S.E.2d 744, 748 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 177, 658 S.E.2d 273 (2008). Findings supported by competent evidence are binding on appeal, “even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*.” *Id.* at 442-43, 640 S.E.2d at 748 (citations omitted).

III. Analysis

Defendant contends that the Commission erred in its computation of Decedent's average weekly wages for purposes of Plaintiff's death benefits claim and should have based Decedent's average weekly wages on the statutory minimum of \$30.00 per week.

N.C. Gen. Stat. § 97-38 (2013) provides, in pertinent part, that death benefits are payable in weekly payments to a person “wholly dependent for support upon the earnings of the deceased employee²” with each payment equal to 66 2/3% of “the *average weekly wages* of the deceased employee at the time of the accident, but not . . . less than thirty dollars (\$30.00), per week[.]” (Emphasis added.) The employee's

2. Defendant makes an argument in its brief that Plaintiff failed to show that she was “wholly dependent” and therefore not eligible for death benefits. However, the Commission's order reflects that Defendant stipulated that Plaintiff was married to Decedent at the time of his death. As Decedent's widow, Plaintiff is “conclusively presumed to be wholly dependent” on the Decedent at the time of his death, pursuant to N.C. Gen. Stat. § 97-39 (2013). Accordingly, this argument is overruled.

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“average weekly wages” may be calculated using one of the five methods described under N.C. Gen. Stat. § 97-2(5). Our Supreme Court has stated that “[t]his statute sets forth in priority sequence five methods by which an injured employee’s average weekly wages are to be computed” and that it “establishes an order of preference for the calculation method to be used[.]” *McAninch v. Buncombe Co. Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997).

In the present case, the Commission applied the fifth method provided for under N.C. Gen. Stat. § 97-2(5), which provides as follows:

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2013). Our Supreme Court has provided the following guidance regarding the application of this fifth method:

The final method, as set forth in the last sentence [of N.C. Gen. Stat. § 97-2(5)], clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. “Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision.”

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citations omitted) (ellipsis in original).

Defendant essentially contends that the Full Commission should have determined that Decedent’s average weekly wages were zero because this is the amount he “would be earning were it not for” his diagnosis for lung cancer and that it is not “fair and just” to Defendant to require it to pay benefits based on Decedent’s final wages when Decedent had been retired for 19 years and had no earning capacity at the time of his 2010 diagnosis. Defendant argues that this case is controlled by our decision in *Larramore v. Richardson Sports*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), a decision which was affirmed *per curiam* by our Supreme Court at 353 N.C. 520, 546 S.E.2d 87 (2001).

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In *Larrimore*, the Full Commission applied the fifth method found in N.C. Gen. Stat. § 97-2(5) in calculating the average weekly wages of a professional football player who had signed a contract with the Carolina Panthers but who never played a down for them due to an injury he suffered during tryouts which caused him not to make the roster. 141 N.C. App. at 252, 255, 540 S.E.2d at 769, 771. Specifically, the Commission calculated the injured player's average weekly wages to be \$1,653.85 – the amount he would have made had he made the final roster – finding that this amount represents what the player “would be earning were it not for the injury.” *Id.* at 255, 540 S.E.2d at 771.

Defendant argues that, applying *Larramore*, the Full Commission here should have calculated Decedent's average weekly wages to be the statutory minimum because Decedent was earning zero at the time he was diagnosed with lung cancer and he would have continued to earn zero if he had never contracted lung cancer. Defendant further argues that *Larramore* is controlling over any other Court of Appeals decisions that appear to conflict with it because it was affirmed by our Supreme Court.

We believe *Larramore* is distinguishable from the present case and that the present case is controlled by this Court's holdings in *Abernathy v. Sandoz Chemicals*, 151 N.C. App. 252, 565 S.E.2d 218, *disc. review denied*, 356 N.C. 432, 572 S.E.2d 421 (2002) and *Pope v. Manville*, 207 N.C. App. 157, 700 S.E.2d 22, *disc. review denied*, 365 N.C. 71, 705 S.E.2d 375 (2010). Unlike the present case, *Larramore* involved an employee who suffered an injury while “on the job.” The issue of whether an individual was entitled to benefits for an injury which did not manifest until after retirement was not before our Court or the Supreme Court in *Larramore*.

In contrast to *Larramore*, but similar to the present case, *Abernathy* involved an individual who sought benefits for an occupational disease rather than an injury, which did not manifest until after the individual had retired. We affirmed the Commission's application of the fifth method, calculating the average weekly wage based on the individual's last year of employment, stating that “it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income.” *Abernathy*, 151 N.C. App. at 258, 565 S.E.2d at 222.

Likewise, in *Pope*, this Court considered a situation where an individual sought benefits for asbestosis for which he was diagnosed well

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after he retired. This Court followed its prior holding in *Abernathy* and concluded that the Commission did not err in calculating the individual's average weekly wage based on what he earned during his work life rather than awarding the statutory minimum simply because he had retired before the diagnosis. *Pope*, 207 N.C. App. at 160-61, 700 S.E.2d at 25.

In the present case, based on the Full Commission findings and the stipulation by Defendant, Decedent's lung cancer, diagnosed in 2010, was an occupational disease. *See Hatcher v. Daniel Int'l Corp.*, 153 N.C. App. 776, 781, 571 S.E.2d 20, 22 (2002) (holding that lung cancer may qualify as an occupational disease). Specifically, the Commission found as follows:

12. With respect to [Decedent's] lung cancer, the facts are analogous to his prior asbestos claim, with the exception that the lung cancer took a longer period to develop. [Decedent] was last injuriously exposed to the hazards of asbestos while employed by [SDC]. [Decedent's] lung cancer was caused by the same period of asbestos exposure that caused his compensable occupational disease of asbestosis. [Decedent] was not diagnosed with lung cancer until after his retirement from [SDC]. At the time of his diagnosis, [Decedent] had already been disabled by unrelated multiple sclerosis that forced him to retire from [SDC] in 1991. [Decedent] amended the Form 18B originally filed on April 18, 1994 to include a claim for lung cancer due to asbestos exposure and Defendants accepted the lung cancer claim as compensable.

We further believe that the findings are adequate to reflect that the Full Commission considered the first four methods of calculating average weekly wages before deciding to apply the fifth method. Specifically, the Full Commission stated as follows:

15. Based upon the preponderance of evidence in view of the entire record, the Full Commission finds that the first three methods of determining average weekly wage pursuant to N.C. Gen. Stat. § 97-2(5) are not applicable because they are based on the earnings of an injured employee during the fifty-two weeks preceding the date of injury or disability and [Decedent] had been retired for many years prior to his diagnosis of lung cancer and his death. The Full Commission further finds no evidence was presented by

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the parties regarding the average weekly wage earned by a similarly-situated employee; therefore, the fourth method of calculating average weekly wage cannot be used. Additionally, the Full Commission finds that it would be unfair and unjust to calculate [Decedent's] average weekly wage based upon his date of diagnosis or date of death as he was no longer employed and was not earning any income at either of those times. Therefore, using the first four methods to determine [Decedent's] average weekly wage would result in [Decedent's] dependents receiving no benefits (except the \$30.00 weekly statutory minimum) and the Full Commission finds that such a result would be unfair and unjust.

16. Since the utilization of the first four methods for determining average weekly wages enunciated in N.C. Gen. Stat. § 97-2(5) are not applicable, the Full Commission finds that the fifth method under the statute, which allows “any other method of calculation,” is the most appropriate method to calculate [Decedent's] average weekly wage. Due to the exceptional reasons and circumstances of this claim, [Decedent's] average weekly wage should be calculated based upon the earnings of [Decedent] during his last year of employment with [SDC], divided by fifty-two weeks, as it would most nearly approximate the amount which [Decedent] would have earned if not for his injury while working for [SDC] and is fair and just. During the last full year of his employment with [SDC], [Decedent] earned \$31,530.89 resulting in an average weekly wage of \$606.36 and a weekly compensation rate of \$404.24.

We, therefore, hold that the findings by the Full Commission are sufficient to support the Commission's calculation method and, moreover, that the Commission correctly determined Decedent's average weekly wages to be \$606.36, yielding a corresponding weekly compensation rate of \$404.24. Based on our holdings in *Abernathy* and *Pope*, we believe that based on the facts of this case – where (1) Decedent was exposed to asbestos during his career at SDC, (2) he retired from SDC for a reason unrelated to any injury suffered at work, (3) after retirement he was diagnosed with lung cancer directly caused by his exposure to asbestos during his career at SDC, and (4) where he dies as a result of the lung cancer – the Full Commission did not err in calculating

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Decedent's average weekly wages based on the wages during the last year of employment at SDC rather than based on the statutory minimum. Defendant's contentions are accordingly overruled.³

III. Conclusion

In light of the foregoing, we affirm the Commission's 30 September 2013 opinion and award.

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

3. We note the Commission's alternative basis for its calculation of Decedent's wages, namely, that it had employed the same method in deriving Decedent's wages in connection with his asbestos claim; that this Court had affirmed the Commission's opinion and award pertaining to that claim; and that Defendant here is essentially re-litigating the same calculation issue. We do not reject this alternative basis as meritless, but instead decline to reach the issue in light of our holding, which we believe rests firmly upon *Pope*, a case decided subsequent to the 2001 decision in which we upheld Decedent's asbestos claim.

NEIL v. KUESTER REAL ESTATE SERVS., INC.

[237 N.C. App. 132 (2014)]

DEVIN NEIL, KOLLIN KALK, SUSAN ZHAO, AND JOHN STOEHR, PLAINTIFFS
v.
KUESTER REAL ESTATE SERVICES, INC., CHS/ASU, LLC, AND KUESTER-GREENWAY
COMPANY, LLC, DEFENDANTS

No. COA14-513

Filed 4 November 2014

1. Appeal and Error—appealability—interlocutory orders and appeals—class certification

An order denying a motion for class certification is immediately appealable because the denial of class certification affects a substantial right and could work an injury if not corrected before the final judgment.

2. Class Actions—certification—same issue of law or fact

When ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether each of the prospective class members has an interest in the same issue of law or fact, and that the issue predominates over issues affecting only individual class members.

3. Class Actions—certification denied—differing facts

The trial court did not abuse its discretion by denying plaintiff's motion for a class certification in an action involving the retention of security deposits by a landlord. The record revealed the existence of competent evidence that defendants claimed different amounts and types of alleged damages by each plaintiff and charged each plaintiff differing amounts for the alleged damages.

Appeal by Plaintiffs from order dated 30 January 2014 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 19 September 2014.

Hedrick Kepley, PLLC, by Michael P. Kepley, and Eggers, Eggers, Eggers, Eggers and Eggers, by Austin F. Eggers, for Plaintiffs.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher B. Kincheloe and Lindsey L. Smith, for Defendant Kuester Real Estate Services, Inc.

Turner Law Office, PA, by Victoria H. Tobin, for Defendants CHS/ASU, LLC, and Kuester-Greenway Company, LLC.

NEIL v. KUESTER REAL ESTATE SERVS., INC.

[237 N.C. App. 132 (2014)]

STEPHENS, Judge.

This case is an appeal from the trial court's denial of Plaintiffs' motion for class certification in their action against various real estate entities which provide rental housing, largely to a college student population, in Boone, North Carolina. The crux of Plaintiffs' complaint concerns alleged violations of the North Carolina Tenant Security Deposit Act ("the Act"), and the dispositive question in resolving their motion for class certification concerns the remedy to which they would be entitled under the Act. Plaintiffs assert that the proper remedy would be an automatic full refund of their security deposits, obviating the need for separate trials on damages for every prospective class member. After careful consideration, we hold that, for the violations of the Act alleged, Plaintiffs would *not* be entitled to an automatic full refund, but rather, would only be entitled to a refund of any amounts withheld from their security deposits for a use not permitted by the Act. Determination of the appropriate amount of each Plaintiff's refund would require individual trials, thus rendering class action an inferior method for the adjudication of Plaintiffs' claims. Accordingly, we affirm the order of the trial court denying Plaintiffs' motion for class certification.

Factual and Procedural Background

At the time their complaint was filed in November 2012, Plaintiffs Devin Neil, Kollin Kalk, Susan Zhao, and John Stoehr were students at Appalachian State University in Boone. On 1 August 2011, Neil and Kalk, along with another individual, entered into a lease agreement with Defendant Kuester Real Estate Services, Inc. ("Kuester"), for unit 407 at Turtle Creek West, an apartment complex owned by Defendant CHS/ASU, LLC ("CHS"), and located near the University. CHS had contracted with Kuester to manage and maintain Turtle Creek West. The lease agreement ended on 31 July 2012, and Neil and Kalk allege that, before they vacated the premises, they thoroughly cleaned the apartment and returned it to the same condition as when they moved in, minus any normal wear and tear.

However, Neil and Kalk later received invoices from Kuester which reflected charges for, *inter alia*, carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an "administrative fee" of \$40. This fee is explicitly authorized by the lease addendum to which Neil and Kalk agreed in writing. In pertinent part, the lease addendum provides:

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[237 N.C. App. 132 (2014)]

In order to promote and maintain the community, and as a condition of residency, “Turtle Creek West” has established the following additional rules and regulations for all tenants. Adherence to these rules and regulations is essential for the comfort and convenience of all tenants.

Tenant shall be subject to a \$40 Administrative Fee (in addition to the cost of any repairs or remedies) for: [any of some forty listed safety, health, and maintenance regulations]

Among the rules and regulations listed are several which require tenants to keep their units clean and in good condition, specifically including the bathroom, kitchen, walls, and carpets. On appeal and in their complaint, Plaintiffs assert that the charges listed on each invoice exceeded the security deposit of \$250 per person which Neil and Kalk had made at the time they entered into the lease, leaving an outstanding balance owed by each of them.¹

On 6 August 2011, Zhao and Stoehr, along with another individual, entered into a lease agreement with Kuester for unit 104 at Greenway Commons, another apartment complex located in Boone and managed by Kuester. Greenway Commons is owned by Defendant Kuester-Greenway Company, LLC (“Greenway”). Zhao’s and Stoehr’s lease also ended on 31 July 2012, and like Neil and Kalk, they allege that they thoroughly cleaned their unit and returned it to its original condition, less any normal wear and tear, before moving out. They each received an invoice from Kuester which reflected charges for services such as carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an administrative fee of \$40. Greenway Commons requires all tenants to agree in writing to an addendum explaining the administrative fee to be charged for violation of listed rules and regulations. This addendum is identical to that used at Turtle Creek West, with the exception of the apartment complex name. Zhao and Stoehr each initialed an addendum. The complaint alleges

1. The record on appeal does not support this assertion. The record contains four partially legible documents entitled “Transaction Listing,” which appear to list charges by and payments to CHS and Greenway for each Plaintiff from roughly March 2011 through August 2012. The Transaction Listing for each Plaintiff appears to reflect a refund or reimbursement. In addition, in the excerpts of their depositions which are in the record, Stoehr and Kalk each mention receiving partial refunds of their security deposits.

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[237 N.C. App. 132 (2014)]

that the total charges on each invoice exceeded the \$550² per person security deposit Zhao and Stoehr had been required to pay when signing their lease.³

On 13 November 2012, Plaintiffs initiated this action by the filing of a complaint in Watauga County Superior Court. The complaint alleges that Defendants formed a plan “to increase profits through the overcharging of their respective tenants and taking their security deposits at the end terms of their respective leases” and includes claims for violations of the Act, unfair and deceptive trade practices (“UDTP”), fraud, and punitive damages. Plaintiffs defined their proposed class as “[a]ll natural and/or legal persons who have entered into lease agreements to lease residential dwelling units at either and/or Turtle Creek West and Greenway Commons, which leases were managed by Defendant Kuester during the years 2009 and ongoing.” In support of class certification, the complaint alleges, *inter alia*:

37. Common questions of law and fact exist as to all members of the Applicator Class, and they predominate over any questions that affect only individual Applicator Class Members. The questions of law and fact that are common to the Applicator Class, and which would dominate [sic] over any individualized issues, include but are not limited to the following:

- a. Whether Defendants violated the . . . Act through their administration and use of the Plaintiffs’ and Applicator Class Members’ respective security deposits;
- b. Whether Defendants withheld as damages part of Plaintiffs’ and the Applicator Class Members’ respective security deposits for conditions that were due to normal wear and tear;
- c. Whether Defendants retained amounts from Plaintiffs’ and the Applicator Class[members’] respective security deposits which exceeded their actual damages;

2. The record suggests that Neil and Kalk were required to pay a lower security deposit than Zhao and Stoehr because the former two Plaintiffs assumed an existing lease from other tenants.

3. See Footnote 1, *supra*.

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- d. Whether Defendants knew, reasonably should have known, or were reckless in not knowing the lease agreements the Defendants were using to rent their respective properties contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;
- e. Whether Defendants negligently, recklessly, and/or unfairly and deceptively concealed from [their] tenants the fact that their contracts contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;
- f. Whether Defendants misrepresented to their respective tenants the actual damage sustained by Defendants, if any;
- g. Whether Defendants failed to disclose material facts about the alleged need for repairs and/or cleaning to each of their respective tenants prior to sending the respective tenants invoices for alleged charges;
- h. Whether Defendants' conduct constitutes unfair and/or deceptive acts or practices, in or affecting commerce, in violation of Chapter 75 of the North Carolina General Statutes;
- i. Whether Plaintiffs and Applicator Class Members are entitled to compensatory damages;
- j. Whether Plaintiffs and Applicator Class Members are entitled to an award of treble damages;
- k. Whether Plaintiffs and Applicator Class Members are entitled to all or some of their security deposits to be returned to them along with all or some of the charges which were charged over and above their respective security deposits;
- l. Whether Plaintiffs and Applicator Class Members are entitled to an award of punitive damages; and
- m. Whether Plaintiffs and Applicator Class Members are entitled to an award of their reasonable attorneys'

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fees, expert witness fees, pre-judgment interest, post-judgment interest, and costs of suit.

38. The only non-common issue is the amount of specific damages for each particular member of the Applicator Class; therefore, common questions of law and fact clearly predominate within the meaning of Rule 23 of the North Carolina Rules of Civil Procedure.

39. Plaintiffs' claims are typical of the claims of all Applicator Class Members, in that Plaintiffs leased property from Defendant Kuester, and they were sent statements for itemized charges for alleged necessary cleaning, painting, and other alleged damage to the Premises once they vacated the Premises, and they seek to recover for the damages caused by Defendants' conduct and material misrepresentations to them regarding the alleged charges. Consequently, Plaintiffs' legal claims are the same as those of another Applicator Class Member, and the relief they seek is the same as that of any other Applicator Class Member. Plaintiffs will fairly and adequately represent the interests of the absent Applicator Class Members, in that Plaintiffs have no conflicts with any other Applicator Class Members that would interfere with their zealous pursuit of these claims on behalf of the other Applicator Class Members. Furthermore, Plaintiffs have retained competent counsel who are experienced plaintiffs' attorneys and are in good standing with the North Carolina State Bar.

40. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy described herein, because it permits a large number of injured persons to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence and effort. Class treatment will also permit the adjudication of claims by Applicator Class Members who could not afford to individually litigate these claims against large corporate defendants.

On 14 January 2013, Kuester filed its answer, moving to dismiss Plaintiffs' lawsuit pursuant to Rule of Civil Procedure 12(b)(6) and asserting various affirmative defenses. On 15 January 2013, CHS and Greenway filed a joint answer which also included a motion to dismiss and affirmative defenses.

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On 13 November 2013, Plaintiffs moved for class certification, alleging:

1. The class of people the named plaintiffs are seeking to represent are too numerous as to make it practicable to bring them all before the [c]ourt;
2. The named and unnamed members of the class have an interest in the same issues of law or fact that predominate over issues affecting only individual class members to wit:
 - a. Did [D]efendants violate the . . . Act by doing one or more of the following:
 - i. Charging tenants an unlawful \$40.00 “administrative fee”, and taking the “administrative fee” from each tenant’s security deposit;
 - ii. Withholding funds as damages from their tenants’ security deposits for conditions which were due to normal wear and tear;
 - iii. Retaining amounts from their tenants’ security deposits which exceeded their actual damages.
 - b. If so, did [D]efendants commit fraud and/or unfair and/or deceptive trade practices?
 - c. If so, what are the damages to each tenant?
3. The class members within the [c]ourt’s jurisdiction can fairly and adequately represent the interests of those within and without the [c]ourt’s jurisdiction; and
4. No reasons exist to deny the present motion.

Following a hearing on 18 November 2013, the trial court entered an order denying Plaintiffs’ motion for class certification dated 5 February 2014. That order states:

This action was filed on November 13, 2012, by Plaintiffs[] Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr on behalf of themselves and others similarly situated, alleging issues of law and fact common to all members of the Applicator Class, including, *inter alia*, the following:

- a. Whether Defendants violated the North Carolina Tenant Security Act;

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- b. Whether Defendants improperly withheld funds from tenant deposits for conditions that were due to normal wear and tear;
- c. Whether the amounts withheld by Defendants exceeded their actual damages;
- d. Whether Defendants misrepresented their actual damages; and
- e. Whether Defendants' conduct entitles members of the proposed class to a refund of all or some of their security deposits.

The order also contained the following findings of fact:

1. There is nothing in the record to indicate that [] Plaintiffs, Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr, would unfairly or inadequately represent the interest of all of the potential members of a class in this matter;
2. There is no evidence of record that there exists a conflict of interest between [] Plaintiffs and members of the proposed class;
3. [] Plaintiffs have a genuine personal interest in the outcome of the case;
4. The [c]ourt assumes for purposes of this motion only that alleged issues of fact and law (a) and (e) above are common to all members of the proposed class;
5. With regard to issues (b), (c), and (d), the [c]ourt finds the resolution of the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit.
6. Even assuming as Plaintiffs' counsel has argued, that Defendants have no compulsory counterclaims, it still must be assumed that if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, as Plaintiffs allege, then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. These, too, would require separate trials of the breach of contract claims and result in

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potentially differing outcomes, thereby negating the benefits of a class action lawsuit.

7. The common issues of fact that may be shared by the class members do not predominate over issues affecting only individual class members.

Based upon those findings of fact, the trial court made the following conclusions of law:

1. The named representatives established that they will fairly and adequately represent the interests of all members of the class;
2. There is no conflict between the named representatives and class members;
3. The named representatives have a genuine personal interest in the outcome of the case;
4. The class members are so numerous that it is impractical to bring them all before the court;
5. The common issues of fact in this matter do not predominate over issues affecting only individual class members.
6. Plaintiffs' Motion for Class Certification is denied.

From the order denying their motion for class certification, Plaintiffs appeal.

Grounds for Appellate Review

[1] As Plaintiffs note, the order denying their motion for class certification is interlocutory, as it does not constitute a final judgment on the merits of their claims. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[a]n interlocutory order is appealable if it affects a substantial right and will work injury to the appellants if not corrected before final judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 355-56 (1984) (citation omitted). This Court has held that, in cases purporting to warrant class certification, where a plaintiff "recovers after the trial court has refused to certify the action, the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment." *Id.* at 762, 318 S.E.2d at 356. Accordingly, an order denying a motion for class certification is immediately appealable. *Id.*

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Standard of Review

Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. It states in pertinent part: If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued. First, parties seeking to employ the class action procedure pursuant to our Rule 23 must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites: (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class. When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy.

Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. The trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [our case law].

The touchstone for appellate review of a Rule 23 order is to honor the broad discretion allowed the trial court in all matters pertaining to class certification. Accordingly, we review the trial court's order denying class certification for abuse of discretion. The test for abuse of discretion is

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whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Beroth Oil Co. v. N.C. Dep't of Transp., __ N.C. __, __, 757 S.E.2d 466, 470-71 (2014) (citations, internal quotation marks, ellipses, and certain brackets omitted). When reviewing a class certification order, the trial court's "findings of fact are binding if supported by competent evidence, and [its] conclusions of law are reviewed *de novo*." *Id.* at __, 757 S.E.2d at 471.

[2] In sum, when ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether "each of the [prospective class] members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at __, 757 S.E.2d at 470. If the court determines that no class exists, no further analysis is required. *Id.*

Discussion

[3] Plaintiffs argue that the trial court erred in holding that Plaintiffs failed to establish the existence of a class and, therefore, that the court abused its discretion in refusing to grant their motion for class certification. We disagree.

Specifically, Plaintiffs contend that the trial court erred in making finding of fact 5, that "the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit[;]" and finding of fact 6, that, "if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, . . . then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. . . . [which] would require separate trials. . . ." Plaintiffs also challenge the court's ultimate determination, finding of fact 7 and conclusion of law 5, that "common issues of fact in this matter do not predominate over issues affecting only individual class members."

While denominated as factual findings, findings of fact 5 and 6 are better characterized as mixed findings of fact and conclusions of law. Finding of fact 7 is a legal conclusion. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the application of legal

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principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.”) (citations and internal quotation marks omitted).

Certainly, the trial court considered evidentiary facts, such as the alleged damage done to Plaintiffs’ units and the specifics of the billing to repair that damage, in order to reach the challenged determinations. However, our review of the record reveals the existence of competent evidence that Defendants claimed different amounts and types of alleged damages by each Plaintiff and charged each Plaintiff differing amounts for the alleged damages. For example, the Transaction Listings reflect that Plaintiffs were each charged different amounts for varied types of cleaning and repairs on their individual bedrooms and in the common areas of their units. A former property manager for Kuester testified that tenants were charged differing amounts based on the specific need for repairs and/or cleaning to the tenant’s individual unit. Each Plaintiff was charged a different total amount against their security deposits, and each received some portion of his or her security deposit back. In sum, the factual portions of the trial court’s determinations are supported by competent evidence and, thus, are binding on appeal. *See Beroth Oil Co.*, __ N.C. at __, 757 S.E.2d at 471. Even so, the core of Plaintiffs’ appeal is their contention that the trial court reached erroneous legal conclusions about the remedies available to them under the Act which in turn led to erroneous conclusions about the need for separate trials on damages. We must consider the court’s conclusions *de novo*. *Id.*

Plaintiffs assert that any willful violation of the Act would require a *total* refund of each class member’s security deposit, regardless of what damage may have been done to individual apartments, and that Defendants would not be entitled to file any counterclaims. They argue that the sole issue to be decided is whether Defendants violated the Act and that individual trials are neither necessary nor the most efficient option to determine that issue. If Plaintiffs’ understanding of the Act is correct, we agree that no separate trials for individual class members would be required. We conclude, however, that Plaintiffs misinterpret the remedies available to them for Defendants’ alleged violations of the Act.

The Act contains seven sections. The first section mandates how security deposits must be maintained by landlords:

Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed

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and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (2013). The second section discusses the permitted uses of security deposits:

Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to [section] 62-110(g) and electric service pursuant to [section] 62-110(h), damage to the premises, nonfulfillment of rental period, any unpaid bills that become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, costs of removal and storage of the tenant's property after a summary ejection proceeding or court costs in connection with terminating a tenancy. The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in [section] 42-52.

N.C. Gen. Stat. § 42-51 (2011).⁴

4. Section 42-51 was amended effective 1 October 2012. 2012 N.C. Sess. Laws 17, s.4. The former version of this statute quoted herein applies to Plaintiffs' case. The substance of the statute remained largely the same, though the format was altered to list by subsection the specific permitted uses of the security deposit. One noteworthy change was the addition of subsection (a)(8): "Any fee permitted by G.S. 42-46." Section 42-46 is part of Article 5, entitled "Residential Rental Agreements" and includes provisions for various court-related fees, and fees for late payment of rent. N.C. Gen. Stat. § 42-46(a)(1) (2013). In their argument on appeal, Plaintiffs include a brief reference to Defendants' alleged violation of subsection (a)(8). Because subsection (a)(8) is contained in the amended version of the statute not applicable to Plaintiffs' security deposits, we do not address assertions regarding section 42-46 in this opinion.

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Section 42-52 discusses the obligations of landlords in providing tenants an accounting of any money withheld from the security deposit and a timely refund of any remaining balance:

Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in [section] 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the extent of the landlord's claim against the security deposit cannot be determined within 30 days, the landlord shall provide the tenant with an interim accounting no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord and shall provide a final accounting within 60 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the tenant's address is unknown the landlord shall apply the deposit as permitted in [section] 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages.

N.C. Gen. Stat. § 42-52 (2013). Section 42-53 concerns pet deposits, section 42-54 discusses transfer of units between landlords, and section 42-56 describes the persons and entities considered landlords under the Act and to whom the Act applies. *See* N.C. Gen. Stat. §§ 42-53, -54, -56 (2013).

Most pertinent to resolution of this appeal, the section entitled "Remedies" provides that,

[i]f the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. *The willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article shall void the landlord's right*

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to retain any portion of the tenant's security deposit as otherwise permitted under [section] 42-51. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, such willful noncompliance is against the public policy of this State and the court may award attorney's fees to be taxed as part of the costs of court.

N.C. Gen. Stat. § 42-55 (2013) (emphasis added). Plaintiffs focus on the italicized language as the remedy for Defendants' alleged violation of section 42-51 — by taking the \$40 administrative fee from their security deposits — and section 42-52 — by withholding from the security deposits damages attributable to normal wear and tear and retaining amounts greater than the actual damages done to the units. We are not persuaded by Plaintiffs' assertions.

Under our long-standing principles of statutory construction, “we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. [In addition], words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent while avoiding absurd or illogical interpretations.” *Fort v. Cnty of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012). Applying these principles to the plain language of the Act, section 42-55 sets forth four distinct remedies: (1) where a landlord “fails to account for and refund the balance of the tenant's security deposit as required[,]” tenants can bring a civil action to receive the required accounting and appropriate refunds due them (“the appropriate refund remedy”); (2) where a landlord “willfully fails to comply with the deposit, bond, or notice requirements of this Article[,]” a tenant can seek refund of the entire security deposit, even if the landlord would otherwise be entitled to retain some portion thereof (“the full refund remedy”); (3) where a tenant has incurred damages from the landlord's failure to comply with the Act, the tenant may sue to recover those damages (“the damages remedy”); and (4) where a landlord's noncompliance is willful, the tenant can seek attorney's fees (“the attorney's fees remedy”). *See* N.C. Gen. Stat. § 42-55.

While the damages remedy and the attorney's fees remedy could be sought in conjunction with each other or with the other remedies,

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the appropriate refund remedy and the full refund remedy are mutually exclusive. The first allows only for the required accounting and proper refund of the security deposit, while the second entitles a tenant to a total refund, even if the tenant's actions would otherwise subject his deposit to partial or complete forfeit. Put another way, the appropriate refund remedy merely requires a landlord to comply with the accounting and refund requirements of the Act, while the full refund remedy imposes a penalty for noncompliance. It follows, then, that these two remedies must apply to different types of noncompliance with the Act, since otherwise, every tenant with a noncomplying landlord would certainly elect to receive a full refund.

Plaintiffs appear to interpret the trigger for the full refund remedy, to wit, the phrase "willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article[,]” as a reference to non-permitted uses of security deposits in violation of section 42-51 and overcharging for damages in violation of section 42-52. We do not believe that the word "deposit" in the above-quoted portion of the remedy section is intended to reference *any and all* wrongful use or withholding of a security deposit. Such an interpretation would lead to a nonsensical result since the entire Act concerns security deposits, and thus every violation of the Act by a landlord would afford the landlord's tenants full refunds and the appropriate refund remedy would become, in effect, surplusage. Such statutory interpretations must be avoided. *See Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citations and internal quotation marks omitted).

We conclude that the full refund remedy is available only for willful violations of section 42-50, the only section of the Act containing provisions regarding deposit, bond, and notice *vis a vis* security deposits:

Security deposits from the tenant in residential dwelling units *shall be deposited in a trust account* with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, *furnish a bond* from an insurance company licensed to do business in North Carolina. . . . The landlord or his agent *shall notify* the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (emphasis added).

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It seems equally clear that the appropriate refund remedy, to wit, a proper accounting and refund of any remaining portion of the security deposit to which a tenant is entitled, applies to violations of section 42-52, such as overcharging for damages and charging for normal wear and tear. The appropriate refund remedy is available when a landlord “fails to account for and refund the balance of the tenant’s security deposit as required[.]” N.C. Gen. Stat. § 42-50, an echo of the requirement that landlords “shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord.” N.C. Gen. Stat. § 42-52.⁵ Nothing in the statute would require an automatic refund of every tenant’s full security deposit for Defendants’ alleged overcharging for repairs and charging for normal wear and tear. Thus, we agree with the trial court’s conclusion that each prospective class member would require a separate trial to determine, *inter alia*, what portion of the class member’s individual charges, if any, was attributable to overcharging or charging for normal wear and tear.

As for Plaintiffs’ allegation that Defendants have violated section 42-51 by deducting the administrative fee — essentially a fine for breaking the rules and regulations listed in the lease addendum — from their security deposits, we likewise conclude that any such violations would entitle them only to the appropriate refund remedy, damages remedy, and/or attorney’s fees remedy. Withholding money for an issue not on the list of permitted uses for security deposits directly implicates the proper amount of a tenant’s security deposit refund, thereby triggering the appropriate refund remedy.⁶

Further, we can find nothing in the Act that would prevent a landlord from fining tenants for violating health, safety, or other rules and regulations such as those Plaintiffs agreed to in their lease addenda. The Act simply bars landlords from taking those amounts out of security deposits. *See* N.C. Gen. Stat. § 42-51. Thus, even if Plaintiffs prevail in proving that Kuester violated the Act by deducting the administrative fee from their security deposits and the fees were therefore refunded to them, CHS and Greenway could simply bill them separately for the \$40 fee.

5. The damages and attorney’s fees remedies could also be available if Plaintiffs were able to establish that they incurred damages from Defendants’ noncompliance and/or that the noncompliance was willful. *See* N.C. Gen. Stat. § 42-55. Of course, any determination of damages would also require individual trials for each Plaintiff.

6. *See* Footnote 5, *supra*.

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We also note that, if any of the applicator class members had damage and cleaning costs which exceeded the amount of their security deposit, such that CHS or Greenway had to bill them for additional amounts, a fact-finder would need to determine whether the administrative fee was taken out of the security deposits or was part of the additional amount billed.⁷

In sum, the factual underpinnings of the findings of fact Plaintiffs challenge on appeal are supported by competent evidence. The trial court did not err in its ultimate finding and legal conclusion that “common issues of fact in this matter do not predominate over issues affecting only individual class members.” Plaintiffs having failed to establish the existence of a class, the trial court did not abuse its discretion in denying Plaintiffs’ motion. *See Beroth Oil Co.*, __ N.C. at __, 757 S.E.2d at 470-71. The order denying Plaintiffs’ motion for class certification is

AFFIRMED.

Chief Judge McGEE and Judge HUNTER concur.

7. The Transaction Listing for each of the four named plaintiffs appears to include a line item for \$40 noted as “Administrative Fee” with “Administrative fee” noted under the “Comment” column. In contrast, the amounts billed for various cleaning and repairs required after Plaintiffs vacated their units are described as “Security Deposit Forfeit” with specific explanations of charges listed in the Comment column. For example, Kalk’s Transaction Listing includes a charge of \$4 as “Security Deposit Forfeit” with the comment “Clean washer/dryer[.]” Accordingly, the evidence is disputed as to whether the administrative fees were actually taken out of the security deposits.

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DANIEL E. SKINNER, PLAINTIFF

v.

SUZANNE REYNOLDS, BLAKE MORANT, NATHAN HATCH, JAMES REID MORGAN,
WAKE FOREST UNIVERSITY, AND WAKE FOREST UNIVERSITY
SCHOOL OF LAW, DEFENDANTS

No. COA14-325

Filed 4 November 2014

Libel and Slander—libel per se—libel per quod—failure to state a claim—dismissal proper

Plaintiff's complaint was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) because it failed to state a claim for defamation based on libel per se or libel per quod. Plaintiff's claims for negligent supervision were properly dismissed as derivative of his substantive claims.

Appeal by plaintiff from order entered 12 July 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 11 September 2014.

Daniel E. Skinner, pro se.

Bell, Davis & Pitt, P.A., by William K. Davis, and Stephen M. Russell, Sr., for defendant-appellees.

STEELMAN, Judge.

Plaintiff's complaint was properly dismissed under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because it failed to state a claim for defamation based on libel *per se* or libel *per quod*. Plaintiff's claims for negligent supervision were properly dismissed as derivative of his substantive claims.

I. Factual and Procedural Background

Daniel Skinner (plaintiff) was enrolled at Wake Forest University School of Law, beginning in the fall of 2009. Plaintiff, who had received merit scholarships, was informed in June 2011 that the amount of his scholarships would be reduced by half because he had failed to remain in the top two-thirds of his law school class. Plaintiff disputed the reduction of his scholarships, arguing that the class rank requirement did not apply to certain scholarships. He pursued his challenge to the scholarship reduction over the following year. He first met with Melanie Nutt,

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then the school's Director of Admissions, who informed him that the condition applied to his entire financial aid award. He then appealed to Jay Shively, the Assistant Dean for Admissions and Financial Aid, who wrote to plaintiff in August 2011 informing plaintiff that all of his scholarships were subject to the requirement that he remain in the top two-thirds of his class. Plaintiff next submitted a grievance to Ann Gibbs, Associate Dean for Administrative and Student Services, who consulted with the law school's legal counsel. In September 2011 Dean Gibbs notified plaintiff that she and the school's legal counsel concluded that all of his scholarships were subject to the class rank requirement. Plaintiff's contentions were then reviewed by Law School Dean Blake Morant, who wrote to plaintiff on 21 November 2011 "comprehensively addressing" his arguments and reiterating that the condition applied to all of his scholarships. In April 2012, plaintiff met in person with Dean Morant and Suzanne Reynolds, the Executive Associate Dean for Academic Affairs. Dean Reynolds also held a second meeting with plaintiff to discuss the terms of his scholarships.

On 10 May 2012 Dean Reynolds hand-delivered a letter to plaintiff, in which she stated that she had "two purposes in this letter. One is to set out our position about your scholarship award. The other is to remind you of the code of conduct expected of students." The letter first reviewed the events surrounding plaintiff's challenge to the reduction of his scholarship, and responded to plaintiff's assertion that the law school's review of plaintiff's grievance did not comply with the requirements of the American Bar Association. The second part of the letter discussed plaintiff's behavior during his challenge to the reduction of his scholarships, stated her opinion that plaintiff tended to react with suspicion to those who disagreed with him, and reminded plaintiff of the need to comply with the university's code of conduct. Dean Reynolds provided Dean Morant and Associate Dean Gibbs with copies of her letter to plaintiff.

On 9 May 2013 plaintiff filed this lawsuit, asserting claims of defamation against Dean Reynolds, Wake Forest University, and Wake Forest School of Law; and claims of negligent supervision against Dean Morant and against Nathan Hatch and James Reid Morgan, the president and senior vice president of Wake Forest University. Plaintiff alleged that certain statements in the second part of Dean Reynolds's letter constituted libel *per se* and libel *per quod*, that the university and law school were vicariously liable for Dean Reynolds's libel, and that the other defendants were liable for failure to properly supervise Dean Reynolds.

On 24 May 2013 defendants filed an answer denying the material allegations of the complaint and moving for dismissal of plaintiff's suit

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under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 12 July 2013 the trial court entered an order granting defendants' motion and dismissing all of plaintiff's claims.

Plaintiff appeals.

II. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. '[D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).'

"*Malloy v. Preslar*, __ N.C. App. __, __, 745 S.E.2d 352, 355 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979)). "In our review of the trial court's ruling on a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), '[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' While we treat plaintiffs' factual allegations as true, we may ignore plaintiffs' legal conclusions." *McCraun v. Pinehurst*, __ N.C. App. __, __, 737 S.E.2d 771, 777 (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), and citing *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)), *disc. review denied*, 366 N.C. 593, 743 S.E.2d 221 (2013).

III. Analysis

A. Libel Per Se

"*Libel per se* is a publication which, *when considered alone without explanatory circumstances*: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 736, 659 S.E.2d 483, 486 (2008) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) (internal quotations omitted) (emphasis in *Nucor*). Further:

"[D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to

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disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.” “Although someone cannot preface an otherwise defamatory statement with ‘in my opinion’ and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact.” This Court considers how the alleged defamatory publication would have been understood by an average reader. In addition, the alleged defamatory statements must be construed only in the context of the document in which they are contained, “stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof.”

Nucor, 189 can at 736, 659 S.E.2d at 486-87 (quoting *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317-18, 312 S.E.2d 405, 409 (1984) (citation and quotation marks omitted) (emphasis in original), and *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006), and citing *Boyce*, 153 N.C. App. at 31, 568 S.E.2d at 899).

Plaintiff’s claims for libel are based on statements contained in the second part of Dean Reynolds’s letter, which is reproduced below:

II. The Code of Conduct Expected of Students

I have no concern about law students having disputes with administrators. After all, part of what we teach in a law school is how to raise disputes and pursue them. I am deeply concerned, however, with your conduct in this process. In the course of this disagreement, you have claimed that several administrators have acted fraudulently and have accused another of lying. You have made these statements in the presence of other students. You have sent an email to the entire law school faculty calling for the removal of the Dean.

I would be concerned about this conduct by any student, but it is of particular concern to me in a law student. In the practice of law, people often disagree with each other and must work to resolve those disagreements. From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit. If you had

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made similar accusations under similar circumstances to a client, you would be fired. If you had made similar accusations under similar circumstances to a judge, you would be held in contempt.

We have tolerated your conduct because we have assumed that the issue has consumed you. I do not want our lenience to date to make you think we find such conduct acceptable. It is not. This letter puts you on notice that like all students, we expect you to abide by the code of conduct set out in Chapter 7 of the Student Handbook, which provides in part:

Members of the Law School community are expected to adhere to standards of conduct that will reflect credit upon themselves, the Law School, the legal profession, and Wake Forest University. Students aspiring to the Bar are expected to behave appropriately, to respect the rights and privileges of other[s], and to abide [by] the laws of the city, state, and nation and the regulations of the University and the School of Law.

Now that this dispute is behind us, I will assume that you will abide by the code of conduct. We have given you so many audiences for your position because we want nothing but the best for you. That same desire motivates us now to put an end to the hearings about your scholarship award and to notify you that we expect appropriate conduct from you. We have tolerated inappropriate conduct in hearing you out, but we will not tolerate inappropriate conduct any longer.

I want to close by highlighting our desire for your success - in your remaining year of law school and beyond. We admitted you with every expectation that you would succeed as a law student and as a lawyer. We continue to wish for you the brightest of futures.

Plaintiff focuses his arguments primarily on the following sentence in Dean Reynolds's letter: "From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit." We conclude that this sentence, whether considered alone or in the context of the rest of the letter, does not constitute actionable libel.

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The phrase “from my experience with you on this issue” is tantamount to “in my opinion” or “in my experience.” The subjective nature of Dean Reynolds’s statement is demonstrated by the rest of the sentence, which states her personal opinion that “if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit.” Plaintiff admits that he has accused various parties of fraud and deceit. Dean Reynolds’s opinion that his accusations were motivated by suspicion of those who disagree with him is not a fact that is subject to being proven or disproved, and cannot constitute actionable libel *per se*.

In addition, the paragraph from which plaintiff extracts this sentence indicates that Dean Reynolds was providing guidance to plaintiff, then a student, regarding the standard of behavior to which he would be held if he chose to practice law:

I would be concerned about this conduct by any student, but it is of particular concern to me in a law student. In the practice of law, people often disagree with each other and must work to resolve those disagreements. From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit. If you had made similar accusations under similar circumstances to a client, you would be fired. If you had made similar accusations under similar circumstances to a judge, you would be held in contempt.

The general tenor of the paragraph is that (1) during the course of plaintiff’s challenges to the reduction in his scholarship amount he appeared to have an emotional reaction to disagreement, responding with accusations of fraud and deceit rather than objectively assessing the merits of opposing views, and; (2) plaintiff would be advised to develop other ways of dealing with dispute if he wished to succeed as an attorney. This paragraph expresses Dean Reynolds’s opinions; neither plaintiff’s inner motivation for his accusations, nor the hypothetical reaction of a future client or judge is a fact that can be proven. *Daniels*, 179 N.C. App. at 540, 634 S.E.2d at 591 (dismissing defamation claim in part because “whether or not plaintiff spoke in a ‘sinister’ or ‘Gestapo’ voice is a matter of [the defendant’s] opinion, incapable of being proven or disproved”). Neither Dean Reynolds’s views on plaintiff’s personal reaction to disagreement, nor her advice regarding the practice of law were defamatory.

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Plaintiff, however, argues that the cited language from Dean Reynolds's letter is defamatory because it would "subject the plaintiff to ridicule, contempt, and disgrace," and "impeach[es] the plaintiff in his profession." Plaintiff does not support these conclusory allegations with alleged facts. Instead, plaintiff, who was a student at the time Dean Reynolds wrote to him, posits that if he graduated from law school, was licensed to practice law, and then, in a hypothetical case, engaged in baseless accusations, that he would then be subject to the negative consequences discussed by Dean Reynolds in her letter. As discussed above, the reaction of hypothetical parties to plaintiff's hypothetical future behavior is not a fact subject to proof, and thus cannot form the basis of a libel claim. Moreover, plaintiff's discussion of possible future occurrences constitutes the kind of "explanatory circumstances" that are not properly part of our analysis of whether a complaint states a valid claim for defamation. *Aycock v. Padgett*, 134 N.C. App. 164, 167, 516 S.E.2d 907, 909 (1999) (upholding dismissal of defamation claim where "there would seem to be a need for explanatory circumstances for the listener or reader here to know that plaintiff had committed an infamous crime").

Plaintiff also argues that other statements in Dean Reynolds's letter "implied defamatory facts." For example, he contends that the letter's warning that "we will not tolerate inappropriate conduct any longer" "implied that there were facts that would justify plaintiff's expulsion" from the university. However, the letter does not identify specific examples of "inappropriate conduct," does not refer to particular sanctions available to the university in response to "inappropriate conduct," and does not mention expulsion. Similarly, plaintiff alleges that Dean Reynolds's caution that he could be subject to contempt proceedings if he responded to a judge's disagreement with accusations of fraud and deceit implied that plaintiff had committed a crime. As discussed above, for statements to constitute libel *per se*, "the alleged defamatory statements must be construed only in the context of the document in which they are contained, 'stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof.'" *Nucor*, 189 N.C. App. at 736, 659 S.E.2d at 488 (quoting *Renwick* at 317-18, 312 S.E.2d at 409 (citation and internal quotation marks omitted)). Plaintiff's arguments do not rest on the language of Dean Reynolds's letter, but on hypothetical scenarios and alleged "implications" of her statements. We reject these arguments, and hold that the letter did not defame plaintiff and that it does not support a valid claim for libel *per se*. Having reached this conclusion, we need not reach the parties' arguments regarding the letter's publication or whether it was privileged.

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C. Claim for Libel Per Quod

Plaintiff next argues that his complaint sufficiently alleges facts to support a claim for libel *per quod*. We do not agree.

Libel *per quod* “may be asserted when a publication is not obviously defamatory, but when considered in conjunction with innuendo, colloquium, and explanatory circumstances it becomes libelous.” *Nguyen v. Taylor*, 200 N.C. App. 387, 392, 684 S.E.2d 470, 474 (2009) (citing *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990)). “To state a claim for libel *per quod*, a party must specifically allege and prove special damages as to each plaintiff.” *Nguyen*, 200 N.C. App. at 393, 684 S.E.2d at 475 (citing *Griffin v. Holden*, 180 N.C. App. 129, 138, 636 S.E.2d 298, 305 (2006) (“the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff’s demand.”) (internal quotation omitted)), and *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624 (1980) (“[S]pecial damages must be pleaded with sufficient particularity to put defendant on notice.”) (citations omitted)).

The only “special damages” asserted in plaintiff’s complaint consists of an allegation that the letter “contained false statements . . . causing specific damages, including but not limited to, lost wages and the expenses of mitigating the defamation[.]” Plaintiff fails to state any facts indicating the circumstances of the alleged “special damages” or the amount claimed. The conclusory allegation that he suffered unspecified “lost wages” and “expenses” associated with “mitigating the defamation” is insufficient to inform defendants of the scope of his claim. See *Pierce v. Atlantic Group, Inc.*, ___ N.C. App. ___, ___, 724 S.E.2d 568, 579 (“We do not believe that Plaintiff’s allegation that the alleged defamation ‘damaged . . . [Plaintiff’s] economic circumstances’ fairly informs Defendants of the scope of Plaintiff’s demand. Therefore, we conclude the trial court did not err by dismissing Plaintiff’s claim of libel *per quod* pursuant to Defendants’ Rule 12(b)(6) motion.”), *disc. review denied*, 366 N.C. 235, 731 S.E.2d 413 (2013). We conclude, based on the absence of specific allegations of special damages, that the trial court did not err by dismissing plaintiff’s claim for libel *per quod*. Therefore, we need not address plaintiff’s other arguments pertaining to libel *per quod*.

D. Claims for Negligent Supervision

Plaintiff’s claims for negligent supervision of Dean Reynolds are predicated on his allegation that Dean Reynolds’s letter defamed him. Since we hold that plaintiff’s claims for libel were properly dismissed,

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it follows that the derivative claims for negligent supervision were also subject to dismissal.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err and that its order dismissing plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) should be

AFFIRMED.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA
v.
CHARLES STEVENS BLOW, JR.

No. COA14-133

Filed 4 November 2014

1. Rape—number of counts—evidence ambiguous

The ambiguous characterization of the number of times defendant penetrated a rape victim as “a couple” was insufficient to charge defendant with three counts of first degree rape. Defendant's admission to three instances of “sex” with the victim. did not equate to an admission of vaginal intercourse; he openly admitted to performing oral sex on the victim, among other sexual acts, but vehemently denied penetrating her vagina with his penis.

2. Criminal Law—continuance denied—no prejudice

There was no prejudicial error in a first-degree rape prosecution from the trial court's refusal to grant defendant a continuance when defense counsel learned of a potential defense witness on the eve of trial. Defense counsel conceded that defendant had participated in the psychological evaluations and had knowledge of them, and that defense counsel had two months to confer with defendant to prepare the case before trial. Even if the denial of the motion to continue was erroneous, defendant failed to demonstrate prejudice because he was able to use the psychological reports to impeach the victim's testimony.

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Judge ERVIN concurring in part and dissenting in part in separate opinion.

Appeal by defendant from judgments entered 31 July 2013 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Associate Attorney General Christina E. Simpson, for the State.

Paul F. Herzog for defendant-appellant.

HUNTER, Robert C., Judge.

Charles Stevens Blow, Jr. (“defendant”) appeals from six judgments entered 31 July 2013 after a jury convicted him on three counts each of first degree rape and first degree sex offense on a child. On appeal, defendant contends that the trial court erred by: (1) denying his motion to dismiss with respect to one count of first degree rape and (2) denying his motion to continue when defense counsel learned of a potential defense witness on the eve of trial.

After careful review, we vacate one judgment for first degree rape, but we find no error in the denial of defendant’s motion to continue.

Background

Defendant is the biological father of M.B.¹ and her sister, C.B. M.B. was born in 2001 and was eleven years old when this case went to trial. Defendant and Angela Blow (“Angela”), the mother of M.B. and C.B., married in 2005. In August 2010, Angela and defendant separated and Angela moved to Michigan with M.B. and C.B. While in Michigan, Angela suffered a breakdown and left M.B. and C.B. with her brother. As a result, psychological and medical evaluations were performed on M.B., C.B., Angela, and defendant in April 2011 in the process of determining placement of custody for the children. During these evaluations, M.B. denied the occurrence of any previous abuse when her family lived in North Carolina. Pursuant to an agreement between Angela and defendant, M.B. and C.B. moved to North Carolina to live with defendant and his new girlfriend in June 2011.

1. A pseudonym will be used to protect the privacy and identity of the minor and her minor sibling.

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While visiting her mother in Michigan on 23 December 2011, M.B. was being teased by other children in the family when she became upset and retreated to the bathroom. When Angela went in to check on her, M.B. revealed to Angela that “[s]ometimes dad takes his boy parts and he touches my girl parts.” M.B. then said, “[defendant] told me that if I did not let him do it to me, that now that [C.B.] was getting older he was going to do it to her.” M.B. told Angela, and later testified at trial, that this abuse had been occurring since she was about six years old. The next morning, Angela took M.B. to the local hospital for an examination.

At the hospital, M.B. was questioned by Trooper Ruth Osborne (“Trooper Osborne”) of the Michigan State Police. M.B. told Trooper Osborne that defendant would put “his boy parts” “on [M.B.’s] girl parts.” When asked for clarification, M.B. later stated to Trooper Osborne that defendant would put his “boy parts” inside her. M.B. stated during the interview that defendant would touch her on her private parts with his hand, his “boy part,” and his electric toothbrush. A sexual assault examination was performed on M.B. during this hospital visit, however the prosecution was not able to present this evidence because the swabs were accidentally thrown away before being examined by the North Carolina State Bureau of Investigation.

The Michigan State Police contacted Detective Dottie Parker (“Detective Parker”) of the Henderson County Sheriff’s Office, and a North Carolina investigation began. Defendant consented to an interview with Detective Parker on 28 December 2011. During this interview, defendant admitted that he had rubbed his penis on M.B.’s vagina, performed oral sex on M.B., and put a vibrating toothbrush on her vagina. However, defendant repeatedly denied ever “penetrating” M.B. with either his finger, toothbrush, or penis.

Defendant was arrested following the interview. He was indicted on 26 March 2012 on three counts of first degree rape, alleged to have occurred between June 2011 and December 2011, and three counts of first degree sex offense, alleged to have occurred between June 2007 and June 2010.

The defense made a pretrial motion to continue on the eve of trial, claiming that defense counsel had learned of the psychological evaluations completed on defendant, Angela, and M.B. the day before trial was scheduled to begin. During the motion hearing, the defense asserted that the relevance in these evaluations lay in (1) the impeachment of M.B. through purported prior inconsistent statements, and (2) the psychological profiles of M.B. and defendant. The motion was denied.

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At trial, M.B. testified that during the time period when she and C.B. lived with defendant and his girlfriend from June to December 2011, defendant would oftentimes come into the small bedroom M.B. shared with C.B. and would touch M.B. on her “private parts” and chest. M.B. stated that this happened “a lot,” not just once or twice. M.B. testified that defendant performed oral sex on her “a lot,” sometimes taking her into his bedroom to perform these acts. M.B. also stated that defendant placed his fingers and electric toothbrush inside her vagina “a couple times.” M.B. further testified that defendant put his penis in her vagina “a couple times.” M.B. did not remember exactly how many times defendant put his penis inside her, but she testified that it happened “more than one time.” M.B. testified that she did not tell anyone about this abuse initially because she was afraid “[defendant] would hurt me.”

Defendant presented no evidence, but moved to dismiss all charges at the close of the State’s evidence and renewed the motion before the case was submitted to the jury. Defendant argued in part that one of the charges for first degree rape should be dismissed because the only evidence presented by the State to support those charges was M.B.’s testimony that defendant inserted his penis into her vagina “a couple” times. Both motions were denied. The jury convicted defendant of all charges. Defendant was sentenced to 221 to 275 months imprisonment for each of the three charges of first degree rape and one count of first degree sex offense, all of which are to be served concurrently. He was also sentenced to 221 to 275 months imprisonment for the remaining two counts of first degree sex offense, which are to be served consecutively. Thus, in total, defendant was sentenced to 663 to 825 months of active imprisonment.

Discussion**I. Motion to Dismiss**

[1] Defendant first argues that the trial court erred when it denied defendant’s motion to dismiss with respect to one count of first degree rape. We agree.

“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). To defeat a motion to dismiss, the State must present “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) (citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

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State v. Denny, 361 N.C. 662, 664-665, 652 S.E.2d 212, 213 (2007) (quotation marks omitted). “Generally, a jury may find a defendant guilty of an offense based solely on the testimony of one witness.” *State v. Combs*, __ N.C. App. __, __, 739 S.E.2d 584, 586, *disc. review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

In considering a motion to dismiss, the trial court must look at the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference drawn from that evidence. *Denny*, 361 N.C. at 665, 652 S.E.2d at 213. However, if the evidence is “sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

“A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . 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) (2013). Our Supreme Court has held that “intercourse” means “the slightest penetration of the sexual organ of the female by the sexual organ of the male.” *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970).

Here, M.B. explicitly testified at trial that defendant put his penis into her vagina. She told Trooper Osborne that she “didn’t know what he was doing,” but defendant said that it was “just sex.” M.B. testified that the first time defendant put his penis into her vagina, it caused her pain because she “never did it before.” When asked how many times defendant put his penis into her vagina, M.B. said “a couple,” and that it happened “more than once,” but could not remember exactly how many times it occurred.

Defendant and the State are in agreement that M.B.’s testimony supported two charges of first degree rape. Indeed, M.B. testified that defendant inserted his penis into her vagina “more than once,” and under any definition of the term, “a couple” indicates more than one. However, defendant contends that since M.B. testified that defendant inserted his penis into her vagina “a couple” of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. We agree.

The dissent relies on Detective Parker’s testimony regarding her post-interview report to reach the conclusion that the State presented substantial evidence of three counts of rape. In the report, Detective Parker indicated that defendant admitted to having intercourse with

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M.B. three times. We do not believe that Detective Parker's conclusion regarding defendant's statements amounts to substantial evidence supporting three charges of first degree rape. Defendant openly conceded that he committed sexual acts with M.B., such as rubbing his penis, hands, and a vibrating toothbrush on her vagina and performing oral sex on her. Thus, when asked by Detective Parker if he had "sex" with M.B. about three times when she lived with him in North Carolina, he answered in the affirmative. However, defendant did not admit to penetrating M.B.'s vagina with his penis. Detective Parker's testimony revealed that defendant seemed confused about what her definition of "sex" was:

Q: Do you recall Mr. Blow ever telling you in his – from his mouth that "I've had sex with [M.B.] three times"?

A: I would ask him how many times and he said "about once every three months."

...

Q: Okay. And from your calculation from that to him in the video you indicate you believe that was about three times?

A: Yes.

Q And you got him – when you said that he agreed with you.

A: Yes.

Q: He said okay. And there was a point later in the video, a little over an hour into your interview with him . . . that Mr. Blow indicated to you that – he says "you keep saying that I put my penis in her," but he tells you that that didn't happen, and you explain to him, "well, that's what sex is"?

A: Uh-huh.

Q: . . . It may be difficult, but I'm – because I'm referring to a specific point where near the end, before you go out the second time, for about a 12- to 14- minute period you and he are discussing what sex is.

A: Uh-huh.

Q Do you recall that point?

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A: I do recall.

Q: Okay. And – and at that point he is telling you again that he did not put his penis inside of her, that [it] was on her?

A: Uh-huh.

Q And that – and in fact, actually, I think you made a point of it yesterday in your direct that he kept saying “on” not “in”?

A: Yes.

Q: He said that a lot?

A: He did.

Thus, defendant’s admission to three instances of “sex” with M.B. does not equate to an admission of vaginal intercourse. He openly admitted to performing oral sex on M.B., among other sexual acts, but vehemently denied penetrating her vagina with his penis.

Furthermore, Detective Parker herself conceded on cross examination that defendant later clarified his statements and denied penetrating M.B. with his penis. Specifically, Detective Parker testified as follows:

Q You indicate in your report that Mr. Blow admitted to actually having intercourse with [M.B.]; is that right?

A: Yes.

Q: Do you recall that Mr. Blow actually told you that if there had been changes to [M.B.] that any penetration would have been accidental?

A: I recall him saying that, yes.

Q: Okay. And you recall him telling you throughout the interview that he had never put anything, I think his words were, “I never stuck anything in [M.B.]”?

A: Yes.

Q He told you he never put his finger in [M.B.]?

A: Yes.

Q: He told you that he had never put the toothbrush in [M.B.]; is that right?

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A: Yes.

Q: He told you that he never put his penis in [M.B.]?

A: Yes.

Q: And he told you that, would it be fair to say, about ten times?

A: Sure.

Given the context of Detective Parker's testimony, we do not believe that her assertion in her report that defendant admitted to having sex with M.B. three times was a reasonable account of defendant's statements. This may explain the State's passing mention of this argument in its brief on appeal.² Even giving the State every reasonable inference, defendant's admission to multiple acts of sexual abuse, but adamant denial of penetrating M.B.'s vagina with his penis, does not amount to evidence that a "reasonable mind might accept as adequate to support" the conclusion that defendant inserted his penis into M.B.'s vagina on three separate occasions. *Denny*, 361 N.C. at 664-665, 652 S.E.2d at 213.

The State therefore relies on the definition of "a couple" to argue that it presented substantial evidence of three counts of first degree rape. As the State notes, Merriam-Webster Dictionary provides several definitions for the term "couple," one of which being "an indefinite small number" that may be used interchangeably with the term "few." Additionally, defendant points us towards other sources indicating that "a couple" can also be defined as "two individuals of the same sort considered together"; "two similar things"; "two of the same species or kind, near in place or considered together"; and "a pair."³

However, we need not determine whether "a couple" means "two" or "more than two" of something to rule on this matter. Instead, we agree with defendant's contention that the ambiguous nature of the term "a

2. Specifically, the entirety of the State's argument on this issue is the following: "The State also submitted evidence of Defendant's extrajudicial admission to an interviewing office [sic] to having had sex with the child about once every three months over the nine month period she resided in his house since her move in April 2010. Or, as he acceded, according to his previous estimation, 'about three times.'"

3. Although not a controlling source of authority on this distinction, we find the following anecdote indicative of the common usage of the term "a couple." When a father asked his four-year-old daughter if he could take "a couple" of french fries from her plate, the daughter said yes. But when the father took four french fries, the little girl took back two of them and stated emphatically, "A couple means two!"

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couple” causes M.B.’s testimony to raise no more than a suspicion or conjecture that more than two instances of rape occurred. If we agree with the State that testimony of “a couple” instances of conduct amounts to substantial evidence supporting “an indefinite small number” of charges, we open the door to speculation as to how many charges can fit within those bounds. Using this logic, the State could potentially charge a defendant with four or five crimes just as it could with three, based only on an allegation that the criminal conduct happened “a couple” of times. We believe that this is the type of “speculation” and “conjecture,” *State v. Brown*, 162 N.C. App. 333, 338, 590 S.E.2d 433, 437 (2004), that cannot defeat a motion to dismiss. *See State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424 (2011) (“A motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant’s guilt.”).

Accordingly, although “the unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury,” *State v. Carter*, 198 N.C. App. 297, 306, 679 S.E.2d 457, 462 (2009), M.B.’s ambiguous characterization of the number of times defendant inserted his penis into her vagina as “a couple” was insufficient to charge defendant with three counts of first degree rape.

II. Motion to Continue

[2] Defendant next contends that the trial court erred in denying defendant’s motion to continue, as defense counsel learned of a potential defense witness on the eve of trial. We disagree.

Ordinarily, the ruling on a motion to continue is “addressed to the discretion of the trial court,” and it is not subject to review absent “a gross abuse of that discretion.” *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). However, “when a motion to continue raises a constitutional issue, the trial court’s ruling is fully reviewable on appeal.” *Id.* Even if a constitutional issue is raised, denial of a motion to continue is grounds for a new trial only if the defendant can show that the ruling was both erroneous and prejudicial. *State v. Garner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988).

“It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense.” *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). “However, no set length of time is guaranteed and whether defendant is denied due process must be

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determined under the circumstances of each case.” *Id.* Here, defendant argues that he was denied this right because his defense counsel learned of the psychological reports conducted on defendant and M.D. on the eve of trial and did not have adequate time to subpoena the psychologist to testify. At the hearing on the motion to continue, defense counsel conceded that defendant had knowledge of these proceedings due to his participation in the psychological evaluations and that defense counsel had two months to confer with defendant in order to prepare their case before trial. Based on these circumstances, *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747, we conclude that the two-month period during which defense counsel could have learned of the psychological reports had there been diligent communication with his client amounted to a “reasonable time to investigate, prepare and present his defense.” *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747. Thus, we find no error in the trial court’s denial of defendant’s motion to continue.

Additionally, even if the denial of the motion to continue was erroneous, defendant has failed to demonstrate prejudice. *See Garner*, 322 N.C. at 594, 369 S.E.2d at 596. During the cross-examination of M.B., defense counsel was allowed to introduce relevant parts of the psychologist’s written report. Specifically, defense counsel had M.B. read to the jury a portion of her psychological evaluation which stated, “[M.B.] denies being physically or sexually abused. She denies being afraid of either parent or any other relatives.” After reading this part of the report, M.B. testified that she had very little recollection of the psychological examination and did not have any recollection of denying sexual abuse by defendant. Thus, because defendant was still able to use the psychological reports at trial to impeach M.B.’s testimony, the denial of the motion to continue did not prevent defendant from “present[ing] his defense,” *Carter*, 184 N.C. App. at 712, 646 S.E.2d at 851, and he has failed to demonstrate the prejudice required to be granted a new trial.

Accordingly, we find no error in the trial court’s denial of defendant’s motion to continue.

Conclusion

For the foregoing reasons, we vacate the underlying judgment entered for the third count of first degree rape, number 11 CRS 55728. We find no error in the trial court’s denial of defendant’s motion to continue. Because the sentences entered on the three judgments for first degree rape are to be served concurrently, this decision does not alter defendant’s sentence, and we need not remand the matter to the trial court.

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JUDGMENT IN NUMBER 11 CRS 55729 VACATED.

NO ERROR AS TO REMAINING JUDGMENTS.

Judge McCULLOUGH concurs.

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

Although I concur in the Court's determination that the trial court did not err by denying Defendant's continuance motion, I am unable to join the portion of the Court's opinion that concludes that the trial court erred by denying Defendant's motion to dismiss one of the three first degree rape charges that had been lodged against him. After carefully reviewing the record in light of the applicable law, I am compelled to conclude, contrary to the result reached by my colleagues, that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict Defendant of three counts of first degree rape. As a result, although I concur in the remainder of the Court's opinion, I respectfully dissent from my colleagues' decision to vacate one of Defendant's first degree rape convictions for insufficiency of the evidence.

In the course of concluding that the State failed to present sufficient evidence to support the jury's decision to convict Defendant of three counts of rape, the Court focuses on the testimony of the alleged victim, M.B., who stated that Defendant put his penis into her vagina "a couple times." In the course of clarifying this portion of her testimony, M.B. further stated that, although Defendant penetrated her vagina with his penis on more than one occasion, she could not remember exactly how many times Defendant engaged in this unlawful conduct. Although I agree with my colleagues that this portion of M.B.'s testimony, viewed in isolation, does not suffice to support a determination that Defendant raped M.B. on three different occasions, the record also contains the testimony of Detective Dottie Parker of the Henderson County Sheriff's Office, who testified that, in the course of discussing M.B.'s allegations with her, Defendant admitted having "had sex" with M.B. about once every three months over a seven month period and that he had engaged in this conduct "about three times." Given that, "when considering a motion to dismiss, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of 'every reasonable inference to be drawn therefrom,'" *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309

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S.E.2d 232, 236 (1983)), I believe that Defendant's admission that he had "had sex" with M.B. "about three times," when taken in the light most favorable to the State, sufficiently supports the trial court's decision to allow the jury to consider the issue of Defendant's guilt of three counts of first degree rape and dissent from my colleagues' decision to the contrary.

In rejecting the analysis set out in this concurring and dissenting opinion, the Court relies upon two essential arguments. First, my colleagues appear to argue that Defendant's statement that he had "had sex" with M.B. did not constitute an admission that Defendant had vaginally penetrated her with his penis on those occasions. However, when read in context, I believe that Defendant's statements, as recounted by Detective Parker, are reasonably susceptible to the interpretation, which is consistent with ordinary parlance, that Defendant used the term "having sex" as a shorthand reference to engaging in vaginal intercourse. Secondly, my colleagues argue that various statements that Defendant made during the remainder of his conversation with Detective Parker establish that he did not acknowledge having vaginal intercourse with M.B. more than twice. Although Defendant made a number of different statements during his conversation with Detective Parker, I believe that the extent, if any, to which his subsequent comments contradicted, rather than explained, his admission to having "had sex" with M.B. on three different occasions was a question for the jury rather than a matter to be resolved by the trial court in addressing Defendant's dismissal motion. *State v. Wagoner*, 249 N.C. 637, 639, 107 S.E.2d 83, 85 (1959) (stating that "[t]he contradictory statements made by the defendant to the investigating officer do not cancel out the testimony given in the trial"). As a result, given that I am unable to agree with my colleagues that the record fails to contain sufficient evidence to support all three of Defendant's rape convictions and would uphold the denial of Defendant's dismissal motion relating to Defendant's third rape conviction, I concur in the Court's decision in part and dissent from that decision in part.

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[237 N.C. App. 170 (2014)]

STATE OF NORTH CAROLINA

v.

DERICK JOHNELLE MILES

No. COA14-458

Filed 4 November 2014

**Sexual Offenses—attempted second-degree sexual offense—
request for fellatio—violent, threatening context—force and
against victim’s will**

The trial court erred by denying defendant’s motion to dismiss an attempted second-degree sexual offense charge arising from defendant’s request for fellatio. Given the violent, threatening context, defendant’s request amounted to an attempt to engage the victim in a sexual act by force and against her will.

Appeal by defendant from judgments entered on or about 7 June 2013 by Judge Thomas H. Lock in Superior Court, Alamance County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A. by James R. Glover, for defendant-appellant.

STROUD, Judge.

Derick Johnelle Miles (“defendant”) appeals from a conviction for an attempted second-degree sexual offense. Defendant contends that insufficient evidence supports his conviction. We find no error.

I. Background

In 2010, M.G. met defendant while working at a car wash. M.G. and defendant talked on the phone and went on one date. In 2010, they had sexual relations twice. After hearing a rumor about defendant, M.G. ended their relationship.

In early 2011, M.G. and her daughter moved to an apartment in Mebane. In February 2011, while picking up her daughter from day care, M.G. saw defendant. They agreed to meet again. Defendant wanted a romantic relationship, but M.G. wanted a friendship only. Between February and May 2011, defendant and M.G. had sexual relations

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five times. In May 2011, after defendant threatened M.G., M.G. ended their relationship and attempted to cut off contact with defendant. In response, defendant called M.G.'s phone numerous times, knocked on M.G.'s door for an hour, attempted to evict M.G., and threatened to damage M.G.'s car. M.G. sometimes answered his phone calls and told him that she did not want a relationship.

Sometime after 8:00 p.m. on 3 July 2011, while M.G. was cleaning her apartment, she heard a knock on her door. M.G. looked through her peephole and saw one of her neighbors. She did not see anyone else, so she opened the door. After she opened it, defendant appeared, ran into her apartment, slammed the door behind him, and took his clothes off. Defendant had asked M.G.'s neighbor to knock on her door, so that defendant could "surprise" her. M.G. attempted to run toward the back of the apartment, but defendant grabbed her by her shoulder. Defendant threw M.G. on the couch, and M.G. cried, screamed, and yelled. M.G. tried to fight off defendant, but defendant overpowered her. Defendant took M.G.'s clothes off and raped her. M.G. tried to escape through the front door, but defendant grabbed M.G. by her hair, ripping out some of her hair extensions, and pulled her back into the apartment. Defendant then choked M.G. with his hand, impeding M.G.'s ability to breathe. Defendant flipped M.G. upside down, yelled at her, grabbed a screwdriver, and jabbed it at her in a threatening manner. M.G. told defendant that she needed to pick up her daughter. Defendant demanded that M.G. first drive him to his apartment in Burlington.

After M.G. drove defendant to his apartment, defendant grabbed her car keys. Defendant grabbed M.G. by her waist and dragged her out of her car and into his apartment. Defendant yelled and slapped M.G.'s face so hard that her braces cut the inside of her mouth. Defendant then acted as if he would let her leave and allowed her to go back to her car. But then defendant grabbed her and dragged her back into his apartment. Defendant grabbed a pointed kitchen knife and tried to hand it to M.G. He told her that she would escape only if she used it against him. She refused to take it. Defendant then asked her to perform fellatio and showed her his penis. M.G. begged him to not make her do it. Defendant then took M.G.'s clothes off and attempted to perform anal intercourse on her. After M.G. screamed and jumped in pain, defendant turned M.G. over and raped her. After unsuccessfully trying to fight off defendant, M.G. decided to feign love for defendant in order to get him to stop his abuse. Defendant gave M.G. some of his clothes and let her leave around 1:00 a.m.

On or about 13 February 2012, a grand jury indicted defendant for two counts of first-degree rape, two counts of first-degree kidnapping,

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first-degree burglary, assault by strangulation, a first-degree sexual offense, and an attempted first-degree sexual offense. At the conclusion of all the evidence at trial, defendant moved to dismiss all the charges. The trial court denied the motion. On or about 7 June 2013, a jury found defendant guilty of second-degree rape, non-felonious breaking or entering, and two counts of attempted second-degree sexual offense and not guilty of all other charges. One of the attempted second-degree sexual offense convictions arose from defendant's request for fellatio. The trial court sentenced defendant to 146 to 236 months' imprisonment for second-degree rape, 128 to 214 months' imprisonment for an attempted second-degree sexual offense, and 128 to 214 months' imprisonment for an attempted second-degree sexual offense and non-felonious breaking or entering. The sentences were to be served consecutively. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

A. Standard of Review

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012).

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B. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss the attempted second-degree sexual offense charge arising from defendant's request for fellatio. A person is guilty of this offense if the person engages in a sexual act with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5(a)(1) (2011). Fellatio is a sexual act within the meaning of the statute. *State v. Jacobs*, 128 N.C. App. 559, 563, 495 S.E.2d 757, 760, *disc. rev. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). The force required need not be physical force; fear, fright, or coercion may take the place of force. *Id.*, 495 S.E.2d at 760. "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent." *State v. Locklear*, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981).

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Henderson*, 182 N.C. App. 406, 412, 642 S.E.2d 509, 513 (2007). "[W]henever the design of a person to commit a crime is clearly shown, *slight acts* in furtherance of the design will constitute an attempt." *Id.* at 413, 642 S.E.2d at 514.

Defendant contends that requesting a sexual act from an adult cannot constitute an attempted sexual offense, because such a request does not show an intention to commit a sexual act "[b]y force and against the will of the other person." See N.C. Gen. Stat. § 14-27.5(a)(1). In this way, this case differs from cases involving attempted statutory sex offenses where a defendant requests a sexual act from a victim who legally cannot give consent. See, e.g., *State v. Sines*, 158 N.C. App. 79, 579 S.E.2d 895, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003); *Henderson*, 182 N.C. App. 406, 642 S.E.2d 509. Defendant is correct that requesting fellatio from an adult who is legally capable of consent in a non-threatening manner generally would not constitute an attempted sexual offense. But where the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that

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this request is accompanied by a threat and a show of force and thus amounts to an attempt. Had M.G. complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to M.G. amounted to an attempt to engage M.G. in a sexual act by force and against her will. *See* N.C. Gen. Stat. § 14-27.5(a)(1); *Jacobs*, 128 N.C. App. at 563, 495 S.E.2d at 760; *Locklear*, 304 N.C. at 540, 284 S.E.2d at 503. We thus hold that sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense arising from defendant's request for fellatio.

III. Conclusion

Because sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense, we hold that the trial court committed no error.

NO ERROR.

Chief Judge McGEE and Judge GEER concur.

STATE OF NORTH CAROLINA
v.
MATTHEW SMITH SHEPLEY

No. COA14-390

Filed 4 November 2014

1. Appeal and Error—appealability—guilty plea—motion to suppress—motion to dismiss

Based upon defendant's guilty plea in a driving while impaired case, defendant had a right to appeal only the trial court's denial of his motion to suppress and not the denial of his motion to dismiss the charge.

2. Motor Vehicles—driving while impaired—blood test—no right to witness—refusal of breath test

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the results of a blood test. Because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol

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level, he did not have a right under N.C.G.S. § 20-16.2 to have a witness present.

3. Search and Seizure—motion to dismiss—traffic stop—probable cause—operating moped without proper helmet—reasonable suspicion

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the evidence based on an alleged illegal traffic stop. The deputy observed defendant operating his moped without wearing a proper helmet, and a law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation. Thus, the deputy's stop of defendant was supported by reasonable suspicion.

Appeal by defendant from judgment entered 9 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper by Assistant Attorney General Joseph L. Hyde for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STEELMAN, Judge.

The law enforcement officer's stop of defendant was justified by reasonable suspicion. Where the officer obtained a blood sample from defendant pursuant to a warrant, after defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under N.C. Gen. Stat. § 20-139.1(a). The procedures for obtaining the blood sample did not have to comply with the requirements of N.C. Gen. Stat. § 20-16.2, and defendant did not have a right to have a witness present. Because defendant pled guilty, he did not have a right to appeal the denial of his motions to dismiss the charges.

I. Factual and Procedural Background

Just before midnight on 22 November 2011, Deputy Dean Hannah was on patrol in Buncombe County, North Carolina, and saw Matthew Shepley (defendant) driving his moped on Smokey Park Highway. Defendant was wearing a bicycle helmet instead of a DOT approved helmet, and his moped did not have a taillight. After observing the helmet and the absence of a taillight, Officer Hannah illuminated his blue lights

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to initiate a traffic stop. Defendant initially sped up but stopped after traveling about 220 yards. When Officer Hannah approached defendant, he “immediately smelled a strong odor of alcoholic beverage on his breath.”

Based on his observations during the stop, Officer Hannah arrested defendant for driving while impaired and failing to wear a DOT approved helmet, and took him to the Buncombe County Detention Center. Defendant requested that a witness be present to observe the breath testing procedures. When the witness arrived, defendant refused to give a breath sample. The law enforcement officer escorted the witness out of the room, obtained a search warrant, and a blood sample was drawn from defendant outside the presence of the witness. The blood sample was sent to the State Bureau of Investigation where, after a substantial delay, it was determined that defendant had a .14 blood alcohol level.

On 14 May 2013 defendant was convicted in district court of driving while impaired and appealed to superior court. On 6 June 2013, defendant filed a motion to suppress the evidence against him, asserting that Deputy Hannah’s stop of defendant violated his rights under the 4th Amendment because the stop was not supported by reasonable suspicion of criminal activity. Defendant also filed a motion to dismiss the charge based upon an alleged deprivation of his U.S. constitutional right to a speedy trial. On 8 July 2013 defendant filed a motion to suppress the results of the blood test and dismiss the charge against him because his witness had not been allowed to observe the drawing of his blood pursuant to the search warrant. The trial court denied defendant’s motions in orders entered 12 July 2013. On 5 August 2013 defendant filed a motion asking the trial court to reconsider its ruling on the issue of whether Deputy Hannah’s stop of defendant was supported by reasonable suspicion. The motion was based upon the assertion that at the original hearing on defendant’s suppression motion Deputy Hannah testified that he had taken defendant’s helmet into evidence, but after the hearing Deputy Hannah determined that he had not confiscated the helmet. Following a hearing, the trial court orally denied defendant’s motion. After defendant’s motions were denied, he filed written notice of his intent to appeal the denial of his motions to suppress and dismiss.

On 9 September 2013 defendant pled guilty to driving while impaired, and reserved his right to appeal the denial of his suppression motions. The trial court imposed level two punishment, sentenced defendant to a term of twelve months, suspended the sentence, and placed him on probation for 18 months.

Defendant appeals.

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II. Legal AnalysisA. Scope of Review

[1] On appeal defendant argues that the trial court erred by denying his suppression motion and his motions to dismiss the charge against him. “‘In North Carolina, a defendant’s right to appeal in a criminal proceeding is purely a creation of state statute.’ A defendant who pleads guilty has a right of appeal limited to the following: . . . Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)[(2013)], 15A-1444(e) [(2013)][.]” *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)). “Here, upon defendant’s guilty plea, defendant has a right to appeal only the trial court’s denial of his motion to suppress. . . . Defendant does not have a right to appeal the trial court’s denial of his motion to dismiss[.]” *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008). Therefore, we do not address defendant’s arguments pertaining to the denial of his motions to dismiss.

B. Suppression Motion1. Right to Witness at Blood Drawing

[2] In his first argument, defendant contends that the trial court erred by denying his motion to suppress the results of the blood test because he “was denied his statutory and constitutional right to have a witness present for the blood draw.” We disagree.

N.C. Gen. Stat. § 20-16.2 provides in relevant part that:

(a) Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. . . . Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst . . . or a law enforcement officer . . . who shall inform the person orally and also give the person a notice in writing that:

. . .

(6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives[.]. . .

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(a1) Under this section, an “implied-consent offense” is an offense involving impaired driving, a violation of G.S. 20-141.4(a2), or an alcohol-related offense[.] . . .

. . .

(c) A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

“During the administration of a breathalyzer test, the person being tested has the right to ‘call an attorney and select a witness to view for him the testing procedures.’ This statutory right may be waived by the defendant, but absent waiver, denial of this right requires suppression of the results of the breathalyzer test.” *State v. Myers* 118 N.C. App. 452, 454, 455 S.E.2d 492, 493 (1995) (quoting N.C. Gen. Stat. § N.C.G.S. 20-16.2(a)(6), and citing *McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495, 497, 386 S.E.2d 73, 75 (1989), and *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (1973) (other citation omitted). However, as stated above, if a defendant refuses to submit to the test designated by the law enforcement officer, no blood alcohol tests “may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.” The plain language of the statute limits its application to situations in which a defendant consents to take a breathalyzer or other test designated by the officer.

N.C. Gen. Stat. § 20-139.1(a) addresses the admissibility of chemical analyses of blood alcohol other than those performed pursuant to N.C. Gen. Stat. § 20-16.2, and provides in relevant part that “[i]n any implied-consent offense under G.S. 20-16.2, a person’s alcohol concentration . . . as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person’s alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.”

The relationship between N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1 has been addressed in several cases. In *State v. Drdak*, 101 N.C. App. 659, 400 S.E.2d 773 (1991), the defendant was injured in a

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motor vehicle accident and taken to the hospital, where his blood was tested for alcohol without first informing him of his right to consent or refuse the blood test or of his rights under N.C. Gen. Stat. § 20-16.2. On appeal we held that the results of the blood test were inadmissible, because the blood test was not performed in accordance with N.C. Gen. Stat. § 20-16.2. The North Carolina Supreme Court reversed:

The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: "This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests." This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1. . . . [I]t is the holding of this Court that the obtaining of the blood alcohol test results in this case was not controlled by N.C.G.S. § 20-16.2(a) and did not have to comply with that statute because the test in question is "other competent evidence" as allowed by N.C.G.S. § 20-139.1.

State v. Drdak, 330 N.C. 587, 592-93, 411 S.E.2d 604, 607-08 (1992) (emphasis added). We hold that the argument advanced by defendant in the instant case has been rejected by our Supreme Court. Similarly, in *State v. Davis*, 142 N.C. App. 81, 542 S.E.2d 236 (2001), after the defendant refused to consent to a breath test of his blood alcohol level, the law enforcement officer obtained a search warrant and took urine and blood samples from the defendant. On appeal, we upheld the admission of the results of these tests, citing *Drdak*:

Here the defendant was given the opportunity to voluntarily submit to the testing. He refused, and the officer obtained a search warrant based on probable cause. We hold that testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1. In a similar case our Supreme Court . . . [held that] "it is not necessary for the admission of such 'other competent evidence' that it be obtained in accordance with N.C.G.S. § 20-16.2."

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Davis, 142 N.C. App. at 86, 542 S.E.2d at 239 (quoting *Drdak*). Based on the language of N.C. Gen. Stat. § 20-16.2 and 20-139.1, as well as the *Drdak* and *Davis* opinions, we conclude that after defendant refused a breath test of his blood alcohol level, he was not entitled to have a witness present at the blood test performed pursuant to a search warrant.

In arguing for a contrary result, defendant asserts that *Davis* is not controlling precedent because, although it held that evidence introduced under N.C. Gen. Stat. § 20-139.1(a) did not have to comply with the strictures of N.C. Gen. Stat. § 20-16.2, it did not enumerate the specific provisions of the statute. We disagree, given that its quote from *Drdak*, stating that when evidence is admitted under N.C. Gen. Stat. § 20-139.1(a) “it is not necessary for the admission of such ‘other competent evidence’ that it be obtained in accordance with N.C.G.S. § 20-16.2” would necessarily include the right to have a witness present. Moreover, defendant does not acknowledge *Drdak*, in which our Supreme Court expressly held that the provisions of N.C. Gen. Stat. § 20-16.2 need not be followed if evidence of a defendant’s blood alcohol is admitted under N.C. Gen. Stat. § 20-139.1(a) as “other competent evidence.” We hold that, because defendant’s blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, he did not have a right under N.C. Gen. Stat. § 20-16.2 to have a witness present.

2. Constitutionality of Stop of Defendant

[3] In his second argument, defendant contends that the trial court erred by denying his motion to suppress because Deputy Hannah “did not have legal grounds to initiate” a traffic stop of defendant. We do not agree.

“The Fourth Amendment protects individuals ‘against unreasonable searches and seizures.’ U.S. Const. amend. IV. Traffic stops are permitted under the Fourth Amendment if the officer has ‘reasonable suspicion’ to believe that a traffic law has been broken.” *State v. Hopper*, 205 N.C. App. 175, 177, 695 S.E.2d 801, 803 (2010) (quoting *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (internal quotation omitted). Reasonable suspicion exists if “[t]he stop . . . [is] based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer’s] experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation omitted). Reasonable suspicion requires a “minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch[.]’” *State v. Steen*, 352 N.C. 227,

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239, 536 S.E.2d 1, 8 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1, 10 (1989).

N.C. Gen. Stat. § 20-140.4(a)(2) provides in relevant part that “[n]o person shall operate a . . . moped upon a highway . . . [u]nless the operator and all passengers thereon wear on their heads, with a retention strap properly secured, safety helmets of a type that [comply] with Federal Motor Vehicle Safety Standard (FMVSS) 218.” Violation of this statute is an infraction. N.C. Gen. Stat. § 20-140.4(c). Deputy Hannah testified that he observed defendant operating his moped without wearing a proper helmet. This observation clearly provided the officer with a reasonable suspicion that defendant had committed an infraction. Under N.C. Gen. Stat. § 15A-1113(b), a “law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.” Deputy Hannah’s stop of defendant was supported by reasonable suspicion, and the trial court did not err by denying defendant’s motion to suppress evidence.

Defendant concedes that Deputy Hannah testified to seeing defendant operating his moped with an improper helmet, but argues that because the officer could not confirm “whether or not the helmet was DOT approved until after he approached” defendant, the officer’s belief that defendant’s helmet was improper “cannot support reasonable suspicion[.]” However, our Supreme Court has held that “reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.” *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. As a result, we are not persuaded by defendant’s argument.

For the reasons discussed above, we conclude that the trial court did not err in denying defendant’s motion to suppress and that its order should be

AFFIRMED.

Judges GEER and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 NOVEMBER 2014)

BEDIZ v. CAPITAL FACILITIES FOUND., INC. No. 14-421	Guilford (13CVS10111)	Affirmed
HENDERSON v. GARCIA MOTORRAD, LLC No. 14-466	Wake (13CVS5714)	Dismissed
IN RE A.C.H. No. 14-239	McDowell (10JT74)	Affirmed
IN RE A.K.D. No. 14-506	Dare (11JT75) (11JT76)	Affirmed
IN RE D.D.A. No. 14-366	Craven (10JT105)	Vacated
IN RE K.A. No. 14-518	Mecklenburg (13JA253-254)	Reversed and Remanded
IN RE K.C. No. 14-410	Pitt (12JT90)	Affirmed
IN RE M.M.V. No. 14-545	Mecklenburg (04JT1210-1211)	Affirmed
IN RE Q.T.F. No. 14-550	Guilford (12JT599)	Affirmed
LSREF2 ISLAND HOLDINGS, LTD., INC. v. PORRATA No. 14-316	Mecklenburg (13CVS16679)	DISMISSED IN PART; REVERSED IN PART
RREF ST ACQUISITIONS, LLC v. AGAPION No. 14-499	Guilford (13CVS5201)	Affirmed
SAFRON v. COUNCIL No. 14-288	Orange (12CVD593)	No Error
SPENCE v. WILLIS No. 14-399	Harnett (14CVD110)	Dismissed

STATE v. JACKSON
No. 14-424

Wake
(11CRS208650)
(11CRS727961)

No prejudicial error;
no plain error

STATE v. SMITH
No. 14-384

Craven
(11CRS54777)
(13CRS132)

Reversed

BARNES v. SCULL

[237 N.C. App. 184 (2014)]

CARSON D. BARNES AND WIFE, ROMELDA E. BARNES, PLAINTIFFS-APPELLANTS

v.

JUDITH SCULL AND HUSBAND, DAVID SCULL; BENJAMIN E. THOMPSON, JR. AND WIFE,
 SANDRA P. THOMPSON; ROGER THOMPSON BASS AND WIFE, PHYLLIS KELLAR BASS;
 MARY LYNN THOMPSON WHITLEY AND HUSBAND, WILLIAM G. WHITLEY, III;
 ROBIN BESS PRIDGEN MERCER, UNMARRIED; JONATHAN PRIDGEN AND WIFE,
 SHARON PRIDGEN; AND ANY UNKNOWN HEIRS OF W. ROBIN PRIDGEN, DECEASED,
 DEFENDANTS-APPELLEES

No. COA14-264

Filed 18 November 2014

Wills—plain language of statute—rules of testamentary construction—class determined upon testator’s death

The trial court did not err in a wills case by granting summary judgment in favor of defendants. According to the plain language of the instrument and prevailing rules of testamentary construction, the class of testator’s “heirs” as referenced in the portion of the third codicil as issue was determined upon testator’s death.

Appeal by Plaintiffs from judgment entered 17 October 2013 by Judge Walter H. Godwin, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 26 August 2014.

Narron & Holford, P.A., by I. Joe Ivey, for Plaintiffs-Appellants.

Broughton Wilkins Sugg & Thompson, PLLC, by Benjamin E. Thompson, III and Blair K. Beddow, for Defendants-Appellees Scull, Thompson, Bass and Whitley.

Farris & Farris, P.A., by Robert A. Farris, Jr. and Rhyan A. Breen; and King & King, LLP, by W. Lewis King, for Defendants-Appellees Mercer and Pridgen.

McGEE, Chief Judge.

John S. Thompson (“Testator”) executed his will in 1944. Testator also executed codicils that replaced certain terms of his will. The only codicil relevant to this appeal is the third codicil that was executed in 1955 (along with Testator’s will, “the will”). Pursuant to the will, Testator devised to his wife, Maude Thompson (“Maude”), a life estate in real property consisting of 146 acres (“the property”). Upon the death of Maude or Testator, whichever death occurred last, the property was to

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be placed in a trust (“the trust”). The proceeds of the trust were to provide support to one of Testator’s sons, Hubert E. Thompson (“Hubert”), for Hubert’s life. According to the will, upon Hubert’s death, the property would go to Hubert’s lineal descendants, if any. If Hubert died without lineal descendants, the property was to “revert to [Testator’s] heirs.”

Testator died in 1960, and was survived by Maude and six children: Hubert, W.C. Thompson (“W.C.”), Annie T. Weigel (“Annie”), B.E. Thompson (“B.E.”), J.W. Thompson (“J.W.”), and James G. Thompson (“James”). Maude died in 1969, at which time the trust went into effect, with the property as the corpus, for the benefit of Hubert. Testator’s descendants relevant to the resolution of this appeal are Hubert and the descendants of James.

James died in 1972. James was survived by his son, James G. Thompson, Jr. (“James Jr.”) and his daughter, Marjorie T. Pridgen (“Marjorie”). James died testate, and left whatever interest he had in the property to Marjorie and her husband, W. Robin Pridgen (“Robin”), a one-half interest to each. James did not leave any interest he had in the property to James Jr. James Jr. died on 24 April 1980, approximately three months before Hubert, who died on 26 July 1980. James Jr. was survived by three sons: John S. Thompson (“John”), James Guy Thompson, III (“James III”), and Gregory A. Thompson (“Gregory”). James III purported to convey his interest in the property to Gregory by deed executed 30 January 1998. John purported to convey his interest in the property to Carson B. Barnes (together with his wife, Romelda E. Barnes, “Plaintiffs”) by deed executed 2 May 2000. Gregory purported to convey his interest in the property to Carson B. Barnes by deed executed 10 May 2000.

Plaintiffs initiated this action by complaint filed 26 June 2012, and requested a declaratory judgment establishing the legitimacy of their purported interest in the property. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen filed their answer on 27 August 2012, contending that Plaintiffs had “received deeds from persons who had no interest in the property, [have] no claim whatsoever to any of the property and [have] no standing to bring this action.” They requested that the trial court “declare the ownership of the subject property” to reflect the validity of that portion of James’ will that conveyed ten percent interest in the property to Marjorie and ten percent interest to Robin, with no interest in the property having gone to James Jr.¹

1. James Jr.’s will is not included in the record, but the 17 October 2013 judgment indicates this division. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and

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Defendants Judith Scull, David Scull, Benjamin E. Thompson Jr., Sandra P. Thompson, Roger Thompson Bass and Phyllis Kellar Bass (together with Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen, “Defendants”) answered Plaintiffs’ complaint on 10 September 2012. These Defendants also contended that the purported deeds from John and Gregory conveyed nothing to Plaintiffs, and requested that Plaintiffs “have and recover nothing of these answering [D]efendants[.]”

Plaintiffs moved for summary judgment on 16 September 2013. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen moved for summary judgment on 19 September 2013. The trial court heard this matter 30 September 2013, and ruled that Plaintiffs had no ownership interest in and to the subject property, denied Plaintiffs’ motion for summary judgment, and granted the motion for summary judgment of Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen. Plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting summary judgment in favor of Defendants. We disagree.

The contested part of the will is a portion of the third codicil to the will, executed by Testator on 23 September 1955. There is no dispute concerning the validity of the third codicil itself. The relevant portion states:

At the death of my wife, I give and devise the above tract of land, containing 146 acres, more or less, to my sons, B.E. Thompson and W.C. Thompson, Trustees, not for their own use and benefit however but in trust to rent out the same or cause the same to be farmed in a husband-like manner, collect the rents, pay the taxes, keep the buildings in reasonable repair and pay the balance annually to my son, Hubert E. Thompson, for and during the term of his natural life and no longer, said trust to terminate upon the death of said Hubert E. Thompson.

At the death of my said son, Hubert E. Thompson, I give and devise the said tract of land to his lineal child or children, in fee simple, representatives of lineal deceased children to stand in the place of and take the share their parent would have taken if living. In the event that my said son shall die without leaving any lineal child

Sharon Pridgen state in their brief that the property was not mentioned specifically in James Jr.’s will, but passed through the residuary clause of that will.

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or representatives of a lineal deceased child, then the said tract of land shall *revert to my heirs*. (Emphasis added).

Plaintiffs agree with the trial court that this language created a contingent remainder interest in Testator's children, excluding Hubert, with the contingencies being the death of Maude, and Hubert's death, without Hubert having surviving lineal descendants.

"A vested remainder is an estate which is deprived of the right of immediate possession by the existence of another estate created by the same instrument."

....

"A contingent remainder is merely the possibility or prospect of an estate which exists when what would otherwise be a vested remainder is subject to a condition precedent or as created in favor of an uncertain person or persons."

Mercer v. Downs, 191 N.C. 203, 205, 131 S.E. 575, 576 (1926) (citations omitted). Because Maude died in 1969 and Hubert died without lineal descendants in 1980, the contingencies were satisfied and, pursuant to the will, the property "reverted" to Testator's "heirs" upon Hubert's death.

The dispositive issue on appeal is at what time the class of Testator's "heirs" as referenced in the above portion of the third codicil was determined — upon Testator's death or upon Hubert's death. If the class was set upon Testator's death, James was in possession of a contingent remainder at his death in 1972, which contingent remainder he devised to his daughter Marjorie and her husband Robin, to the exclusion of his son, James Jr. Assuming the validity of this scenario, upon Hubert's death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.'s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.'s death, and Gregory and John III had no interest to convey to Plaintiffs in 2000.

However, if the class was not determined until Hubert's death, Gregory, James III, and John would have acquired a shared ten percent interest in the property immediately upon Hubert's death, because their father, James Jr., predeceased Hubert. Marjorie would have acquired the other ten percent of the original twenty percent interest apportioned to the James line of Testator's descendants. Assuming the validity of this scenario, Gregory, James III, and John each possessed one-third of a ten percent fee simple absolute interest in the property following Hubert's death, and were free to convey their shares to Plaintiffs.

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Our Supreme Court has addressed the issue before us on multiple occasions.

“It is undoubtedly the general rule of testamentary construction that, in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, an estate limited by way of remainder to a class described as the testator’s ‘heirs,’ ‘lawful heirs,’ or by similar words descriptive of those persons who would take his estate under the canons of descent, had he died intestate, vests immediately upon the death of the testator, and at which time the members of said class are to be ascertained and determined.”

Mercer, 191 N.C. at 205, 131 S.E. at 576 (citation omitted).

However, this rule is subject to the controlling rule of interpretation that the intent of the testator is paramount, provided, of course, that it does not conflict with the settled rules of law. It will be observed that th[e] devise [in *Mercer*] provides that at the death of the life tenant the property should go to “our surviving children or their heirs.” This raises the question as to whether or not the remaindermen are to be ascertained as of the death of the testator or as of the death of the life tenant[.]

Id. Our Supreme Court in *Mercer* held that, after examining the language of the will, “the remaindermen could not be ascertained with certainty until the termination of the life estate.” *Id.* at 207, 131 S.E. at 577. However, in *Mercer* the language, “our *surviving children or their heirs*” weighed in favor of this determination, as it could not be determined whether any of “their heirs” would collect unless and until it was ascertained whether any of the testator’s children predeceased the life tenant. In the present case, Testator simply stated that upon the appropriate conditions, the property would “revert to my heirs.”

Testator’s will was set up so that none of his children would likely inherit any real property in fee simple upon Testator’s death. The entirety of Testator’s real property was devised to his children and his wife as estates for life. At the end of the estate devised to each of Testator’s children, the remainders of each of these estates were to go to testator’s grandchildren, or their lineal descendants, in fee simple. Only upon one of Testator’s children dying without lineal descendants would the real property constituting that child’s estate “revert” to Testator’s “heirs.”

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Testator appears to have structured the will to keep all of his property within his family for at least another generation.

Our Supreme Court has decided in different ways the issue of when a class of “heirs” is set. In *Lawson v. Lawson*, 267 N.C. 643, 148 S.E.2d 546 (1966), relied upon by Plaintiffs, a testator devised to his daughter, Opal Lawson Long (“Opal”), certain of his real property “for and during the term of her natural life, and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of my daughter, Opal Lawson Long, in fee simple.” *Id.* at 643, 148 S.E.2d at 547. When the testator died, Opal had six whole (full-blooded) siblings. When Opal died, two of these siblings had pre-deceased her, but both had surviving children. *Id.* at 643-44, 148 S.E.2d at 547. The children of the deceased siblings argued that Opal’s six whole siblings acquired a remainder in the real property at the testator’s death and, therefore, the deceased siblings’ remainder interest had passed to their children, who then received fee simple interests in the property upon the death of the life tenant. *Id.* at 644, 148 S.E.2d at 547. Our Supreme Court held:

Clearly the interests of the whole brothers and sisters was contingent and could not vest before the death of the life tenant [Opal], for not until then could it be determined that she would leave no issue surviving. “Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted.” Respondents’ parents, having predeceased the life tenant, could not answer the roll call at her death.

Id. at 645, 148 S.E.2d at 548. Our Supreme Court affirmed the ruling of the trial court, which had ruled that the real property passed at Opal’s death only to those “whole brothers and sisters” then living, and that nothing passed to the children or descendants of the whole siblings who pre-deceased Opal. *Id.*

“A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will.” N.C. Gen. Stat. § 41-6 (2013); *see also Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d 772 (1950). In the case before us, if we interpret Testator’s use of the word “heirs” to mean his children, and strictly apply the logic in *Lawson*, then only those children of Testator who survived Hubert acquired fee simple interests in the property. James’ and B.E.’s contingent remainders would

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have terminated when they pre-deceased Hubert. This would mean no descendant nor devisee of either James or B.E. would have any interest in the property. Plaintiffs and several named Defendants would own no portion of the property.

Defendants cite *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976), as supportive of their position. The relevant testamentary language in *White* is as follows:

“I [Harriet M. Stokes] . . . devise . . . to my son, Samuel Stokes . . . land owned by me . . . to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body, then . . . I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs.”

Id. at 76, 224 S.E.2d at 618. The testatrix died in 1925. She was survived by her son, Sam and his wife, Emma, and her two daughters, Hattie and Cora. Sam died without issue in 1970, Hattie died testate in 1961, and Cora died intestate in 1971, a few months before the death of Emma, also in 1971. *Id.* at 76, 224 S.E.2d at 619. Our Supreme Court held

that when testatrix devised the contingent remainder “to my heirs” she intended to refer to all who at her death would be her legal heirs in the technical sense with the exception of her son, Sam, for whom and for whose family she had made other provisions [by giving him and Emma life estates]. Thus when [testatrix] died the contingent remainder passed in equal shares to her two daughters, Hattie and Cora. At Hattie White’s death her one-half interest was devised to her three children, Sam, Mary and Everette. Everette’s share at his death was inherited by his widow, Iva White. . . . Cora Lynch’s one-half interest was inherited at her death by her two children, George Lynch and Lucille Lynch Thompson, the other plaintiffs herein, who are each entitled to a one-fourth undivided interest in the land. The other defendant, Billy Roy Alexander, the only heir of Sam Stokes’ widow, Emma, is not entitled to any interest in the land.

Id. at 85-86, 224 S.E.2d at 624.

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In the present case, if we follow *White*, the roll call of “heirs” was set at Testator’s death. *Id.* at 78-79, 224 S.E.2d at 620; *see also Rawls v. Rideout*, 74 N.C. App. 368, 375, 328 S.E.2d 783, 788 (1985) (“The class of the testatrix[’s] heirs can be ascertained at her death. Thus, we need not take the *Bass* Court’s approach and postpone the class closing until the life tenant’s death.”). In addition, the contingent remainders acquired in the property by Testator’s children were “assignable and transmissible.” *White*, 290 N.C. at 78, 224 S.E.2d at 620 (citation omitted). In the present case, pursuant to the rule stated in *White*, all Testator’s children, other than Hubert, including James and B.E., obtained a contingent remainder in twenty percent of the property at Testator’s death. James’ contingent remainder passed through his will to Marjorie and her husband Robin, to the exclusion of James’ son James Jr. Upon Hubert’s death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.’s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.’s death, and Gregory and John had no interest to convey to Plaintiffs in 2000.

We hold that *White* controls in this instance and, to the extent, if any, that *White* and *Lawson* are irreconcilable, *White*, as the latest pronouncement by our Supreme Court, controls. However: “This rule of construction is to be followed ‘in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances.’” *White*, 290 N.C. at 79, 224 S.E.2d at 620 (citation omitted). Therefore, if the will contains sufficient evidence that it was Testator’s intent that the class should be determined at Hubert’s death, Testator’s intent would control. Though there is some evidence in the will that would support an argument that Testator intended for the class to be set upon Hubert’s death and not Testator’s own, namely Testator’s apparent desire to maintain family ownership of the property for as long as possible, we do not find this evidence strong enough to overcome the plain language of the instrument and the prevailing rules of testamentary construction. For these reasons we affirm.

Affirmed.

Judges BRYANT and STROUD concur.

BYRD v. FRANKLIN CNTY.

[237 N.C. App. 192 (2014)]

AARON BYRD AND ERIC COOMBS, PETITIONERS

v.

FRANKLIN COUNTY, NORTH CAROLINA, RESPONDENT

No. COA13-1457

Filed 18 November 2014

1. Appeal and Error—appealability—jurisdiction—timeliness of appeal—waiver

The Court of Appeals had jurisdiction in an appeal from a determination that petitioners could not operate a shooting range on their property without a special use permit based on petitioners' timely appeal from the County's December letters. Further, where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not waive this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer's interpretation of the law.

2. Zoning—unified development ordinance—shooting range

The superior court did not err by affirming the County's order that petitioners cease and desist from operating a shooting range on their property. Although the superior court erred in its interpretation of the Unified Development Ordinance (UDO) by concluding that the shooting range fell within the Open Air Games category on the Table, the Table did in fact prohibit shooting ranges anywhere in the County by providing that uses not specifically listed in the Table were prohibited. Thus, the portion of the trial court's order determining that the UDO required petitioners to obtain a special use permit to operate their shooting range was reversed, even though the ultimate result reached by the trial court was affirmed on different grounds.

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

Appeal by Petitioners from order entered 24 September 2013 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 13 August 2014.

Currin & Currin, by Robin T. Currin, George B. Currin, and Catherine A. Hofmann, for petitioners-appellants.

BYRD v. FRANKLIN CNTY.

[237 N.C. App. 192 (2014)]

Davis Sturges and Tomlinson, by Aubrey S. Tomlinson, Jr., for respondent-appellee.

DILLON, Judge.

Aaron Byrd and Eric Coombs (“Petitioners”) appeal from a superior court’s order affirming a decision by Franklin County, made by its Board of Adjustment, determining that Petitioners could not operate a shooting range on their property without a special use permit, requiring approval by the County’s Board of Commissioners. For the foregoing reasons, we affirm, in part, and reverse, in part, the superior court’s order.

I. Background

This appeal involves the application of the Franklin County Unified Development Ordinance (“UDO”) to a shooting range. Pursuant to the UDO, property in the County is divided into zoning districts. The UDO contains a Table of Permitted Uses (the “Table”) and identifies in which zoning districts each use set out in the list may be allowed. For each use listed, the Table provides (1) in which zoning districts said use is allowed as a matter of right, without any further approval by the County; (2) in which zoning districts said use is a “conditional” use, requiring approval by the County Board of Adjustment; (3) in which zoning districts said use is a “special” use, requiring approval by the County Board of Commissioners; and (4) in which zoning districts said use is not allowed at all. The UDO further provides that any “[u]ses not specifically listed in the Table [] are prohibited.” The Table does not specifically list shooting ranges or gun ranges.

Petitioners desire to operate a shooting range on a tract of land they own in Franklin County (the “Property”). In the Spring of 2012, Petitioners contacted County officials to determine whether the UDO regulated their proposed shooting range.

Initially, the County Planning Director verbally informed Petitioners that the UDO did not allow a shooting range to operate in the County since this use was not listed in the UDO Table. The Planning Director recommended that Petitioners make a request to the County Board of Commissioners to amend the UDO to include shooting ranges as a use in the Table.

Subsequently, however, sometime prior to November 2012, the Planning Director had another conversation with Petitioners in which he informed them that their proposed shooting range *did* fall within a

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use category listed in the Table, namely the category entitled “Grounds and Facilities for Open Air Games and Sporting Events” (hereinafter “Open Air Games”). He informed Petitioners that an Open Air Game was considered a special use in the Property’s zoning district, and, therefore, Petitioners would need to apply to the Board of Commissioners for a special use permit to operate a shooting range on the Property.

Based on this subsequent conversation, Petitioners applied for a special use permit; however, on 3 December 2012, Petitioners’ application was denied by the Board of Commissioners.¹

Also, in December 2012, Petitioners received two written communications (the “December Letters”) from a County code enforcement officer. The first communication, dated 9 December 2012, informed Petitioners that “in order to conduct the proposed shooting club a Special Use Permit must be obtained” and ordered Petitioners to “cease and desist any and all activity associated with a shooting range” on the Property. The second communication, dated 11 December 2012, stated that it was a “Final Notice of Violation” and ordered Petitioners to “halt all activities of the proposed shooting range immediately” or face “civil penalties,” “legal action seeking injunction[,] and/or possible criminal action.”

On 2 January 2013, Petitioners appealed from the December Letters to the Board of Adjustment. After conducting a hearing on the matter, the Board of Adjustment upheld the code enforcement officer’s decisions in the December Letters, and ordered Petitioners to cease and desist all activities regarding the shooting range. The Board of Adjustment’s order was affirmed by the Franklin County Superior Court by order entered on 24 September 2013. Petitioners filed written notice of appeal to this Court on 8 October 2013.

II. Jurisdiction

[1] As a preliminary matter, the County contends that this Court need not consider the merits of Petitioners’ appeal, arguing that Petitioners failed to file their original appeal to the Board of Adjustment within the time allowed under the UDO. Section 24-1 of the UDO states that “[a]n appeal from any final order or decision of the administrator may be taken to the board of adjustment by any person aggrieved” but that the appeal “**must be taken within 30 days** after the date of the decision or order appealed from.” (Emphasis added). The County also contends

1. Petitioners filed a separate appeal to this Court (COA13-1456) challenging the trial court’s order affirming the Board of Commissioners’ denial of their special use permit.

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that Petitioners waived any challenge to the decision that a special use permit was required by actually applying for the permit.

In the present case, Petitioners appealed from the December Letters to the Board of Adjustment on 2 January 2013, within 30 days of receiving them. The County, however, argues that the appeal was not timely because the 30-day appeal clock commenced, not when Petitioners received the December Letters, but months earlier when the County Planning Director verbally informed Petitioners that they would need the special use permit.

Based on the facts of this case, we believe that the December Letters from the County represented “a final order or decision” from which Petitioners, as “aggrieved” parties, could appeal to the Board of Adjustment. Therefore, Petitioner’s appeal was timely.

We also do not believe Petitioners waived their right to challenge the December Letters before the Board of Adjustment simply because they had previously been told by a County official that they would need a special use permit and Petitioners, out of an abundance of caution, followed this avenue before establishing a shooting range on the Property. Where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not lose this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer’s interpretation of the law. *See Graham Court Associates v. Town Council of Town on Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981) (a landowner was informed that he needed a special use permit; applied for a special use permit and was denied; then challenged whether the special use permit was required and this Court held that it was not). Accordingly, the County’s contentions are overruled, and we turn to the merits of Petitioners’ arguments on appeal.

III. Analysis

[2] In this appeal, Petitioners contend that the superior court erred in its interpretation of the UDO. Specifically, Petitioners argue that the UDO does not regulate shooting ranges and, therefore, they do not need any approval from the County to operate a shooting range on the Property. Petitioners also argue that the superior court erred by concluding that shooting ranges were regulated by the UDO as an Open Air Game. Petitioners primarily rely on this Court’s holding in *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010).

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Essentially, Petitioners challenge the interpretation of the UDO by the Board of Adjustment and superior court. “Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment’s interpretation of a term in a municipal ordinance.” *Morris Communs. Corp. v. City of Bessemer*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011) (citations omitted). “Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment’s conclusions of law.” *Id.* at 156, 712 S.E.2d at 871 (citation omitted).

For the reasons stated below, we agree with Petitioners that the superior court erred in its interpretation of the UDO by concluding that the shooting range fell within the Open Air Games category in the Table. However, we disagree with Petitioners that the UDO does not regulate shooting ranges at all, but it does in fact prohibit shooting ranges anywhere in the County by providing that “[u]ses not specifically listed in the Table [] are prohibited.” Accordingly, we hold that the superior court did not err in affirming the County’s order that Petitioners cease and desist from operating a shooting range on the Property.

A. Shooting Ranges are not Open Air Games

Petitioners argue that the superior court erred in its interpretation of the UDO by concluding that shooting ranges fall within the Open Air Games category of the Table. Based on the superior court’s interpretation, a shooting range would be allowed in the Property’s zoning district with a special use permit approved by the Board of Commissioners. We agree with Petitioners that, applying this Court’s holding in *Land, supra*, shooting ranges do not fall within the Open Air Games category.

In *Land*, this Court held that a shooting range did not fall within the use category “privately owned outdoor recreational facility” contained in the Union County Land Use Ordinance. 206 N.C. App. at 132, 697 S.E.2d at 464. In the present case, the category at issue in the UDO Table describes the use as property used for “Grounds and Facilities for Open Air Games and Sporting Events[.]” However, the Table further qualifies this category description as those uses which fall within the NAICS code 713940.² NAICS code 713904 is labeled “Fitness and Recreational Sports Centers” and is comprised of establishments “primarily engaged in operating fitness and recreational sports facilities featuring exercise

2. The North American Industry Classification System (“NAICS”) is a number system used by businesses and governmental agencies throughout North America.

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and other active physical fitness conditioning or recreational sports activities such as swimming, skating, or racquet sports.” Shooting ranges, though, do not fall within NAICS code 713904, but rather under NAICS code 713990, labeled “All Other Amusement and Recreational Industries,” a code which the County did not use as a reference for the Open Air Games category.

We note that there are other uses listed in the Table which do reference NAICS code 713990, the code assigned to shooting ranges. However, these categories are for “Golf Courses” and “Riding Stables” and not for any use within which a shooting range would fall. The UDO provides that the NAICS codes are meant to provide a reference to determine which uses fall within a given category, but the codes are not meant to enlarge the scope of a category beyond the category’s descriptive title. Specifically, the UDO Table provides that the NAICS codes “are for reference purposes only, and do not mean that all uses under a specified code heading as provided in the [NAICS] Manual are permitted or conditional uses in the applicable zone.”

Here, if the County had intended shooting ranges to be considered an Open Air Game, the County could have added the NAICS code assigned to shooting ranges as a reference for the category; however, the County did not do so. Accordingly, we believe the proper interpretation is that shooting ranges are not Open Air Games in the Table.

B. The UDO Prohibits Shooting Ranges in the County

Petitioners argue that since the Table does not contain a category for shooting ranges, the UDO does not regulate shooting ranges, and, therefore, the County cannot prevent them from operating a shooting range on their Property. We disagree.

Our Supreme Court has provided the following guidance when construing ordinances:

Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [within] their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions

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of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation marks omitted).

We believe that the UDO is unambiguous in prohibiting shooting ranges in the County. UDO section 6-1 states that “[u]ses not specifically listed in the Table of Permitted Uses are prohibited.” Based on a “fair and reasonable construction” of this language, the County clearly recognized that it could not list every conceivable way that property could be used, and, therefore, it sought to provide that any use not listed would be prohibited unless and until any said use not listed was added to the UDO through an amendment thereto approved by the Board of Commissioners. Otherwise, landowners would be allowed to operate a shooting range or any other use not specifically listed in the Table *anywhere* in the County.

Petitioners argue that our holding in *Land* compels us to conclude that since shooting ranges are not expressly excluded by the UDO, they *must* be allowed. We believe that Petitioners’ interpretation of *Land* is overly broad and would lead to absurd results.

The central issue in *Land* was whether a shooting range on the property of the aptly named Dr. Land was regulated by the Union County Ordinance. The ordinance, like the UDO, contained a table of permitted uses. The ordinance also stated that “those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed use,” and that “uses that are not listed [] and that do not have impacts that are similar to those of the listed uses are prohibited.” *Land*, 206 N.C. App. at 129, 697 S.E.2d at 462. Union County opposed Dr. Land’s shooting range.

This Court in *Land* rejected the interpretation of the ordinance advocated by Union County that “all uses not expressly permitted are implied prohibited.” *Id.* at 130, 697 S.E.2d at 462. The Court disfavored the ordinance’s approach towards unlisted uses, stating that “a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was ‘similar to’ a nebulous category in the [ordinance]” and further that the approach “leaves landowners exposed to decisions to the arbitrary and capricious whims of zoning authorities who may disagree with the landowner’s decision concerning ‘similarity of use.’” *Id.* at 132, 697 S.E.2d at 464. In conclusion, the Court held that “absent a clear [ordinance] regulating shooting ranges, Dr. Land was not required to obtain a special use permit.” *Id.*

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We construe this Court's holding in *Land* narrowly to the language of the ordinance that was before it, namely one which states that permitted uses are those uses which are listed and "other uses that have similar impacts to" those listed while prohibiting all other uses.³ We believe that the language in the UDO is clear in prohibiting shooting ranges even though it does not specifically mention "shooting ranges" by name. Unlike the ordinance in *Land*, the UDO does not contain a similarity provision. It would be absurd to state that a use is allowed as a matter of right everywhere in a county, simply because the county failed to list the use expressly by name in its ordinance.⁴ Otherwise where an ordinance provides that property within a residential district can only be used for residential purposes and for no other purpose and under Petitioners' interpretation, the residential property owner could use his property not only for residential purposes but also for any commercial use which the ordinance fails to specifically mention. Petitioners' argument is overruled.

For the foregoing reasons, we reverse that portion of the trial court's order determining that the UDO required Petitioners to obtain a special use permit to operate their shooting range. However, in light of our holding that Petitioners' shooting range was not a permitted use within the County, we affirm the ultimate result reached by the trial court albeit on different grounds.

AFFIRMED IN PART, REVERSED IN PART.

Judge DAVIS concurs.

3. We need not address to what extent *Land* applies to the interpretation of ordinances which provide a means by which an unlisted use might be permitted if similar to a listed use. We note, for example, that in contrast to the *Land* Court's concern regarding unlisted uses and the "similar to" language as conferring too much discretion to county officials, this Court in *Fairway Outdoor Adver. v. Town of Cary*, applied the language of an "unlisted use" provision in an ordinance that provided for a level of discretion to the town's planning director to permit certain unlisted uses, but that ordinance provided criteria for exercising that discretion. ___ N.C. App. ___, ___, 739 S.E.2d 579, 583 (2013). Further, we note that, more recently, this Court applied ordinance language providing that in determining whether an unlisted use is permitted, "the use addressed by this ordinance that is most closely related to the land use impacts of the proposed [unlisted] use shall apply[.]" *Fort v. County of Cumberland*, ___ N.C. App. ___, ___, 761 S.E.2d 744, 747 (2014) (concluding that a firearms training facility – a use not listed in the ordinance – was "similar" to the listed use category "Recreation/Amusement Outdoor").

4. We have held that a firearms training facility was not allowed in a particular zoning district because this use did not fall within the use category "SCHOOLS, public, private, elementary or secondary." *Fort v. County of Cumberland*, ___ N.C. App. ___, 721 S.E.2d 350 (2012) ("*Fort I*").

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

I concur with the majority's conclusion that the trial court erred by interpreting the Franklin County Unified Development Ordinance ("UDO") as including shooting ranges under the category of "Open Air Games." However, because I believe that *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010), is controlling, I respectfully dissent from the majority's position that the UDO prohibits any land use that it does not specifically name.

In *Land*, the landowner challenged a cease-and-desist order issued by a zoning administrator prohibiting him from using a shooting range on his private property. *Land*, 206 N.C. App. at 126, 697 S.E.2d at 460. The trial court found in favor of the landowner, and the Village of Wesley Chapel ("the Village") appealed. *Id.* at 124, 697 S.E.2d at 459. The Village argued that its land use ordinance regulated every conceivable use of property, whether or not the use was specifically mentioned. *Id.* at 129, 697 S.E.2d at 462. The applicable provisions of the ordinance read as follows:

(a) The presumption established by this ordinance is that all legitimate uses of land are permissible within at least one zoning district with the county. Therefore, because the list of permissible uses set forth in Section 146 (Table of Permissible Uses) cannot be all-inclusive, those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed uses.

(b) *All uses that are not listed in Section 146 and that do not have impacts that are similar to those of the listed uses are prohibited.* Nor shall Section 146 be interpreted to allow a use in one zoning district when the use in question is more closely related to another specified use that is permissible only in other zoning districts.

Id. (emphasis added). Thus, the Village argued that because its ordinance did not list the operation of a shooting range as a permissible land use, such use was implicitly prohibited under subsection (b).

Citing long-standing common law principles of the "free use of property," this Court rejected the philosophy embedded in the Village's ordinance, and in the UDO here, that "everything is proscribed except that which is allowed." *Id.* at 131, 697 S.E.2d at 463. The problem with such

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an ordinance, as expressed by the Court, was that “it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the [ordinance].” *Id.* Citing *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966), which itself quoted Yokley, *Zoning Law and Practice*, Second Edition (1962 supplement), Vol. 1, Section 184), this Court reaffirmed the notion that “[z]oning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [sic.] their express terms.” *Id.* Based on these principles, the Court held that, despite the language in subsection (b) prohibiting all uses not explicitly mentioned in the ordinance, the landowner was not required to obtain a special use permit absent a clear mandate within the ordinance regarding shooting ranges. *Id.* at 132, 697 S.E.2d at 464.

I find *Land* to be dispositive on the issue presented here. The majority attempts to distinguish *Land* on the fact that the Village’s ordinance contained a provision allowing “other uses that have similar impacts” to those explicitly mentioned, and the UDO does not contain a similar clause. I do not find this distinction material to our analysis. Rather than relying on the “similar impacts” provision to form the basis of its holding, the *Land* Court cited long-standing precedent in rejecting the notion that a zoning ordinance may prohibit uses not explicitly allowed. *See, e.g., In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (“A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use.”); *In re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962) (“Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner.” (internal quotation marks omitted)); *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 564, 619 S.E.2d 555, 559 (2005) (“Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation.”).

The *Land* Court made clear that the law favors uninhibited free use of private property over governmental restrictions. Despite this principle, the majority asserts that it would be absurd for a use to be allowed as a matter of right because the county failed to expressly restrict the use in its zoning ordinance. I believe that it would be similarly absurd, but more importantly, unlawful, to support the notion that an otherwise legal use of private property is automatically *disallowed* simply because the government failed to identify it by name in a zoning ordinance.

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Based on the holding in *Land*, I am bound to conclude that the UDO's provision prohibiting all uses not explicitly allowed in the ordinance is in derogation of the common law and is without legal effect. Therefore, I would reverse the trial court's order.

SANTIAGO ESTRADA, EMPLOYEE, PLAINTIFF

v.

TIMBER STRUCTURES, INC., EMPLOYER AND AMERICAN ZURICH INSURANCE
COMPANY, CARRIER AND JAMES C. CERATT, JR., D/B/A/ TIMBER STRUCTURES
BUILDERS, NON-INSURED EMPLOYER, DEFENDANTS

No. COA14-468

Filed 18 November 2014

Workers' Compensation—expiration of policy—end of policy period—renewal premium not paid

A workers' compensation insurance policy did not cover defendants at the time of plaintiff's injury where defendants did not pay the renewal premium by the expiration date of the policy and the policy expired. Neither N.C.G.S. § 58-36-105 nor N.C.G.S. § 58-36-110 govern the expiration of a workers' compensation insurance policy at the end of the policy period.

Appeal by plaintiff and defendants from the Opinion and Award entered 24 January 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2014.

Hedrick Kepley, PLLC, by Jeffrey M. Hedrick, for plaintiff-appellant.

Patrick Harper & Dixon L.L.P., by Michael P. Thomas, for defendant-appellants Timber Structures, Inc., and James C. Ceratt, Jr., d/b/a Timber Structures Builders.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for defendant-appellee American Zurich Insurance Company.

STEELMAN, Judge.

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Where defendants failed to pay the renewal premium due on their workers' compensation insurance policy by the expiration date of the policy, the policy expired. Neither N.C. Gen. Stat. § § 58-36-105 nor 58-36-110 govern the expiration of a workers' compensation insurance policy at the end of the policy period.

I. Factual and Procedural History

James C. Ceratt, Jr., (with James C. Ceratt, Jr., d/b/a Timber Structures Builders, collectively, "defendants") is a licensed general contractor. Santiago Estrada Flores (plaintiff) was employed as a laborer and carpenter for defendants. Prior to 2009, defendants had several workers' compensation insurance policies canceled due to defendants' failure to pay the required premium. As a result, in 2009 defendants obtained workers' compensation insurance through the North Carolina Rate Bureau, which assigned defendant-appellee American Zurich Insurance Company ("Zurich") to offer defendants workers' compensation insurance. Upon defendants' payment of a premium deposit of \$850.00, Zurich issued Policy Number 6ZZ0B-9856M64-8-09 to defendants for the period 4 August 2009 through 4 August 2010.

On 25 May 2010 Zurich mailed defendants a letter offering to renew the workers' compensation insurance policy. At the top of the letter was printed "EXPIRATION DATE 080410." The letter stated in relevant part that:

Enclosed is your renewal quotation[.]

...

IMPORTANT NOTICE

All Premiums billed under your expiring policy must be paid before your policy can be renewed. . . .

In order to avoid a lapse in coverage, your renewal payment must be received by the expiration date shown on your bill. Depending on the plan requirements, if payment is not received by the expiration date, either the policy will be issued with a lapse in coverage or your premium check will be returned and no policy will be issued.

The letter was accompanied by a "Premium Notice" listing the "Date of Bill" as 25 May 2010, and stating that:

"Your policy will expire on the expiration date if the renewal premium is not paid. If the required deposit is

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received by us within 60 days after policy expiration, your renewal will be effective the day after the U.S. postmark date appearing on the renewal deposit envelope. Monies received for deposit more than 60 days after the expiration date will be returned and the policy will not be reinstated.”

The Premium Notice also included a chart reiterating the relevant payment amount, due date, and expiration date:

Amount Due	\$1000
Date Due	7-21-10
Expiration Date	08-04-10

Mr. Ceratt admitted at the hearing that he did not make a payment towards the premium prior to the expiration date of 4 August 2010.

On 19 August 2010 plaintiff suffered an injury by accident arising out of and in the course of his employment for defendants. On 3 September 2010 plaintiff filed an Industrial Commission Form 18 notifying defendants of his injury and seeking workers’ compensation medical and disability benefits.¹ The Form 18 named Zurich as the workers’ compensation insurance carrier. Zurich denied “that a workers’ compensation policy was in effect for [defendants] on the date of [plaintiff’s] accident.” A hearing was conducted on plaintiff’s claim before Industrial Commission Deputy Commissioner Adrian Phillips on 23 July 2012. On 20 June 2013 Deputy Commissioner Phillips filed an Opinion and Award holding that defendants’ workers’ compensation insurance had expired at the time of plaintiff’s injury and awarding plaintiff medical and temporary total disability benefits, to be paid by defendants. Both plaintiff and defendants appealed to the Full Commission. On 18 September 2013 the Commission filed an order dismissing defendants’ appeal for failure to timely file an Industrial Commission Form 44, Application for Review.

On 24 January 2014 the Full Commission filed an order affirming the decision of the Deputy Commissioner with modifications. The order noted the dismissal of defendants’ appeal and specified that “only Plaintiff’s appeal remains before the Full Commission for review.” The Commission found in relevant part that:

1. On 19 August 2010 plaintiff was working for defendants at the Blackberry Creek Mattress Store in Boone, N.C. Plaintiff initially sought compensation from the store, but it was dismissed as a defendant and is not a party to this appeal.

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...

24. Defendant-Employer James C. Ceratt, Jr., d/b/a Timber Structures Builders [{"Ceratt"}] . . . obtained a policy of workers' compensation coverage from Defendant-Carrier American Zurich Insurance Company [{"Zurich"}], with an initial policy period covering August 4, 2009 to August 4, 2010[.]

25. On or around May 25, 2010, [Zurich] sent [Ceratt] a "Workers' Compensation Insurance Plan Letter" (hereinafter "the letter") providing a policy renewal quote. The letter informed [Ceratt] that "in order to avoid a lapse in coverage, your renewal payment must be received by the expiration date shown on your bill." Along with the letter, [Zurich] provided [Ceratt] a "Premium Notice" indicating a "Date of Bill" of May 25, 2010, an amount of \$1000.00 due . . . July 21, 2010, and an "Expiration Date" of August 4, 2010.

...

33. After [Ceratt] learned that [he] was not covered by the policy, he sought to renew the policy with [Zurich]. On September 9, 2010, [Zurich] issued a "renewal" of [the policy] stating a retroactive policy period from August 24, 2010 to August 4, 2011[.]

34. [Ceratt] was uninsured from 12:01 a.m. August 4, 2010 through August 24, 2010.

...

38. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [Zurich] did not insure [Ceratt] on Plaintiff's date of injury.

The Commission held that defendants' workers' compensation insurance policy expired on 4 August 2010 due to their failure to submit payment prior to the expiration date, and that defendants were not insured at the time of plaintiff's accident.

Plaintiff and defendants appeal.

II. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, [t]he Commission

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is the sole judge of the credibility of the witnesses and the weight to be given their testimony.’ Therefore, on appeal from an award of the Industrial Commission, review 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) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), and citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (other citations omitted). Findings that are not challenged on appeal are “presumed to be supported by competent evidence” and are “conclusively established on appeal.” *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). The “Commission’s conclusions of law are reviewed *de novo*.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

III. Workers’ Compensation Insurance

The sole issue on appeal is whether a workers’ compensation insurance policy covered defendants at the time of plaintiff’s injury. We hold that the policy issued by Zurich expired on 4 August 2010 and was not in effect on 19 August 2010, the date that plaintiff was injured.

“We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.’” *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (quoting *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). “This Court’s review of contract provisions is *de novo*. ‘It is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts.’” *Fulford v. Jenkins*, 195 N.C. App. 402, 404, 672 S.E.2d 759, 760 (2009) (citing *Sutton v. Messer*, 173 N.C. App. 521, 525, 620 S.E.2d 19, 22 (2005), and quoting *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986)). In addition:

The cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control. If not ambiguous or uncertain, the express language the parties have used should be given effect, and the intention of the parties must be derived from the language employed. . . . If the intention

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of the parties is clear, the courts have no authority to change the contract in any particular or to disregard the express language the parties have used.

Lineberry v. Trust Co., 238 N.C. 264, 267, 77 S.E.2d 652, 654 (1953).

N.C. Gen. Stat. § 97-99(a) provides that a “policy for the insurance of the compensation in this Article, or against liability therefor, shall be deemed to be made subject to the provisions of this Article.” “[W]hen a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails.” *Progressive American Ins. Co. v. Vasquez*, 350 N.C. 386, 392, 515 S.E.2d 8, 12 (1999) (quoting *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 605, 461 S.E.2d 317, 322 (1995)).

In this case, the parties have discussed two statutes with relevance to workers’ compensation insurance policies. N.C. Gen. Stat. § 58-36-105(a) provides in pertinent part that “[n]o policy of workers’ compensation insurance or employers’ liability insurance written in connection with a policy of workers’ compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons: (1) Nonpayment of premium in accordance with the policy terms. . . .” (emphasis added). The statute expressly limits its application to cancellation of an insurance policy before the end of the policy term. We hold that N.C. Gen. Stat. § 58-36-105 does not apply to the expiration of a policy of workers’ compensation insurance at the end of the term, based upon the insured’s failure to renew the policy.

N.C. Gen. Stat. § 58-36-110(a) provides that “[n]o insurer shall refuse to renew a policy of workers’ compensation insurance or employers’ liability insurance written in connection with a policy of workers’ compensation insurance except in accordance with the provisions of this section, and any nonrenewal attempted or made that is not in compliance with this section is not effective. . . .” This statute only applies to a situation in which the insurer refuses to renew a policy. As we held in *Zaldana v. Smith*, __ N.C. App. __, 749 S.E.2d 461 (2013), *disc. review denied*, __ N.C. __, 758 S.E.2d 869 (2014):

“The plain meaning of ‘refuse’ is ‘to indicate unwillingness to do.’ The American Heritage College Dictionary 1148 (3rd ed. 1993). An insurer, therefore, ‘refuses to renew’ a policy

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when the insurer indicates an unwillingness to renew the policy.” . . . An insurer cannot ‘indicate an unwillingness’ to renew a policy merely by letting it expire under its own express terms. At a minimum, an insurer must, by word or action, specifically indicate to the insured that it is unwilling to renew the policy at issue.

Zaldana, __ N.C. App. at __, 749 S.E.2d at 463 (quoting *Associates Fin. Servs. of Am. v. N.C. Farm Bureau Mut. Ins. Co.*, 137 N.C. App. 526, 531, 528 S.E.2d 621, 624 (2000)). Based on the statutory language and on *Zaldana*, we hold that N.C. Gen. Stat. § 58-36-110 is only applicable to a situation in which an insurer “refuses to renew” a policy, and is not relevant to a situation in which the insurer is willing to renew an insurance policy but the insured fails to submit a premium payment by the expiration date.

The relevant facts of this case are not in dispute and establish that defendants’ workers’ compensation insurance policy expired on 4 August 2010 because defendants failed to make a premium payment by that date. Therefore, on 19 August 2010, the date of plaintiff’s injury, defendants were not insured under the policy issued by Zurich.

In arguing for a contrary result, appellants do not challenge the evidentiary support for the Commission’s factual findings that (1) Zurich sent defendants a letter on 25 May 2010 stating that it was willing to renew defendants’ workers’ compensation insurance and that a premium payment of \$1000 was due by 4 August 2010; (2) the letter warned that the policy would expire on 4 August 2010 if no payment was received, and; (3) defendants made no payments until after the date of plaintiff’s injury. Instead, appellants argue that, although Zurich was neither cancelling defendants’ insurance policy prior to its expiration date nor refusing to renew the policy, Zurich was nonetheless required to comply with the procedures set out in N.C. Gen. Stat. § 58-36-105 and § 58-36-110. Appellants make similar arguments regarding the analogous provisions of the Rules promulgated by the Rate Bureau. As discussed above, these statutes do not apply in the factual context of the present case, in which Zurich did not cancel defendants’ insurance policy before its term expired, and was willing to renew the policy for another year. Simply put, defendants failed to pay the premium required to renew the policy and, as a result, did not have workers’ compensation insurance coverage on the date of plaintiff’s injury.

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Conclusion

We conclude that the Full Commission did not err by ruling that defendants' workers' compensation insurance expired on 4 August 2010 and that its Opinion and Award should be

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

IN THE MATTER OF A.W.

No. COA14-597

Filed 18 November 2014

1. Termination of Parental Rights—grounds—one sufficient

Although a father challenged each of the statutory grounds under N.C.G.S. § 7B-1111 on which the trial court terminated his parental rights, a finding of any one of the enumerated grounds for termination of parental rights under the statute is sufficient to support a termination.

2. Termination of Parental Rights—grounds—initial grounds beyond father's control—little effort to involve himself with child

The trial court had sufficient grounds to terminate a father's parental rights under N.C.G.S. § 7B-1111(a)(2) (willfully leaving the juvenile in foster care and not making reasonable progress toward correction of the circumstances that led to removal). Although the conditions which lead to the child's placement with foster parents were not in the father's control, he made essentially no effort to involve himself with the child until the mother indicated that she was voluntarily terminating her parental rights so that the child could be adopted by the foster parents. Moreover, there was a sufficient basis in the record for terminating the father's parental rights that had nothing to do with poverty.

3. Termination of Parental Rights—trial counsel's concession—other grounds for termination

The trial court did not err in a termination of parental rights proceeding by relying on trial counsel's concession that grounds

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may have existed to terminate a father's parental rights. There were unrelated findings of fact that sufficiently supported the trial court's terminating the father's parental rights.

Appeal by Respondent-Father from order entered 25 February 2014 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 20 October 2014.

Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Petitioner-Appellee.

Kilpatrick Townsend & Stockton LLP, by John M. Moye, for guardian ad litem.

Robert W. Ewing for Respondent-Appellant.

McGEE, Chief Judge.

Respondent ("the Father") appeals from the trial court's order terminating his parental rights as to the minor child, A.W. ("the Child"). We affirm the trial court's order.

I. Background

Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") filed a juvenile petition on 30 December 2010, alleging that the Child was dependent. On that same date, YFS obtained nonsecure custody of the Child. The Child's mother ("the Mother") was eighteen years old at the time and had entered into a Contractual Agreement for Continuing Residential Support ("CARS agreement") with YFS after she had aged out of foster care. This agreement allowed the Mother to remain in foster care with stipulations that she remain in school and comply with the rules and regulations of her placement. Paternity had not been established for the Child and there were no relative placement options. The trial court adjudicated the Child dependent on 10 February 2011.

The Mother identified the Father as the potential biological parent of the Child in December of 2011. The Father was contacted by YFS soon thereafter, and paternity testing confirmed that he was the Child's biological father. The Father was notified that he was the Child's biological father on 23 January 2012.

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The YFS social worker conducted a home visit with the Father and his sister on 15 February 2012. The social worker inquired about the Father's willingness to work a case plan for reunification with the Child. The Father indicated that he was not able to at the time, but that his sister was interested. The social worker discussed the process with the Father's sister, letting the Father's sister know that she must fill out paperwork and return it so that a home study could be done on her home. This paperwork was never submitted.

The social worker did not speak with the Father again until December 2012. At that time, the Father had learned that the Mother wanted to surrender her parental rights so that the Child could be adopted by his foster parents. The Father met with the social worker, and the social worker explained to him that he would need to submit to a Families in Recovery to Stay Together ("F.I.R.S.T.") assessment, and then a case plan could be developed. The social worker also explained that the Father would need to appear in court and state his wishes before they could move forward. The Father appeared in court for the first time on 25 January 2013, at a permanency planning hearing. The trial court appointed him counsel and continued the matter to allow the Father an opportunity to meet with counsel.

Subsequent permanency planning hearings were scheduled for 20 February 2013 and 3 May 2013 but had to be rescheduled. In continuance orders filed 12 April 2013 and 23 April 2013, the trial court noted that its determination regarding whether it would be in the Child's best interests to have visitation with the Father would have to occur at a later time. The trial court conducted the permanency planning hearing on 9 July 2013. The trial court found:

[The Father] was informed on January 23, 2012 that he would have to seek a court order authorizing him to receive custody and/or visitation of [the Child] but [the Father] did not take action until December 10, 2012. During those 11 months, [the Father] did not participate in a FIRST assessment as requested by the social worker, did not contact YFS to inquire about the [Child's] well-being, failed to provide consistent support or assistance, did not follow up with the social worker about having [the Child] placed with his sister, and did not take any other action toward gaining custody of [the Child]. From January 2012 to January 2013, [the Father] visited with [the Child] sporadically and has not seen [the Child] since January of 2013. Although [the Father] was employed with Fed Ex

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and worked 25-30 hours a week, he never inquired with the department about how to begin paying child support or made any payments, but he did buy [the Child] a few outfits during this time.

The trial court ceased reunification efforts, established adoption as the permanent plan, and ordered YFS to file a petition to terminate the Father's parental rights. However, the trial court also granted the Father visitation rights.

YFS filed a petition to terminate the Father's parental rights on 16 August 2013, alleging grounds existed to terminate his parental rights based upon (1) neglect, (2) failure to make reasonable progress, (3) willful failure to pay a reasonable portion of the cost of care, (4) failure to legitimate, and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a) (1), (2), (3), (5), and (7) (2013). The termination hearing was held on 6 January 2014, after which the trial court found the existence of all grounds alleged by YFS. The trial court determined that termination of the Father's parental rights was in the Child's best interests and entered an order terminating the Father's parental rights ("the order"). The Father appeals.

II. Standard of Review

"We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Moreover, the trial court's findings of fact are binding on appeal if they are supported by any competent evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Where a respondent does not challenge the trial court's findings, those findings are presumed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

III. Analysis

During the termination hearing, which the Father did not attend, the trial court found that:

3. [The Child] came into [YFS] custody . . . [the day after he was born,] 30 December 2010. Given his mother's

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placement with Mecklenburg County YFS at that time[,] [and because she] was previously a minor in foster care and unable to provide care for the baby or for herself[,] [the Mother] had agreed to a CARS agreement, which allowed her to remain in a [YFS] placement beyond her eighteenth birthday.

. . . .

7. [The Father], the biological father of [the Child], . . . has never made himself available to set up a family service agreement (case plan) to address the issues that brought the child into care and to place himself in a position to parent [the Child].

8. [The Father] was told repeatedly that he was found to be the father of [the Child] and that he needed to establish a case plan. First when he spoke with [the social worker's] supervisor, and then later at a home visit in February 2012 [when he met with the social worker].

9. At that February 2012 meeting [the Father] was told that the first step toward reunification or being involved in [his] son's life was obtaining a F.I.R.S.T. (Families in Recovery Stay Together) assessment and setting up a case plan. He at the time and ever since that time has demonstrated the he was not or is not able nor interested himself in providing a placement or caring for [the Child's] needs.

10. [The Father] did indicate that his sister [("Sister 1")] was a potential placement at the February 2012 meeting. Unfortunately, [Sister 1] never followed up nor submitted the paperwork provided by YFS to be considered for placement. [Sister 1] never contacted YFS to express any further interest in placement after the February 2012 meeting and YFS was unable to contact her regarding her willingness to be considered for placement.

11. [The Father] has a second sister[("Sister 2")] that the paternal grandmother made [YFS] aware of in December 2012. [Sister 2] did participate in the completion of a home study to be considered for placement of [the Child].

12. [Sister 2] completed the home study as requested but was not approved for a variety of reasons for placement.

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13. [The Father's] mother, [the Child's] paternal grandmother, indicated that she is not able to be a placement for the child.

14. No one else was ever identified by [the Father] as a possible permanent placement for [the Child].

15. No one else from [the Father's] family ever step *sic* forward to offer a relative placement for [the Child].

16. An appointment for an assessment with [F.I.R.S.T.] was scheduled in March 2012. [The Father] did not appear for the appointment and never completed the [F.I.R.S.T.] assessment.

17. There was no contact between [the Father] and YFS from February 2012 until December 2012 and early January 2013, although YFS made several attempts to contact [the Father] by telephone, by mail, and by home visit.

18. In December 2012 and early January 2013, [the Father] had some contact with [YFS]. [YFS] made [the Father] aware that he needed to participate in the court proceedings and maintain contact with YFS if he wanted to be involved in his child's life. On 25 January 2013, [the Father] appeared for [a] court hearing that was continued to 20 February 2013. [The Father] appeared at the 20 February 2013 [hearing], however he did not avail himself during or following that court hearing to any plan or services to work towards reunification with [the Child].

19. [The Father] appeared again at a scheduled hearing on 9 July 2013. [The Father] was allowed visitation [at] that time. [The Father] has participated in seven visits since that time. He visited with [the Child] two times in August [2013], two times in September [2013], two times in October [2013], no visits in November [2013], and one visit around the holiday in December [2013].

....

24. Although [the Father] was employed for a good portion of this case and he being aware since early 2012 that he is [the Child's] father, he has paid no support to YFS or to [the Child's] foster parent] or to any placement where [the Child] has resided. [The Father] has apparently

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on some occasions provided some clothing items for [the Child]. That is the extent of the financial support of his child.

. . . .

38. [The Father's] absences in court speak volumes regarding his commitment to parent [the Child]. There have been numerous court hearings and he has made three court appearances. He has just not been involved.

The Father does not challenge any of the above findings. Therefore, they are binding on appeal. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

[1] Instead, the Father challenges each of the five statutory grounds under N.C. Gen. Stat. § 7B-1111 on which the trial court terminated his parental rights. However, a “finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. [§] 7B-1111 is sufficient to support a termination.” *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003) (citation omitted). The trial court may terminate parental rights under § 7B-1111(a)(2) upon a finding that:

[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

We find it dispositive of the Father's appeal that the evidence supports termination of his parental rights on these grounds.

[2] In his brief, the Father contends that his parental rights were not subject to termination under § 7B-1111(a)(2) because the “conditions” which led to the Child's placement in YFS custody were not within the Father's control. However, the Father's argument is unpersuasive.

First, in order for a trial court to terminate a parent's rights under § 7B-1111(a)(2), the parent must have willfully left the juvenile in YFS custody for more than twelve months. A finding of willfulness here does not require proof of parental fault. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted). On the contrary, “[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.”

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In re McMillon, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001). “A finding of willfulness is not precluded even if the respondent has made *some* efforts to regain custody of [his child].” *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (emphasis added).

From the time the Father was notified on 23 January 2012 that he was the biological parent of the Child to when his parental rights were terminated by court order two years later, the Father made no meaningful effort to remove the Child from YFS custody. YFS engaged with the Father repeatedly over that time in an attempt to put together a case plan to reunify the Child and the Father. These efforts by YFS were met almost universally with inaction by the Father. Indeed, the Father made essentially no effort to involve himself with the Child until the Mother indicated in December of 2012 that she was voluntarily terminating her parental rights.

It is true that the Father was not actually granted visitation rights with the Child until 19 July 2013, one month before this action to terminate his parental rights was filed by YFS. Moreover, it is uncontested that the Father visited the Child seven times between July and December 2013. However, these facts alone are not dispositive of the trial court’s conclusion that, by making almost no effort to get the Child placed in his custody, the Father willfully left the Child in YFS custody for more than twelve months.

[3] The Father’s willfully leaving the Child in YFS custody is also directly tied to the second requirement for terminating his parental rights under § 7B-1111(a)(2): that the parent has not made reasonable progress under the circumstances in correcting the conditions which led to his child being placed in YFS custody. Notably, the Child was placed in YFS custody as a result of being adjudicated dependent. In order to be adjudicated dependent, a child either must have “no parent, guardian, or custodian responsible for the juvenile’s care or supervision” or, as in the present case, the child has a parent, guardian, or custodian, but that caretaker “is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9) (2013). “[T]he determinative factors [when adjudicating a child abused, neglected, or dependent] are the circumstances and conditions surrounding the child, *not* the fault or culpability of the parent.” *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (emphasis added). This Court has admonished that the adjudication of a child’s dependency “should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent.” *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). In other words, the “conditions”

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which led to the Child being placed in YFS custody are not necessarily tied to the “fault” of either biological parent. Instead, those “conditions” were based entirely on “circumstances and conditions surrounding” the Child at the time he was adjudicated dependent.

Thus, what is required of a parent to avoid the termination of his or her parental rights under § 7B-1111(a)(2) is that the parent make “reasonable progress under the circumstances” towards correcting those conditions that led to the child being placed in YFS custody, irrespective of whoever’s fault it was that the child was placed in YFS custody in the first place. *Cf. In re D.N.W.*, __ N.C. App. __, __ S.E.2d __, COA12-765, *slip op.* at 12–14 (Dec. 18, 2012) (unpublished) (terminating a respondent father’s parental rights under § 7B-1111(a)(2) even though the child was removed from the mother’s home and placed in DSS custody before the father’s paternity had been established); *but cf. In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) (briefly noting that the respondent father did not cause children to be placed in foster care when analyzing § 7B-1111(a)(2), although the trial court’s termination order broadly lacked clear, cogent, and convincing evidence to support termination). In the present case, the Father could have completely cured the Child’s dependency by establishing himself as a parent who could “provide for [the Child’s] care or supervision,” or by arranging for an “appropriate alternative child care arrangement” for the Child. *See* § 7B-101(9). As previously discussed, the Father made almost no effort to do so.

The Father does not present this Court with an argument under § 7B-1111(a)(2) that his parental rights were terminated solely because he might have been in poverty. We do note that the Father challenges the trial court’s ground for termination under § 7B-1111(a)(3), which relates to a parent’s willful failure to pay a reasonable portion of the cost of care for his child in spite of being physically and financially able to do so. The trial court found that the Father “was employed for a good portion of this case” and that he “has paid no support to YFS or to [the Child’s foster parent] or to any placement where [the Child] has resided” since discovering he was the Child’s biological parent. However, the trial court did not make an express finding that the Father was physically and financially able to pay for the Child’s care. Nonetheless, for the purposes of examining § 7B-1111(a)(2), there was a sufficient basis in the record for terminating the Father’s parental rights that had nothing to do with poverty. Indeed, the Father’s failure to obtain custody of the Child appears primarily to have been the result of his own inaction, and thus poverty could not have been the “sole reason” for terminating the

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Father's parental rights. Therefore, the trial court had sufficient grounds to terminate the Father's parental rights under § 7B-1111(a)(2).

Lastly, the Father argues the trial court erred by relying on trial counsel's concession that grounds may have existed to terminate his parental rights. During closing arguments, the Father's trial counsel stated: "My argument to the Court is that obviously there have been some statutory elements in here that probably have been met[.]" The trial court found: "Mr. McKnight, counsel for [the Father], has conceded that the grounds for termination including neglect and abandonment have been met, but requested that the Court consider whether it be in [the Child's] best interests for [the Father's] parental rights to be terminated." This finding by the trial court does not prejudice the Father. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006) ("[When] ample other findings of fact support [the trial court's conclusions of law] . . . , erroneous findings unnecessary to the determination do not constitute reversible error."). As discussed above, there are unrelated findings of fact that sufficiently support the trial court terminating the Father's parental rights under § 7B-1111(a)(2). Accordingly, we affirm the trial court's order.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

IN THE MATTER OF J.F.

No. COA14-101 & No. COA14-562

Filed 18 November 2014

1. Juveniles—sufficiency of petitions—first-degree sexual offense—crimes against nature—identification of particular sex act not required

The trial court did not err by denying a juvenile's motion to dismiss on the ground that the petitions for first-degree sexual offense and crimes against nature were defective. The State was not required to identify the particular sex acts involved or describe the manner in which they were performed. Further, nothing in the crime against nature statute required that the accused be the one performing the sexual act.

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2. Sexual Offenses—first-degree sexual offense—crime against nature—sexual purpose

The trial court did not err by failing to require the State to present evidence of sexual purpose with respect to the first-degree sexual offense and crime against nature charges. The Court of Appeals must give effect to each of the statutes as written, and it does not have the power to add a sexual purpose element to a statute that does not contain one.

3. Sexual Offenses—first-degree sexual offense—crimes against nature—penetration

The trial court erred in a first-degree sexual offense and crimes against nature case by failing to require the State to prove that penetration occurred. Although penetration is not a required element of first-degree sexual offense, it is for crimes against nature. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden and the crime against nature adjudications were reversed.

4. Jurisdiction—juvenile appeal of adjudication before disposition hearing—statutory interlocutory appeal

The trial court's disposition order in a juvenile case was vacated and remanded for a new disposition. The General Assembly permits a juvenile to appeal his adjudication before the disposition hearing if that hearing does not take place within 60 days after adjudication. Because an appeal divested the trial court of jurisdiction over the matter when the juvenile took a statutory interlocutory appeal of the adjudication under N.C.G.S. § 7B-2602, the trial court was divested of jurisdiction to modify the order or proceed to disposition during the pendency of the appeal.

Appeal by juvenile from adjudication order entered 14 May 2013 by Judge Regan A. Miller and from disposition order entered 23 January 2014 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins and Assistant Attorney General Kimberly N. Callahan, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

DIETZ, Judge.

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This juvenile case involves acts of oral sex between two boys, ages fourteen and seven. Fourteen-year-old J.F. convinced the seven-year-old victim to perform fellatio on him, and also performed fellatio on the victim. The trial court adjudicated J.F. delinquent on two counts of first-degree sexual offense and two counts of crime against nature.

On appeal, J.F. argues that the petitions charging him with these juvenile offenses were defective. J.F. also contends that there was insufficient evidence of sexual purpose and of penetration, which J.F. argues are essential elements of the charged offenses. Finally, in a separate appeal, J.F. challenges the terms of his disposition. On the State's motion, we consolidated the two appeals for purposes of decision.

We hold that the petitions in this case are sufficient, that sexual purpose is not an element of either charged offense, and that penetration is not an element of first-degree sexual offense. Accordingly, we affirm the adjudication on the two first-degree sexual offense charges.

However, we must reverse the two adjudications for crime against nature. Our case law requires penetration as an element of the crime against nature offense. Here, the victim testified that there was no penetration and that the two merely "licked" each other's genitalia. As a result, we are constrained to reverse the two crime against nature adjudications.

Accordingly, we affirm the trial court's adjudication order on the two counts of first-degree sexual offense; we reverse the trial court's adjudication order on the two counts of crime against nature; and we vacate the trial court's disposition order and remand for a new disposition.

Facts and Procedural History

On 20 or 21 July 2012, M.H. and J.F. were playing together at the home of M.H.'s grandmother, Mrs. Johnson. Mrs. Johnson was J.F.'s foster mother. At the time, M.H. was seven years old and J.F. was fourteen years old. The two boys were alone in the open loft area of the Johnson home when J.F. asked M.H. to "suck" his penis. M.H. stated that he refused to suck J.F.'s penis, but after J.F. kept asking, M.H. did "lick" it. J.F. then licked M.H.'s penis. After this incident occurred, M.H. returned home, but he did not tell his mother or grandmother what had happened.

The following Sunday, M.H. approached his mother and asked, "why don't I have hair on my guts like [J.F.]?" "Guts" is a word that M.H. used to describe his genitalia. When his mother asked him how he knew this about J.F., M.H. told her that J.F. "asked me to suck his guts." M.H. said that he didn't do it because he knew it was wrong, but that J.F. kept asking

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him to “suck it like you’re sucking a straw.” M.H.’s mother immediately went to Mrs. Johnson’s house to tell her what had happened. On the way, M.H.’s mother contacted the police and had them meet her there.

The State filed petitions against J.F. on 14 November 2012 for two counts of first-degree sexual offense, two counts of crime against nature, and one count of indecent liberties between children. The trial court held a delinquency hearing on 14 May 2013. At the close of the evidence, J.F.’s counsel moved to dismiss all of the charges, arguing that the petitions were defective and that the State had failed to produce evidence of all required elements for each offense.

The trial court granted the motion to dismiss the indecent liberties between children charge on the ground that there was insufficient evidence of sexual purpose, a required element of that offense. But the court denied the motion to dismiss on the two counts of first-degree sexual offense and the two counts of crime against nature, concluding that the petitions were not defective and that there was sufficient evidence to support those four charges.

The trial court adjudicated J.F. delinquent on 14 May 2013. On 15 July 2013, before the disposition hearing occurred, J.F. filed an interlocutory appeal from the adjudication order under N.C. Gen. Stat. § 7B-2602 (2013). The trial court proceeded with the case and entered a disposition order on 23 January 2014. J.F. then filed notice of appeal from the disposition order on 30 January 2014. On the State’s motion, this Court consolidated the two appeals for hearing.

Analysis

I. Sufficiency of the Juvenile Petitions

[1] J.F. first argues that the trial court erred in denying his motion to dismiss on the ground that the petitions were defective. Specifically, J.F. contends that “the petitions do not give him enough actual notice for the crimes he is alleged to have committed, and whether it was during one setting or one period of time or more, or one or two or more acts of felatio.” For the reasons that follow, we reject this argument and hold that the petitions are sufficient.

The sufficiency of a juvenile petition is a jurisdictional issue that this Court reviews *de novo*. *In re K.W.*, 191 N.C. App. 812, 813, 664 S.E.2d 66, 67 (2008). The petition in a juvenile action serves the same purpose as an indictment or other charging instrument in a criminal case. The petition “must contain a plain and concise statement asserting facts supporting *every element* of a criminal offense and the juvenile’s commission

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thereof with sufficient precision clearly to apprise the juvenile of the *conduct which is the subject of the allegation.*" *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (quotation marks and ellipses omitted).

The sufficiency of a juvenile petition is evaluated by the same standards applied to indictments in adult criminal proceedings. *See In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The general rule is that an indictment charging a statutory sexual offense will be sufficient if it is "couched in the language of the statute." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

A petition charging first-degree sexual offense is sufficient if it alleges "that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid." N.C. Gen. Stat. § 15-144.2(b) (2013). It is not necessary to specify in the petition which particular sexual act was committed. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982).

Similarly, a petition charging a crime against nature involving a juvenile victim is sufficient if it states that "defendant did unlawfully, willfully and feloniously commit the infamous crime against nature with a particular man, woman or beast" and further alleges the age of the victim or otherwise indicates that the victim was a minor. *State v. O'Keefe*, 263 N.C. 53, 54, 138 S.E.2d 767, 768 (1964); *accord In re R.L.C.*, 361 N.C. 287, 296, 643 S.E.2d 920, 925 (2007).¹ Although it is necessary to "allege the person with or against whom the offense was committed," it is not necessary to identify "the manner in which [the offense] was committed." *O'Keefe*, 263 N.C. at 54, 138 S.E.2d at 768.

Applying this precedent, we hold that the four petitions in this case are sufficient to satisfy the applicable statutory and constitutional requirements. The petitions charging J.F. with first-degree sexual offense follow the statutory language of N.C. Gen. Stat. § 14-27.4(a)(1) by stating that J.F. "did unlawfully, willfully and feloniously . . . [e]ngage in a sexual act with [M.H.], a child under the age of thirteen (13) years," identifying M.H. by his full name. The petitions also state that the "victim was 7," and one petition states that "juvenile performed fellatio on victim," while the other states that "victim performed fellatio on juvenile."

1. The U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) narrowed the scope of our State's crime against nature statute. However, our Supreme Court has held that the crime against nature statute still applies to fellatio involving a juvenile. *In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925.

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Under *Edwards*, these petitions provide sufficient details of the sex acts charged. 305 N.C. at 380, 289 S.E.2d at 362.

Likewise, the petitions charging J.F. with crimes against nature allege that J.F. “did unlawfully, willfully and feloniously . . . commit the abominable and detestable crime against nature with [M.H.],” again identifying M.H. by his full name. Like the first-degree sex offense petitions, these petitions also state that “victim was 7 years old,” and one petition states that “victim performed fellatio on juvenile,” while the other states that “juvenile performed fellatio on victim.” Under *O’Keefe*, these petitions provide sufficient details of the sex acts charged. 263 N.C. at 54, 138 S.E.2d at 768.

J.F. also argues that, even if each petition is sufficient standing alone, they are defective when viewed together because “there is no specification if one or two acts of fellatio are alleged,” and therefore the petitions “did not give [J.F.] enough actual notice for the crimes he is alleged to have committed.” In other words, J.F. contends that he cannot know if the charges of first-degree sexual offense and crimes against nature refer to the same acts of fellatio or to multiple, separate acts.

We reject this argument because it is precluded by our case law. As explained above, when pleading these sex offenses, the State need not identify the particular sex acts involved or describe the manner in which they were performed. See *Edwards*, 305 N.C. at 380, 289 S.E.2d at 362; *O’Keefe*, 263 N.C. at 54, 138 S.E.2d at 768. If J.F. required more specific details about the factual circumstances underlying each charge in order to prepare his defense, he should have moved for a bill of particulars. See *In re K.R.B.*, 134 N.C. App. 328, 332, 517 S.E.2d 200, 202 (1999). Accordingly, we reject J.F.’s argument that the petitions were defective because they failed to provide sufficient details concerning the sex acts underlying the offenses.

J.F. next argues that the two petitions alleging that M.H. performed fellatio on J.F. are defective because the victim “was the actor” and therefore the petitions do not allege a crime by J.F. As explained below, we reject this argument as well.

The statute defining first-degree sexual offense does not require that the accused perform the sexual act *on* the victim, but rather that he “engage[] in a sexual act *with*” the victim. N.C. Gen. Stat. § 14-27.4(a) (2013) (emphasis added). Moreover, the statute under which J.F. was charged, N.C. Gen. Stat. § 14-27.4(a)(1), does not require that the sex acts involve force or be against the will of the victim; instead, the statute requires only that the victim is under 13 years of age and there is a

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sufficient age differential between the accused and the victim. *Compare* N.C. Gen. Stat. § 14-27.4(a)(1), *with id.* § 14-27.4(a)(2) (requiring first-degree sexual offense involving adult victims to be “by force and against the will” of the victim). This conclusion is confirmed by *State v. Sweat*, in which our Supreme Court affirmed a defendant’s conviction on two counts of first-degree sexual offense based on allegations that the juvenile victim performed fellatio on the defendant. 366 N.C. 79, 727 S.E.2d 691 (2012).

Likewise, nothing in the crime against nature statute requires that the accused be the one performing the sexual act. Our appellate courts repeatedly have upheld crime against nature adjudications in which the alleged victim performed fellatio on the accused. *See, e.g., In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925; *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815 (2001). Accordingly, we reject J.F.’s arguments and hold that the petitions at issue in this appeal are not defective.

II. Evidence of Sexual Purpose

[2] J.F. next argues that the State failed to present evidence of “sexual purpose” with respect to the first-degree sexual offense and crime against nature charges. This “sexual purpose” language comes from the indecent liberties between children statute, which requires that the sex act be “for the purpose of arousing or gratifying sexual desire.” N.C. Gen. Stat. § 14-202.2(a)(2) (2013).

The trial court dismissed the indecent liberties charge in this case because there was insufficient evidence that J.F. acted for the purpose of arousing or gratifying sexual desire. J.F. argues that we should judicially impose the same sexual purpose element on the remaining charges as well. We disagree.

This Court reviews *de novo* the question of what elements are required to prove a particular offense. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. When interpreting an unambiguous statute, courts “are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). Relying on this precedent, our Supreme Court previously refused to read an age differential requirement into the crime against nature statute, although similar age differential provisions are included in other juvenile sex offense statutes. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924.

The reasoning of *R.L.C.* controls here. Neither the first-degree sexual offense statute nor the crime against nature statute contains a

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sexual purpose requirement. *See* N.C. Gen. Stat. §§ 14-27.4(a)(1), 14-177. Because the General Assembly included this requirement in the indecent liberties statute, but omitted it from these other sex offense statutes, we must conclude that the omission was intentional. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. Simply put, this Court must give effect to each of the statutes as written; we do not have the power to add a sexual purpose element to an unambiguous criminal statute that does not contain one. Accordingly, we reject J.F.'s argument.

III. Evidence of Penetration

[3] J.F. next argues that the State failed to prove that penetration occurred. J.F. contends that penetration is an essential element of both first-degree sexual offense and crime against nature.

“We review a trial court’s denial of a [juvenile’s] motion to dismiss *de novo*.” *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009). “Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile’s] being the perpetrator of such offense.” *In re Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quotation marks omitted). “The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent’s guilt.” *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986).

As an initial matter, we must address whether penetration is an essential element of these two offenses. As explained below, we hold that penetration is a required element of the offense of crime against nature, but that it is not a required element of first-degree sexual offense.

First-degree sexual offense requires a “sexual act.” N.C. Gen. Stat. § 14-27.4(a). The term “sexual act” is defined by statute and includes “cunnilingus, fellatio, anilingus, or anal intercourse.” *Id.* § 14-27.1(4). It also includes “penetration, however slight, by any object into the genital or anal opening of another person’s body.” *Id.* This Court has explained that this definition encompasses two different types of sexual acts: “one which requires penetration by ‘any object’ into two specifically named bodily orifices, and one which the North Carolina courts have interpreted to require a touching.” *State v. Johnson*, 105 N.C. App. 390, 392, 413 S.E.2d 562, 563 (1992). Fellatio falls into this latter, “touching” category. *See id.* Fellatio is “any touching of the male sexual organ by the lips, tongue, or mouth of another person.” *State v. Smith*, 362 N.C. 583, 593, 669 S.E.2d 299, 306 (2008) (quotation marks omitted). Thus, in first-degree sexual offense cases involving fellatio, proof of penetration is

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not required. *See id.*; *see also State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 (1988).

By contrast, penetration *is* a required element of the offense of crime against nature. As our Supreme Court has held, an essential element of crime against nature is “some penetration, however slight, of a natural orifice of the body.” *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961). “Proof of penetration of or by the sexual organ is essential to conviction.” *Id.*; *see also In re R.N.*, 206 N.C. App. 537, 540, 696 S.E.2d 898, 901 (2010). As a result, we must determine whether the State presented sufficient evidence of penetration to support J.F.’s adjudication for the two crime against nature offenses.

There is no direct testimony of penetration in this proceeding. M.H. testified that the two boys were alone in the open loft area of the Johnson home when J.F. asked him to “suck” J.F.’s penis. In describing the incident, M.H. differentiated between J.F. asking him to “suck” his penis, which he refused to do, and to “lick” it, which he did. When asked to elaborate, M.H. explained that “lick” meant to touch it with his tongue. When asked directly whether J.F.’s penis went into his mouth, M.H. replied “just a tongue.” Likewise, when asked about how J.F. touched M.H.’s penis, M.H. stated that J.F. only used his tongue and “lick[ed] it.”

Our Court has held that nearly identical direct testimony was insufficient to establish penetration. *See In re R.N.*, 206 N.C. App. at 542, 696 S.E.2d at 902 (vacating crime against nature adjudication for insufficient evidence of penetration where the evidence merely showed that the juvenile “licked” the victim’s “private area”).

Although there is no direct evidence of penetration, the State argues that this Court should infer penetration based on surrounding circumstances, as we did in the 2001 case *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815. In *Heil*, a four-year-old victim performed an act of fellatio on an eleven-year-old juvenile. *See id.* at 26-27, 550 S.E.2d at 817-18. The four-year-old did not testify at the adjudication hearing. Instead, the State introduced the testimony of the victim’s father, who described how the victim demonstrated what he had done by licking his mother’s thumb. *See id.* The juvenile appealed his adjudication for crime against nature, arguing that there was insufficient evidence of penetration.

On appeal, this Court held that, based on the size difference between the juvenile and the victim and “the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile’s penis into [the four-year-old victim’s] mouth.” *Id.* at 29-30, 550 S.E.2d at 820.

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In re Heil is distinguishable in several ways. First, *Heil* relied on the close quarters in which the incident occurred in determining that an inference of penetration was reasonable. Here, both M.H.'s mother and grandmother testified that the loft where the incident occurred was an open area with no door. More importantly, unlike the four-year-old in *Heil*, who was unable to testify, seven-year-old M.H. testified to the details of the incident at the delinquency hearing. That testimony differentiated between acts involving penetration, which M.H. testified did not occur, and acts that merely involved licking or touching with the tongue.

In short, we do not believe the inference of penetration drawn in *Heil* appropriately can be drawn here. That inference conflicts with the victim's own direct testimony. Moreover, a key circumstantial factor relied upon in *Heil* to draw this inference—the small closet space where the incident occurred—is not present here. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden. As a result, we must reverse the crime against nature adjudications.

IV. Jurisdiction to Conduct Disposition Hearing

[4] Our decision to reverse the two crime against nature adjudications compels us to vacate and remand the disposition order. But we would have been required to vacate and remand that order in any event, because the trial court lacked jurisdiction over the disposition proceeding. We briefly address this jurisdictional issue to provide guidance to trial courts faced with similar situations in the future.

As a general matter, an appeal from a trial court order “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.” N.C. Gen. Stat. § 1-294 (2013). Thus, unless another statute provides otherwise, “[a]n appeal removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court.” *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). The statutes governing appeals in juvenile delinquency proceedings confirm this general rule. See N.C. Gen. Stat. § 7B-2606 (2013) (providing that in the event of an appeal, the trial court shall have the authority to modify or alter an adjudication order only after “affirmation of the order” by the appellate courts).

But there is an additional wrinkle in juvenile cases. The General Assembly permits a juvenile to appeal his adjudication *before* the disposition hearing (the juvenile equivalent of criminal sentencing) if that hearing does not take place within 60 days after adjudication. See N.C.

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Gen. Stat. § 7B-2602. Because an appeal divests the trial court of jurisdiction over the matter, when a juvenile takes a statutory interlocutory appeal of the adjudication under section 7B-2602, the trial court is divested of jurisdiction “to modify the order or proceed to disposition during the pendency of the appeal.” *In re Rikard*, 161 N.C. App. 150, 153, 587 S.E.2d 467, 469 (2003).

That is precisely what happened here. The trial court entered its adjudication order on 14 May 2013. No disposition was made within 60 days, and J.F. filed notice of appeal from the adjudication order under section 7B-2602 on 15 July 2013. The court later held a disposition hearing on 23 January 2014. As a result of the pending appeal, the trial court had no jurisdiction to conduct that disposition hearing.

In future juvenile delinquency cases where the disposition hearing occurs long after the adjudication, it may be prudent for trial courts first to determine whether the juvenile appealed the adjudication order. This will prevent a trial court from using its already limited time and judicial resources on a proceeding over which the court lacks jurisdiction.

Conclusion

For the reasons stated above, we affirm the trial court’s adjudication order on the two counts of first-degree sexual offense; we reverse the trial court’s adjudication order on the two counts of crime against nature; and we vacate the trial court’s disposition order and remand for a new disposition consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and GEER concur.

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IN THE MATTER OF J.R.W.

No. COA14-657

Filed 18 November 2014

1. Termination of Parental Rights—right to appeal—guardian ad litem’s motion to withdraw

Respondent had no right under N.C.G.S. § 7B-1001(a) to appeal the trial court’s order entered on her assistive guardian ad litem’s motion to withdraw. Further, even if respondent had had a right to appeal under section N.C.G.S. § 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it. Finally, even if the Court of Appeals had suspended its rules pursuant to N.C.R. App. P. 2, respondent’s argument would have been moot.

2. Termination of Parental Rights—competency hearing—appointment of guardian ad litem

The trial court did not abuse its discretion in a termination of parental rights case by conducting the termination proceedings without first holding a hearing to determine whether a guardian ad litem should have been appointed for respondent mother. The record did not suggest that respondent’s mental health problems were sufficiently disabling such that they raised a substantial question as to whether she was non compos mentis and would be unable to aid in her defense at the termination of parental rights proceeding.

Appeal by Respondent-mother from order entered 27 March 2014 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 27 October 2014.

Mercedes O. Chut for Petitioner Guilford County Department of Health and Human Services.

Peter Wood for Respondent-mother.

Ellis & Winters LLP, by Lenor Marquis Segal, for guardian ad litem.

STEPHENS, Judge.

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Respondent-mother (“Respondent”) appeals from an order terminating her parental rights¹ to her minor child, “Joey.”² Respondent does not challenge the order itself; instead, she argues that the trial court abused its discretion by conducting the termination proceedings without first holding a hearing to determine whether a guardian *ad litem* (“GAL”) should have been appointed for her. After careful review of the record and in light of the recent revisions to N.C. Gen. Stat. § 7B-1101.1, which governs when a guardian *ad litem* must be appointed for a parent in a termination of parental rights (“TPR”) hearing, we hold that the trial court did not abuse its discretion by not inquiring into Respondent’s competency prior to holding the TPR hearing.

Facts and Procedural History

The record indicates that since 2008, Respondent has lost custody of six children, including Joey, due to a combination of Respondent’s substance abuse issues, unstable housing, unemployment, and mental health problems. Prior to this matter, Respondent’s parental rights were involuntarily terminated as to her three oldest children, and she relinquished her parental rights to her fourth child. On 13 July 2012, the Guilford County Department of Social Services (“DSS”)³ obtained non-secure custody of Joey and his twin brother two days after their birth and filed petitions alleging they were neglected and dependent juveniles. After a hearing on 22 August 2012, the trial court entered an adjudication and dispositional order in which it concluded Joey and his brother were dependent juveniles, but dismissed the allegation of neglect. The court continued custody of Joey and his brother with DSS, directed DSS to continue to make reasonable efforts toward reunification of Joey and his brother with Respondent and their father, established case plans for Respondent and the father, and directed Respondent and the father to comply with their case plans and cooperate with DSS. The day after the hearing, Joey’s brother died from an acute respiratory infection while in foster care.

1. In her notice of appeal, Respondent also indicated her intent to appeal “the permanency planning order changing the plan to adoption filed 20 July 2013.” However, this order does not appear in the record and Respondent does not address it in her brief.

2. For the purpose of protecting his privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile by a pseudonym in this opinion.

3. Although the Department of Social Services is now known as the Department of Health and Human Services, for ease of reading we refer to the agency throughout this opinion as “DSS.”

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Respondent initially worked with DSS on her case plan, and on 16 May 2013, the trial court appointed a GAL to assist her in the juvenile proceedings pursuant to the then-extant version of N.C. Gen. Stat. § 7B-1101.1(c), which provided for a GAL to be appointed for a parent “if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.” N.C. Gen. Stat. § 7B-1101.1(c) (2011). While the record does not specifically indicate why a GAL was appointed here, there is no indication that substantial questions arose regarding Respondent’s competency to participate in these proceedings.⁴ Moreover, when Respondent’s GAL filed a motion to withdraw on 19 September 2013, he indicated that he had been appointed only in an assistive capacity, and was withdrawing in light of our General Assembly’s enactment of Session Law 2013-129, which eliminated the assistive GAL role for respondents with diminished capacity in TPR cases effective 1 October 2013. The trial court subsequently granted the motion to withdraw, although, perhaps due to a clerical error, it left several pre-printed boxes unchecked in its findings of facts and conclusions of law. Consequently, the court’s order did not explicitly indicate: (1) whether there were substantial questions regarding Respondent’s competency; (2) whether there was good cause to allow Respondent’s GAL to withdraw; and (3) whether the GAL was merely assistive and should thus be permitted to withdraw pursuant to recent statutory changes without holding another hearing to determine if a new substitutive GAL should be appointed.

The record indicates that Respondent failed to make sufficient progress toward reunification, and by order entered 30 August 2013, the trial court modified the permanent plan to include adoption as well as reunification with a parent. DSS subsequently filed a motion to terminate the parental rights of Respondent and Joey’s father on 30 September 2013. DSS alleged grounds to terminate Respondent’s parental rights on the basis of neglect, failure to make reasonable progress to correct the conditions that led to Joey’s removal from Respondent’s home, failure to pay a reasonable portion of the cost of care for Joey, dependency, and the prior termination of her parental rights to other children. *See*

4. According to the trial court’s Permanency Planning Review Hearing Order of 30 August 2013, Respondent, who was diagnosed with schizo-affective bipolar disorder in 2012, reported to a social worker in April 2013 that she occasionally heard voices and saw images that were not there; that resulted in the appointment of an assistive GAL in a separate TPR proceeding regarding her fourth-oldest child. There is no evidence in the record that the trial court ever appointed a substitute GAL in this or any prior proceeding involving Respondent or any of her children.

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N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6), (9) (2013). By order entered 19 December 2013, the trial court relieved DSS of further reunification efforts, changed the permanent plan for Joey to adoption only, and directed DSS to continue making efforts toward finalizing the permanent plan of adoption. In its motion to terminate Respondent's parental rights, DSS acknowledged the previous appointment of a GAL for assistance but alleged that "[t]here is no evidence to suggest that the mother is incompetent." In her reply to the motion to terminate her parental rights, Respondent fully admitted to the allegation that there was no evidence to suggest she is incompetent. After a hearing on 11 February 2014, the trial court entered an order on 27 March 2014 terminating Respondent's parental rights to Joey.⁵ The court concluded all five grounds alleged by DSS existed, and that termination of Respondent's parental rights was in Joey's best interest. Respondent appeals.

GAL Withdrawal Order

[1] Respondent first argues that the trial court's order entered on her assistive GAL's motion to withdraw is fatally deficient because it does not make adequate findings of fact or conclusions of law. Respondent, however, has no right to appeal this order under N.C. Gen. Stat. § 7B-1001(a) (2013) (limiting the orders which may be appealed in cases brought under Chapter 7B); *see also In the Matter of A.R.G.*, 361 N.C. 392, 646 S.E.2d 349 (2007) (demonstrating our Supreme Court's refusal to expand the bases for appellate review under section 7B-1001 and its predecessors). Further, even if Respondent did have a right to appeal under section 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it as required by section 7B-1001(b). Respondent has not filed a petition for a writ of certiorari seeking review of the order under Rule 21 of our Rules of Appellate Procedure, and her argument is thus not properly before this Court. Finally, even if this Court were to suspend its rules pursuant to N.C.R. App. P. 2, Respondent's argument would be moot, and it is well-established that where an argument is moot, no appellate review should lie. *See, e.g., Davis v. Zoning Bd. of Adjustment of Union Cnty.*, 41 N.C. App. 579, 582, 255 S.E.2d 444, 446 (1979) (dismissing appeal after finding that all questions raised had been rendered moot by amendments to the ordinance in question). Here, given the statutory changes to section 7B-1101.1 that went into effect on 1 October 2013, Respondent's assistive GAL would have been removed by operation of law with or without

5. Joey's father agreed to sign a general relinquishment of his parental rights at the start of the termination hearing.

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a court order. Moreover, nothing in the record indicates that substantial questions had arisen regarding Respondent's competency sufficient to qualify her for a substitutive GAL when she had previously not qualified. Indeed, Respondent herself admitted in her reply to DSS's motion to terminate her parental rights that there is no evidence to suggest she is incompetent. Accordingly, Respondent's first argument is without merit.

GAL Inquiry

[2] Respondent next contends that the trial court abused its discretion when it did not conduct, on its own motion, an inquiry to determine whether she required a GAL before holding the hearing to terminate her parental rights. We disagree.

We review a trial court's determination of whether or not to appoint a GAL for a parent for abuse of discretion. See *In re M.H.B.*, 192 N.C. App. 258, 664 S.E.2d 583 (2008). "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511 (citation omitted), *affirmed per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010). "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).

Under the statutory changes that went into effect on 1 October 2013, section 7B-1101.1(c) of our General Statutes provides that, "[o]n motion of any party or on the court's own motion, the court may appoint a guardian *ad litem* for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013). North Carolina law defines an incompetent adult as one who

lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2013). As noted above, although prior versions of section 7B-1101.1 also provided for the appointment of an

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assistive GAL for a parent who suffers from diminished capacity, our General Assembly eliminated that provision when it revised the statute.

In the present case, Respondent contends that due to her history of mental health problems, the trial court should have conducted an inquiry into her competence and need for a GAL in the termination proceedings. In support of her argument, Respondent relies on case law decided under prior versions of section 7B-1101.1(c), such as *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), which she contends supports the proposition that allegations of mental health issues should trigger a GAL inquiry. Essentially, the crux of Respondent's argument boils down to the notion that if her mental health history rendered her incompetent as a parent, it must also have rendered her incompetent as a litigant.

However, this argument ignores the fact that mental health was just one of several bases for the court's TPR order. It also appears to erroneously conflate the circumstances generating incapacity to provide appropriate care and supervision of a juvenile with the circumstances that establish a parent's lack of capacity to manage her own affairs or act in her own interest during termination proceedings. We note that these are two separate concepts with their own specific standards, and conflating them ignores this Court's prior holdings that evidence of mental health problems is not per se evidence of incompetence to participate in legal proceedings. *See, e.g., In re S.R.*, 207 N.C. App. 102, 698 S.E.2d 535, *disc. review denied*, 364 N.C. 620, 705 S.E.2d 371 (2010) (concluding the trial court did not abuse its discretion in not appointing a guardian *ad litem sua sponte* where, even though the mother suffered from substance abuse and mental health issues, there was no indication that she was incompetent or had a diminished capacity); *Soderlund v. Kuch*, 143 N.C. App. 361, 546 S.E.2d 632, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 438 (2001) (holding that a mentally ill adult was not necessarily legally incompetent).

Much of Respondent's argument relies on cases, such as *N.A.L.*, that were decided under earlier iterations of section 7B-1101.1(c), which required appointment of GALs for parents who suffered from diminished capacity in addition to GALs for those who are incompetent. Indeed, prior versions of the controlling statute once contained language that required a trial court to appoint a guardian *ad litem* any time a TPR petition alleged incapability to care for the juvenile due to substance abuse, mental retardation, mental illness, or organic brain syndrome. However, that language was deleted when section 7B-1101.1 was enacted in 2005, *see* 2005 N.C. Sess. Laws 398 § 14, and the current version of section 7B-1101.1(c) is far narrower in its requirements. In fact, nothing in the

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statute's plain language requires the trial court to conduct an inquiry to determine whether a GAL should be appointed for a parent merely because of her mental health history. Although our General Assembly could have revised the statute to reinstate this requirement in 2013, it chose not to do so. Instead, as it stands, the statute vests discretion in the trial court, which *may* hold a hearing on appointing a GAL only for a parent who is incompetent.

Here, despite Respondent's claims to the contrary, the record establishes both that the severity of her mental health problems was well known to the trial court, and that those issues did not rise to the level of incompetency. On the one hand, the fact that Respondent attended all but one of the hearings related to this matter gave the trial court ample opportunity to observe and evaluate her capacity to act in her own interests. Moreover, although the record contains no evidence that Respondent could not "manage [her] own affairs" or "make or communicate important decisions," *see* N.C. Gen. Stat. § 35A-1101(7), it does include facts in keeping with a finding of competency.

For example, Respondent successfully transitioned from living at a shelter when Joey was born to living by herself in an apartment through a supportive housing program in July 2012, where she resided through the date of the termination hearing. Respondent also enrolled in a GED program and attended a vocational rehabilitation program. Although the fact that Respondent's application for Social Security disability benefits was denied is by no means conclusive proof of her competency, it does provide some evidence to support such a finding. Respondent regularly visited Joey, where she functioned as a parent and exhibited no instances of poor judgment. Additionally, in August 2012, Respondent asked to participate in the Juvenile Court Infant Toddler Initiative and completed the Positive Parenting Program in February 2013. Respondent does not suggest that her mental health problems worsened between the release of her GAL in September 2013 and the hearing to terminate her parental rights on 11 February 2014. In sum, the record does not suggest that Respondent's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she is *non compos mentis* and would be unable to aid in her defense at the termination of parental rights proceeding.

Accordingly, we hold that the trial court did not abuse its discretion when it did not, on its own motion, inquire into Respondent's competency before holding the hearing to terminate her parental rights. Respondent does not challenge the grounds found to terminate her parental rights or the trial court's conclusion that termination of her parental rights is in

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Joey's best interest. Thus, the trial court's order terminating her parental rights to Joey is

AFFIRMED.

Judges GEER and McCULLOUGH concur.

IN THE MATTER OF N.G.H.

No. COA14-621

Filed 18 November 2014

Jurisdiction—subject matter—standing—termination of parental rights

Petitioners' failure to include a copy of the petition to adopt in the record in a termination of parental rights case deprived the trial court of subject matter jurisdiction. Because the district court lacked jurisdiction, the order terminating respondent mother's parental rights was vacated without prejudice to petitioners' right to file a new petition alleging facts that would show they had standing to bring the action.

Appeal by Respondent-mother from order entered 12 March 2014 by Judge R. Russell Davis in Pender County District Court. Heard in the Court of Appeals 27 October 2014.

Corbett & Fisler, by Robert H. Corbett, for Petitioners.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for Respondent-mother.

STEPHENS, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor child, N.G.H.,¹ who was born in January 2012. Petitioners, a cousin of Respondent-mother and his wife, filed a petition to terminate Respondent-mother's parental rights on 5 August 2013.

1. We refer to the juvenile by her initials in order to protect her identity.

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Respondent-mother contends that the order must be vacated because Petitioners failed to establish that they had standing to file the petition. “Whether petitioner had standing is a legal issue that this Court reviews *de novo*.” *In re A.D.N.*, ___ N.C. App. ___, ___, 752 S.E.2d 201, 205 (2013) (italics added), *disc. review denied*, ___ N.C. ___, 755 S.E.2d 626 (2014). Standing to file a legal proceeding is a matter of subject matter jurisdiction, and “[i]ssues of subject matter jurisdiction may be raised at any time, including on appeal.” *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 267, 546 S.E.2d 110 (2000). Standing to file a petition or motion to terminate parental rights is conferred by N.C. Gen. Stat. § 7B-1103. *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004). A petition or motion must state “[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [section] 7B-1103 to file a petition or motion” to terminate parental rights. N.C. Gen. Stat. § 7B-1104(2) (2013). The petition must include any document or order through which the petitioner claims standing that will enable the court to determine whether it has subject matter jurisdiction. *In re T.B.*, 177 N.C. App. 790, 793, 629 S.E.2d 895, 897-98 (2006).

Petitioners submit that they have standing because they have filed a petition to adopt the child. *See* N.C. Gen. Stat. § 7B-1103(7) (2013) (stating that “[a]ny person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes” has standing to file a petition to terminate parental rights). We are unable, after careful examination of the petition, to find any factual allegation therein that Petitioners have filed a petition for adoption pursuant to Chapter 48. No petition for adoption is attached to the termination of parental rights petition or referenced therein.

On appeal, Petitioners concede that the petition is deficient. However, they contend that “matters outside the pleadings, such as [a] contract attached to [a] defendant’s motion [to dismiss for lack of subject matter jurisdiction], may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter.” *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978) (citation omitted). *Tart*, however, concerned a contract dispute, not a petition for termination of parental rights filed under Chapter 7B. *See id.* In *In re T.B.*, we held

that, where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the

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petition is filed, that awards DSS custody of the child. This is implicitly recognized by N.C. Gen. Stat. § 7B-1104(5) . . . , which sets out the requirements for a petition for termination of parental rights, and provides in relevant part that the petition shall set forth . . . (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion.

177 N.C. App. at 793, 629 S.E.2d at 897-98 (citation and internal quotation marks omitted; emphasis in original). Likewise, section 7B-1104 also requires that a petition for termination of parental rights must include, *inter alia*, “[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [section] 7B-1103 to file a petition or motion.” N.C. Gen. Stat. § 7B-1104(2). This Court has upheld orders terminating parental rights in cases where petitions failed to allege or prove standing, but only where the required documentation, such as a custody order, was later filed and made part of the record. *See, e.g., In re H.L.A.D.*, 184 N.C. App. 381, 390-92, 646 S.E.2d 425, 429-30 (2007) (rejecting a challenge to the petitioners’ standing where, although [the] petitioners failed to attach a copy of the custody order to the petition for termination, the custody order was later made part of the record before the trial court, and the mother failed to show that she was prejudiced in any way by the failure to physically attach a custody order to the motion), *affirmed per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); *In re W.L.M.*, 181 N.C. App. 518, 526, 640 S.E.2d 439, 444 (2007) (rejecting a challenge to the trial court’s subject matter jurisdiction where no custody order was attached to the petition, but “the motion to terminate [the] respondent’s parental rights incorporated by reference the juvenile file and custody order in effect when the motion was filed.”).

Petitioners note that, at the termination hearing, one of them testified that the Petitioners had “contemporaneous[ly] . . . filed an action for adoption[.]” However, no testimony established that any adoption petition was filed pursuant to Chapter 48 or that Petitioners had standing to file an adoption petition under Chapter 48. The petition to terminate Respondent-mother’s parental rights did not incorporate by reference any adoption petition, and no copy of any adoption petition was ever filed in this matter. Petitioners’ failure to include a copy of the petition to adopt in the record “ultimately deprived the [district] court of subject matter jurisdiction.” *See In re T.B.*, 177 N.C. App. at 793, 629 S.E.2d at

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898. Because the district court lacked subject matter jurisdiction, the order terminating Respondent-mother's parental rights must be vacated without prejudice to Petitioners' right to file a new petition alleging facts that would show they have standing to bring that action. *See id.* Accordingly, the order terminating Respondent-mother's parental rights is

VACATED.

Judges GEER and McCULLOUGH concur.

IN THE MATTER OF T.L.H.

No. COA14-549

Filed 18 November 2014

Termination of Parental Rights—appointment of GAL—mother with substance abuse and mental health issues

The trial court abused its discretion in a termination of parental rights case by not conducting an inquiry into whether it was necessary to appoint a guardian ad litem (GAL) for a mother who had a substance abuse history and was schizophrenic. Although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into the need for a GAL.

Judge HUNTER, Robert C., dissenting.

Appeal by respondent mother from order entered 4 February 2014 by Judge Tabatha Holliday in Guilford County District Court. Heard in the Court of Appeals 6 October 2014.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

J. Thomas Diepenbrock for respondent-appellant mother.

Parker Poe Adams & Bernstein, LLP, by Sye T. Hickey, for guardian ad litem.

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[237 N.C. App. 239 (2014)]

ELMORE, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to the juvenile T.L.H. Respondent contends the trial court abused its discretion by failing to inquire into whether it was necessary to appoint her a guardian *ad litem* (GAL), when the allegations supporting termination of her rights were focused on her serious mental health disorders. We reverse the order terminating respondent's parental rights and remand for a hearing to determine whether respondent requires a GAL.

I. Background

In addition to the juvenile T.L.H., who was born in 2013, respondent has two older children who were removed from her care. The Guilford County Department of Health and Human Services (DHHS) became involved with this juvenile at the time of the juvenile's birth, after respondent informed the hospital that she had no place to take the juvenile and a hospital psychiatrist evaluated respondent and determined the juvenile would not be safe with her. Respondent has a substance abuse history and is schizophrenic. According to DHHS, respondent "has a history of substance abuse and has diagnoses of schizophrenia, chronic paranoid type, chronically noncompliant, marijuana dependence, personality disorder," and DHHS stated it needed to "rule out borderline intellectual functioning." Respondent requested that DHHS "take custody of [the juvenile] until [respondent] could obtain her own housing and other things needed for her and her baby."

On 12 April 2013, DHHS filed a petition alleging the juvenile was neglected and dependent, and the juvenile was placed in non-secure custody. The petition alleged that respondent had "a substance abuse history and is schizophrenic and has poor mental health compliance;" respondent had two children removed from her care due to substance abuse, domestic violence and her unresolved mental health issues; and respondent was hospitalized on several occasions in the past year due to mental health complications.

Deputy County Attorney Robert W. Brown, III requested that the trial court appoint respondent a GAL at an 18 April 2013 hearing to determine the need for the continued nonsecure custody of the juvenile. Judge Betty Brown (Judge Brown) appointed attorney Amy Bullock as respondent's GAL on that date. Judge Brown did not indicate whether the GAL was appointed in a substitutive capacity or an assistive capacity. The trial court dismissed the neglect allegation but adjudicated the

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juvenile dependent in an order entered 5 June 2013. The order also relieved DHHS of the duty to make reasonable efforts toward reunification, although it permitted DHHS to continue to make such efforts.

The matter came on for a permanency planning hearing on 11 July 2013, and respondent testified at the hearing. The trial court changed the permanent plan for the juvenile to adoption. On 9 September 2013, DHHS filed a petition to terminate the parental rights of respondent and the juvenile's unidentified father. As grounds for termination of respondent's rights, the petition alleged: (1) neglect; (2) dependency; and (3) respondent's rights to another child had previously been terminated and she lacked the ability to establish a safe home. N.C. Gen. Stat. § 7B-1111(a) (1, 6, 9) (2013). A pretrial hearing was conducted before Judge Thomas Jarrell (Judge Jarrell), following which Judge Jarrell entered an order on 19 November 2013 stating: "Attorney Amy Bullock was released by operation of law effective October 1, 2013 as [respondent's] guardian ad litem attorney of assistance." Respondent proceeded in this matter without the assistance of a GAL. The case came on for a termination hearing on 6 January 2014. Respondent was not present for the hearing, and her attorney made a motion to continue on her behalf. According to the attorney, he had been unable to send respondent notice of the hearing because she had moved and DHHS had not provided him with her new address. The attorney had sent correspondence to respondent's former address in November and December of 2013. DHHS contended that a social worker had informed respondent of the termination hearing date and that respondent had not been present for any court dates since the July permanency planning hearing. The trial court denied the motion to continue, and terminated respondent's parental rights based on all three grounds alleged in the petition. The trial court's order also terminated the parental rights of the juvenile's unidentified father. Respondent appeals.

II. Appointment of GAL

In her sole argument on appeal, respondent contends the trial court abused its discretion by failing to conduct an inquiry into whether it was necessary to appoint her a guardian ad litem. We agree.

In 2013, our General Assembly enacted amendments to Article 11 of the Juvenile code that apply to all proceedings occurring on or after 1 October 2013. 2013 N.C. Sess. Laws 129, §§ 32, 42. N.C. Gen. Stat. § 7B-1101.1(c) no longer allows the trial court to appoint a GAL for a parent with diminished capacity. Instead, subsection (c) specifies: "On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with

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G.S. 1A-1, Rule 17.” As such, N.C. Gen. Stat. § 7B-1101.1 now contemplates the appointment of a GAL only for the substitution for a parent who is incompetent in accordance with N.C. Gen. Stat. 1A-1, Rule 17. N.C. Gen. Stat. § 7B-1101.1 (2013).

In line with this amendment is the well-settled rule that “[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention, which raise a substantial question as to whether the litigant is *non compos mentis*.” *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). “Whether the circumstances . . . are sufficient to raise a substantial question as to the party’s competency is a matter to be initially determined in the sound discretion of the trial judge.” *Id.* (citation and quotation omitted). Thus, although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent’s competence require the trial court to inquire into whether a GAL need be appointed. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008). This Court has recently explained the process which must be followed in connection with the appointment of a parental guardian ad litem pursuant to N.C. Gen. Stat. § 7B-1101.1(c) as follows:

[T]he trial court . . . must conduct a hearing in accordance with the procedures required under [N.C. Gen. Stat. § 1A-1,] Rule 17 in order to determine whether there is a reasonable basis for believing that a parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. If the court chooses to exercise its discretion to appoint [a guardian ad litem] under N.C. Gen. Stat. § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the [guardian ad litem] should play, whether one of substitution or assistance.

In re P.D.R., ___ N.C. App. ___, ___, 737 S.E.2d 152, 159 (2012). There is no record evidence that Judge Brown conducted a hearing to determine in what capacity respondent’s GAL would serve. In the present case, “the record clearly reflects that the trial court failed to delineate the precise role to be played by Respondent-Mother’s guardian ad litem during the termination proceeding as required by N.C. Gen. Stat. § 7B-1101.1(c).” *In re B.P.*, ___, N.C. App. ___, 748 S.E.2d 773, 2013 WL 3379659 at *7 (2013). Though Judge Jarrell indicated that he believed respondent’s GAL was serving in an assistive capacity, there is no record evidence

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that he conducted any hearing before making the determination. We believe *B.D.* and *P.D.R.* required that he do so before removing respondent's GAL.

To illustrate the effect of the amendment, we look to an unpublished opinion recently authored in this Court, *In re H.B.*, 762 S.E.2d 1 (N.C. Ct. App. 2014). *In re H.B.*, the respondent-mother argued that the trial court erred in failing to inquire as to whether she needed a GAL based on the fact that the trial court had before it evidence of her diminished capacity and because, at the time of the termination hearing, N.C. Gen. Stat. § 7B-1101.1(c) (2011) authorized the appointment of a GAL based on evidence of incompetency and/or diminished capacity. This Court noted that, as amended, N.C. Gen. Stat. § 7B-1101.1, applied to any future proceedings occurring on or after 1 October 2013. *Id.* Given that the termination order was entered after the amendment date, we held that the record must have shown evidence of incompetency to require the trial court to consider whether to appoint a GAL in the cause. Because there was no such evidence in the record and because DHHS did not allege dependency as a ground for terminating the respondent's parental rights, we concluded the trial court did not err. *Id.*

In *In re N.A.L.*, the juvenile petition alleged that the juveniles were dependent and that the respondent-mother was "incapable of providing for the proper care and supervision of the minor child" because of her "problems in controlling her anger outbursts; her significant tendency to be aggressive towards others, including her child; and her lack of understanding of her prior neglect of the minor child." *N.A.L.*, 193 N.C. App. at 118-19, 666 S.E.2d at 771. Further, the respondent was also diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning. *Id.* In the order terminating the respondent's parental rights, the trial court found that she "has significant mental health issues which impact her ability to parent this child and meet his needs." *Id.* at 119, 666 S.E.2d at 771. Despite DHHS's allegations and its own findings of mental health issues, the trial court did not inquire whether the appointment of a GAL was appropriate. On appeal, the respondent-mother argued, and we agreed, that the trial court should have "properly inquired into" the respondent's competency pursuant to N.C. Gen. Stat. § 1A-1, Rule 17 to determine whether she was a candidate for the appointment of a GAL. *Id.* at 119, 666 S.E.2d at 771-72.

Here, respondent challenges the trial court's failure to inquire into her need for a GAL based on the evidence of her incompetency and the DHHS petition alleged dependency as a ground for termination. As in *In re N.A.L.*, the allegations against respondent in this case partly revolve

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around respondent's multiple, serious mental health conditions. DHHS alleged that respondent had schizophrenia, had poor mental health compliance, and was not taking her medication. A hospital psychiatrist evaluated respondent and determined that "there was no way this newborn child can be safe with this mother." DHHS also noted that respondent's parental rights to her two other biological children were terminated, in part, due to her unresolved mental health issues. In the petition to terminate respondent's parental rights filed 9 September 2013, DHHS requested that the trial court make an inquiry to determine whether a guardian was necessary to proceed with the termination. There is no indication in the record, however, that the trial court ever made such an inquiry at the termination stage. The petition also noted that respondent's mental illness was one of the facts that led to the juvenile's removal to DHHS custody, and that respondent received Social Security benefits based on her mental health diagnoses.

In the termination order, the trial court made the following findings of fact:

16. The mother has been diagnosed with Bipolar Disorder, Schizophrenia, Schizo-Affective Disorder, and Narcolepsy. The mother also has a long history of failing and refusing to take her mental health medications as prescribed and recommended. As a result of the Narcolepsy, the mother falls asleep unexpectedly and may remain asleep for hours. The mother has also been diagnosed with Cannabis Dependence, has a long history of the same, tested positive for Marijuana, and failed to submit to a substance abuse assessment as requested.

....

26. The mother's mental illness, consistent refusal to comply with mental health medications, narcolepsy, and [Cannabis] Dependence render the mother incapable of providing proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. § 7B-101. These conditions contributed to the juvenile being removed from the home and the dependency adjudication on May 16, 2013. The mother's long history of the same conditions despite [DHHS] intervention in 2000 and 2004 evidences a reasonable probability that such incapability will continue for the foreseeable future. The mother has failed to come forward with an appropriate alternative child care arrangement.

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Given the serious nature of respondent's multiple ongoing mental health conditions, the trial court's reliance on those conditions to support grounds to terminate her parental rights, and the probable impact of respondent's mental health status on her ability to participate in the proceedings, we believe the record demonstrates that the trial court abused its discretion by failing to conduct an inquiry into respondent's competency and the need for a guardian *ad litem*. See *In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d at 772 (trial court erred by failing to make inquiry in light of evidence raising issues of respondent's competence). There was evidence before Judge Brown which could reasonably have allowed her to appoint the GAL in a substitutive capacity, but Judge Brown failed to make the determinations required by *P.D.R.*, *supra*. There is no record evidence that Judge Jarrell conducted a hearing pursuant to *P.D.R.* In light of this evidence, we remand for the purpose of determining respondent's "need for a GAL and the proper role of that GAL." *P.D.R.*, ___, N.C. App. at ___, 737 S.E.2d at 159, and "conducting any additional proceedings that might be needed dependent upon the determination made at that time." *B.P.*, ___ N.C. App. at ___, 748 S.E.2d 773, ___, 2013 WL 3379659 at *7. Accordingly, we reverse the termination order as to respondent, and remand for a hearing for the trial court to determine whether respondent is in need of a GAL.

Reversed and remanded.

Chief Judge McGEE concurs.

HUNTER, Robert C., dissenting.

Because I believe that the record shows that the trial court did not abuse its discretion in failing to inquire as to respondent's competency at the termination hearing, I must respectfully dissent.

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013). Although the statute formerly allowed the trial court to appoint a GAL for a parent who was incompetent or had diminished capacity, it was amended in October 2013 to delete language permitting appointment of GALs for parents who have diminished capacity. The statute now only allows appointment of a GAL for incompetent parents. An incompetent adult:

[L]acks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions

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concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2013).

“A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*.” *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). “Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge.” *Id.* “A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010).

Previously, a trial court was required to appoint a GAL when the petition alleged dependency as a ground to terminate the parent's rights. *In re J.D.*, 164 N.C. App. 176, 180, 605 S.E.2d 643, 645, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). However, a dependency allegation no longer automatically triggers appointment of a GAL, although allegations of mental health problems may still require the trial court to inquire into appointment of a GAL. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008).

On appeal, respondent contends that the “trial court . . . had a duty to properly inquire whether [respondent] was incompetent, and required the appointment of a guardian ad litem. The trial court's failure to conduct such an inquiry is an abuse of discretion and requires reversal.” Citing respondent's mental illness and failure to comply with treatment, respondent alleges that there was a substantial question as to respondent's competency. For the following reasons, I disagree.

To resolve whether the trial court abused its discretion, I believe it is necessary to detail the procedural history of the case prior to the termination stage. Based on the allegations in the juvenile petition filed 12 April 2013, the trial court appointed Amy Bullock as respondent's provisional GAL at the first hearing on the petition. At the time, the trial court exercised its then-existing authority under section 7B-1101.1(c) to appoint a GAL for a parent with diminished capacity. Respondent's GAL assisted respondent in a number of hearings including the adjudication

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and disposition hearing on 16 May 2013, the permanency planning hearing on 11 July 2013, and the pretrial hearing on 18 November 2013. It was only after the statute change in October 2013 that the trial court released the GAL, noting that a parent with diminished capacity was no longer entitled to a GAL.

Furthermore, I disagree with the majority's conclusion that the record demonstrates respondent's incompetency to such a level that its failure to conduct another inquiry as to her competency once the statute changed constituted an abuse of discretion. In contrast, while I do believe that the evidence would support a finding of diminished capacity, I cannot say that the evidence rose to such a level that the trial court abused its discretion. As discussed, the trial court initially appointed the GAL based on its finding of diminished capacity but released the GAL once the statute changed in October 2013. Implicit in this decision is that the trial court concluded that respondent was not incompetent as of October 2013; otherwise, the trial court would not have dismissed the GAL despite the statute change. Thus, the issue is whether the trial court was presented with sufficient evidence that respondent was incompetent to render the failure to conduct an inquiry at the termination hearing an abuse of discretion.

"[A] person with diminished capacity is not incompetent, but may have some limitations that impair their ability to function." *In re P.D.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 158 (2012). Therefore, the fact that respondent was initially appointed a GAL based on diminished capacity has little bearing on the determination of whether she was/is incompetent. As noted above, for purposes of a section 7B-1101.1(c) determination of whether a parent should be appointed a GAL, incompetency means that the parent is unable to manage her affairs or communicate important decisions due to, among other conditions, mental illness.

Respondent cites her mental health diagnoses as sufficient evidence requiring an inquiry into her competency, and it is undisputed that she has a long history of mental illness. However, respondent has identified no specific information in the record that indicates she is incapable of managing her own affairs due to her mental conditions, including in this termination matter. At the July 2013 permanency planning hearing, respondent testified that she began receiving social security benefits. When she received the first check, she used it to pay back rent and bills. In November 2013, respondent applied for and obtained new housing away from her boyfriend with whom she had a long history of domestic violence. In December 2013, she came to DSS and applied for new benefits. Finally, by releasing the GAL appointed based on the lower

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threshold of diminished capacity, the trial court implicitly indicated that respondent is not incompetent. Accordingly, I am unable to conclude that the trial court's decision to release the GAL was so arbitrary that it could only have been the result of an unreasoned decision; since respondent exhibited some level of sufficiency at managing her affairs, I do not think the trial court abused its discretion in releasing the GAL.

Finally, the majority's reliance on *In re N.A.L.* is misplaced. There, despite allegations that the respondent had serious mental health issues, the trial court failed to conduct any inquiry as to whether she was entitled to a GAL under section 7B-1101.1(c). *In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d at 771. Therefore, the Court held that the trial court abused its discretion by failing to conduct any inquiry as to whether the respondent should be appointed a GAL. *Id.* at 119, 666 S.E.2d at 772.

However, unlike *In re N.A.L.*, here, the trial court actually appointed a GAL under section 7B-1101.1(c) based on the circumstances alleged in the juvenile petition that suggested that respondent had diminished capacity. It was only after the statute changed in October 2013 that the trial court released the GAL because parents with diminished capacity were no longer entitled to a GAL. Furthermore, *In re N.A.L.* was decided before N.C. Gen. Stat. § 7B-1101.1(c) changed. Thus, this Court had to determine whether the evidence was sufficient to raise a substantial question as to the respondent's incompetency and diminished capacity, a lesser standard than incompetency. *See generally In re P.D.R.*, ___ N.C. App. at ___, 737 S.E.2d at 158. Accordingly, *In re N.A.L.* is distinguishable from the present case and is not controlling.

Finally, I believe that the Court's recent decision in *In re H.B.*, No. COA13-1474, 2014 WL 2507835 (June 3, 2014) (unpublished), provides guidance, and I would adopt its reasoning. In *In re H.B.*, the trial court originally appointed the respondent a GAL prior to the adjudication hearings. *Id.* at *2. However, although the GAL participated in the hearings through the permanency planning review hearing, she did not attend any further hearings nor was there any indication in the record why she no longer participated. *Id.* On appeal, the respondent argued that the trial court abused its discretion by failing to inquire into her competency or diminished capacity because "nothing in the record indicate[d] that her need for a GAL had lessened." *Id.* After noting that her appeal as to diminished capacity was moot based on the change in N.C. Gen. Stat. § 7B-1101.1, this Court found no abuse of discretion as to the trial court's failure to inquire into her competency. *Id.* at *3.

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Here, like *In re H.B.*, respondent was initially appointed a GAL before the statute changed in October 2013. However, once the statute changed, the trial court released the GAL, noting that parents with diminished capacity were no longer entitled to a GAL. Furthermore, I do not believe that respondent's circumstances had worsened to the extent that the trial court's decision to not inquire as to her competency at the later termination hearing was so arbitrary that it could not have been the result of a reasoned decision. In contrast, I believe that the evidence shows that her circumstances had improved. After the appointment of the GAL based on diminished capacity, respondent began receiving social security benefits, paid back bills and rent, applied for new benefits, and obtained new housing away from her boyfriend. Accordingly, I would find no abuse of discretion.

In sum, I believe that the trial court did not abuse its discretion by failing to re-inquire as to respondent's competency at the termination hearing. Although respondent clearly had a long history of mental illness, she was able to apply for and obtain new housing, apply for new benefits at DSS, and use her social security benefits to pay back rent and bills. Thus, given this evidence of competency, I am unable to say that the trial court's decision was so arbitrary that it could have only resulted from an unreasoned decision. Therefore, I would affirm the order terminating her parental rights.

ROBERT M. PHILLIPS, SR., THOMAS E. OSBORNE,
AND WIFE KAREN L. OSBORNE, PLAINTIFFS
v.
ORANGE COUNTY HEALTH DEPARTMENT, DEFENDANT

No. COA13-1463

Filed 18 November 2014

1. Parties—real party in interest—not raised at trial

Defendant consented to being treated as the real party in interest by declining to raise the issue before the trial court.

2. Jurisdiction—subject matter—necessary parties

The trial court did not lack subject matter jurisdiction based on the failure to join necessary parties because defendant did not raise the issue below, and because failure to join a necessary party does not negate a court's subject matter jurisdiction.

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3. Declaratory Judgments—appropriate subject—justiciable issue—authority of county to inspect and charge fees

A case involving the authority of a county to inspect and to charge inspection fees for certain wastewater systems when those systems have already been permitted and inspected by the State was an appropriate subject for a declaratory judgment. A justiciable controversy existed even though the inspections plaintiffs complained about had already been completed because plaintiffs argued that defendant had no legal right to conduct those inspections.

4. Immunity—governmental—declaratory judgment action

The trial court did not lack subject matter jurisdiction in an action concerning a county's authority to inspect certain wastewater treatment systems after they had been inspected by the State based on plaintiffs' failure to allege waiver of governmental immunity. This was a declaratory judgment rather than a negligence action.

5. Administrative Law—exhaustion of remedies—statutory basis—wastewater treatment—local board of health rules

The trial court properly exercised subject matter jurisdiction in a case involving the authority of a county to inspect certain wastewater treatment facilities that had already been certified by the State. Although defendant further contended that plaintiffs had failed to exhaust administrative remedies, there were no prescribed administrative remedies available to plaintiffs.

6. Sewage—spray irrigation wastewater systems—authority of local health department

The trial court's conclusion that a county health department did not have the authority to inspect plaintiffs' spray irrigation wastewater systems was supported by the facts and by appropriate law. The statutes expressly created a different system of regulation for wastewater systems that discharge effluent onto the land surface.

7. Declaratory Judgments—county health department—authority to inspect

The trial court did not err in a declaratory action concerning a county health department's authority to inspect certain wastewater systems by failing to grant defendant county's motion to dismiss or to grant its motion for judgment on the pleadings. Plaintiffs' complaint set forth a justiciable claim and requested appropriate relief, and the trial court had subject matter jurisdiction over plaintiffs' complaint.

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8. Sewage—wastewater treatment systems—local inspections—preemption by State

A health department facing a challenge to its authority to inspect certain waste water treatment systems was not entitled to judgment on the pleadings on its contention that it adopted more stringent rules for the regulation of plaintiffs' spray irrigation systems than required by the State. It was held elsewhere in the opinion that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs' wastewater systems.

9. Sewage—wastewater irrigation system—exclusive authority of State—summary judgment

The trial court did not err in granting plaintiffs' motion for summary judgment in an action involving the authority of a county health department to inspect certain wastewater systems. The parties indicated at the hearing that there were no genuine issues as to the material fact, and, by statute, only the State has the authority to regulate plaintiffs' spray irrigation systems.

10. Attorney Fees—declaratory judgment action—county's authority to inspect wastewater facility—award not an abuse of discretion

The trial court's award of attorneys' fees to plaintiffs was affirmed in an action involving the county's authority to inspect certain wastewater treatment facilities. The trial court had subject matter jurisdiction and its decision to award attorneys' fees was not so arbitrary that it could not have been the result of a reasoned decision.

Appeal by defendant from order entered 11 June 2013 by Judge George B. Collins in Orange County Superior Court. Heard in the Court of Appeals 4 June 2014.

Hoof Hughes Law, PLLC, by James H. Hughes, for plaintiff-appellees.

Orange County Attorney's Office, by Annette M. Moore, Jennifer Galassi, and John L. Roberts, for defendant-appellant.

CALABRIA, Judge.

The Orange County Health Department ("defendant") appeals from an order granting summary judgment and declaratory judgment in favor of Robert M. Phillips, Sr. ("Phillips"), Thomas E. Osborne ("Osborne"), and Karen L. Osborne (collectively, "plaintiffs"). The trial court found

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(1) that defendant had no authority to inspect and charge fees for inspecting plaintiffs' wastewater systems; and (2) that defendant is statutorily preempted from regulating any wastewater treatment systems permitted by the North Carolina Department of Environment and Natural Resources ("NCDENR") under rules adopted by the North Carolina Environmental Management Commission ("EMC") pursuant to Article 21, Chapter 143 of the General Statutes of North Carolina. The court also awarded plaintiffs attorneys' fees. We affirm.

I. Background

Plaintiffs own properties in Orange County, North Carolina that failed perk tests, which determine whether land is suitable to percolate wastewater. Since the properties were determined to be unsuitable for traditional septic tank systems for wastewater disposal, plaintiffs' properties utilize "spray irrigation" wastewater systems designed to discharge effluent directly to the land surface ("spray irrigation system"). NCDENR is the agency that designed a method of advancing its statutory purpose of administering a complete program of water and air conservation, by issuing permits for property owners utilizing spray irrigation systems in North Carolina. *See* N.C. Gen. Stat. §§ 143-211(c); -215.1(a4) (2013).

On 18 April 1997 and 14 February 2005, plaintiffs obtained permits from NCDENR allowing them to use spray irrigation systems on their properties. The conditions of the permits were that the systems would be periodically inspected by NCDENR, and that plaintiffs would be billed and be responsible for paying NCDENR an "administering and compliance fee." Plaintiffs executed operation and maintenance agreements with NCDENR, indicating that they would maintain their spray irrigation systems in compliance with the permitted conditions.

Prior to the events of the instant case, Phillips received a notice of late inspection fees from defendant. When Phillips inquired into the matter, questioning defendant's authority to inspect and charge fees, defendant indicated that the Orange County Board of Health had approved a program "whereby all non-discharge systems permitted by the State . . . would be inspected on a periodic basis[,] and that Phillips' spray irrigation system was subject to inspection.

Defendant subsequently attempted to inspect plaintiffs' spray irrigation systems. Osborne objected to an inspection of his spray irrigation system because the State of North Carolina had recently inspected it. Despite Osborne's objection in December 2011, defendant again attempted to inspect his spray irrigation system in January 2012. After

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being deterred by a locked gate, defendant sent Osborne an incomplete inspection report and invoice, along with a request that he contact defendant to schedule an inspection appointment. On 15 March 2012, defendant received an inspection payment from Osborne, along with a letter indicating that “[p]ayment is made under protest and believe [sic] to be fraudulent.”

Defendant encountered similar resistance from Phillips in its efforts to inspect his spray irrigation system. In July 2012, Phillips contacted defendant, indicating that he did not want his system inspected, and that he did not want any of defendant’s employees on his property without his permission. Phillips and defendant subsequently corresponded regarding defendant’s authority to inspect Phillips’s spray irrigation system and charge fees for such inspections. In August 2012, defendant informed Phillips of a proposed date to inspect his spray irrigation system. Phillips indicated that he was unavailable on the proposed date and referred the matter to his attorney. However, Phillips stated that while he was amenable to the inspection being conducted while he was present, he refused to pay the accompanying fee.

On 16 November 2012, defendant sent letters to plaintiffs, requesting permission to enter plaintiffs’ properties to inspect the spray irrigation systems and informing them that defendant would seek administrative inspection warrants if permission was not granted. Plaintiffs’ counsel advised defendant of plaintiffs’ position that defendant had no legal authority to conduct the requested inspections. Counsel further requested that defendant notify him should it seek administrative inspection warrants, so that he could object to the warrants at that time. Plaintiffs’ counsel also noted that plaintiffs were amenable to supervised inspections, but that they would not pay fees for the inspections. On 28 November 2012, defendant sought and obtained administrative inspection warrants to complete inspections of both plaintiffs’ spray irrigation systems. Defendant executed the warrants on 29 November 2012, and sent invoices to plaintiffs for inspection costs.

On 14 December 2012, plaintiffs filed a complaint seeking a declaratory judgment in Orange County Superior Court. Plaintiffs alleged, *inter alia*, that since plaintiffs’ spray irrigation systems were permitted by NCDENR under rules adopted by the EMC, defendant had no right to inspect, or charge fees for inspecting, plaintiffs’ systems. Plaintiffs sought to enjoin defendant from (1) conducting further inspections of plaintiffs’ systems; or (2) taking any action to collect inspection fees for plaintiffs’ systems. Plaintiffs also sought to recover attorneys’

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fees from defendant, and to have defendant refund the inspection fees it had collected.

On 22 January 2013, defendant filed an answer, a motion to dismiss, and a motion for judgment on the pleadings. Plaintiffs filed a motion for summary judgment on 16 April 2013. After a hearing, the trial court entered an order finding that defendant was preempted by statute from regulating plaintiffs' type of wastewater treatment system and enjoining defendant from taking any action to collect fees from inspections that had already been conducted on plaintiffs' spray irrigation systems. The trial court also ordered defendant to refund Osborne's inspection fee, which he had paid under protest. Defendant appeals.

Defendant raises several issues on appeal, including (1) that the trial court lacked subject matter jurisdiction; (2) that the trial court erred in declaring that defendant was statutorily preempted from regulating wastewater systems permitted by NCDENR under rules promulgated by the EMC and had no right to inspect or collect fees for inspecting plaintiffs' wastewater systems; (3) that the trial court erred by granting summary judgment in favor of plaintiffs; (4) that the trial court erred by failing to grant defendant's motion to dismiss or its motion for judgment on the pleadings; and (5) that the trial court erred by awarding plaintiffs costs and attorneys' fees.

II. Subject Matter Jurisdiction

We first address defendant's jurisdictional claims. Specifically, defendant contends that the trial court lacked subject matter jurisdiction because (1) defendant is not the real party in interest; (2) necessary parties were not joined; (3) there was no justiciable claim; (4) plaintiffs' complaint was defective as a result of failing to allege a waiver of sovereign or governmental immunity; and (5) plaintiffs failed to exhaust their administrative remedies. We disagree.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *New Bar P'ship v. Martin*, ___ N.C. App. ___, ___, 729 S.E.2d 675, 681 (2012) (citation omitted). "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).

A. Real Party in Interest

[1] Defendant first contends that the trial court lacked subject matter jurisdiction because defendant is not a real party in interest. Specifically, defendant contends that it is not a real party in interest because the

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enabling statutes of local health departments do not contain provisions for the capacity of health departments to sue or be sued.

As an initial matter, we note that defendant did not raise the issue of whether it was the real party in interest before the trial court. Where “th[e] question as to [defendant’s] right to sue was not raised in the court below[,] . . . it is too late now to make this contention.” *Asheville Safe Deposit Co. v. Hood*, 204 N.C. 346, 348, 168 S.E.2d 524, 526 (1933). Therefore, by declining to raise the issue before the trial court, defendant conceded to being treated as the real party in interest. Defendant’s argument is without merit.

B. Joinder

[2] Defendant next contends that the trial court lacked subject matter jurisdiction because necessary parties were not joined in the instant case pursuant to N.C. Gen. Stat. § 1A-1, Rule 19.

“The defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal.” *Sutton v. Messer*, 173 N.C. App. 521, 528, 620 S.E.2d 19, 24 (2005). In addition, “a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding.” *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793, *disc. rev. denied*, 318 N.C. 418, 349 S.E.2d 601 (1986). Because defendant failed to raise this issue below, and because failure to join a necessary party does not negate a court’s subject matter jurisdiction, *id.*, this argument is overruled.

C. Justiciability

[3] Defendant next contends that plaintiffs have no justiciable claim because the inspections that plaintiffs are complaining about have already been completed, and the next inspections are not scheduled to occur until November 2015. Defendant is mistaken.

“[C]ourts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable.” *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992) (citations omitted).

Plaintiffs’ complaint includes other issues in addition to the already completed inspections. Specifically, it includes the reimbursement of the fees that were paid for the inspections as well as an injunction

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to prevent any further inspections and fees. The affidavits submitted to obtain the administrative warrants indicate that plaintiffs' wastewater systems are subject to inspection every three years, meaning that defendant intends to continue the inspections in the future. Although defendant has already completed the currently contested inspections, there is no authority for defendant to continue doing so in the future. Because plaintiffs argue that defendant had no legal right to conduct the inspections it has already completed, a justiciable controversy exists. Moreover, the very purpose of a declaratory judgment is to "make certain that which is uncertain and secure that which is insecure." *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 802 (1971) (citation omitted). Because it is uncertain whether defendant may inspect and charge fees for inspecting wastewater systems when such systems have already been permitted and inspected by the State, this question is an appropriate subject under the Uniform Declaratory Judgment Act.

D. Sovereign/Governmental Immunity

[4] Defendant further contends that the trial court lacked subject matter jurisdiction because plaintiffs failed to allege that defendant had waived sovereign or governmental immunity in its complaint.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citation omitted). A complaint fails to state a cause of action where it fails to allege that immunity has been waived. *See, e.g., In re Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 567, 665 S.E.2d 760, 765-66 (2008) (holding trial court did not err by granting summary judgment in favor of defendants where plaintiffs' complaint failed to allege a waiver of governmental immunity).

Local boards of health derive their powers from the counties in which they sit. *See* N.C. Gen. Stat. § 130A-34 (providing that counties "shall operate a county health department, establish a consolidated human services agency, . . . participate in a district health department, or contract with the State for the provision of public health services."). As such, any action against a local board of health, as an agency of the county, is an action against the county for the purposes of governmental immunity.

It is true that plaintiffs failed to allege that appellant had waived governmental immunity in their complaint. However, the complaint

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in the instant case is a declaratory judgment action, not a negligence action. Although defendant enjoys governmental immunity, such immunity does not bar the claims brought by plaintiffs in the instant case. Therefore, this argument is overruled.

E. Exhaustion of Administrative Remedies

[5] Defendant further contends that, because plaintiffs failed to exhaust the administrative remedies available to them pursuant to N.C. Gen. Stat. § 130A-24(b) (2013), the trial court lacked subject matter jurisdiction and the action should have been dismissed. We disagree.

“As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.” *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, ___ N.C. App. ___, ___, 760 S.E.2d 302, 307 (2014) (quoting *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). “If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed.” *Id.* (citation omitted). Therefore, defendant must establish that plaintiffs (1) had administrative remedies available to them; and (2) that they failed to exhaust those remedies.

Defendant relies on N.C. Gen. Stat. § 130A-24(b), asserting that plaintiffs had administrative remedies prescribed by statute. Defendant’s reliance on this statute, however, fails to consider that plaintiffs’ wastewater systems are not permitted pursuant to Chapter 130A. Rather, plaintiffs’ wastewater systems are permitted pursuant to Chapter 143, which provides its own administrative remedies. In addition, N.C. Gen. Stat. § 130A-24(b) provides the procedure for appeals concerning the enforcement of rules adopted by the local board of health.

Defendant also contends that even if Chapter 143 of the North Carolina General Statutes applies, plaintiffs have failed to exhaust the administrative remedies available to them. Defendant specifically identifies N.C. Gen. Stat. § 143-215.5 (2013) as the statute prescribing these remedies. However, there are no provisions in this statute governing appeals regarding the enforcement of board of health rules; all of the administrative remedies in this statute apply to the State, rather than local entities. Therefore, there are no prescribed administrative remedies available to plaintiffs in this case. Accordingly, defendant’s argument is overruled. The trial court properly exercised subject matter jurisdiction.

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III. Statutory Authority/Preemption

[6] Defendant's next argument addresses its authority to inspect plaintiffs' spray irrigation systems. Specifically, defendant argues that the trial court erred in declaring that defendant did not have the right to inspect plaintiffs' spray irrigation systems. We disagree.

"The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Danny's Towing 2, Inc. v. N. Carolina Dep't of Crime Control and Pub. Safety*, 213 N.C. App. 375, 382, 715 S.E.2d 176, 182 (2011) (citation omitted). "[T]he trial court's conclusions of law are reviewable *de novo*." *Id.*

Defendant contends that it has authority to inspect plaintiffs' spray irrigation systems pursuant to Chapter 130A of the North Carolina General Statutes and the Orange County Regulations. Defendant is mistaken.

N.C. Gen. Stat. § 130A-335(b) provides, in pertinent part, that

[a]ll wastewater systems shall be regulated by the Department [of Health and Human Services] under rules adopted by the Commission [for Public Health] *except for the following wastewater systems that shall be regulated by the Department under rules adopted by the Environmental Management Commission:*

- (1) Wastewater collection, treatment, and disposal systems designed to discharge effluent to the land surface or surface waters.

N.C. Gen. Stat. § 130A-335(b) (2013) (emphasis added). In addition, N.C. Gen. Stat. § 130A-39(b) (2013) expressly excepts certain wastewater systems from the authority of local health boards: "[A] local board of health may adopt rules concerning wastewater collection, treatment and disposal systems *which are not designed to discharge effluent to the land surface or surface waters[.]*" (emphasis added). Wastewater systems designed to discharge effluent to the land surface or surface waters "shall be regulated by [NCDENR] under rules adopted by the [Environmental Management] Commission[.]" N.C. Gen. Stat. § 143-215.1(a4) (2013).

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Additionally, a statement of intent to provide a complete statutory program is strong evidence of the General Assembly's intent to preempt local regulation. See *Granville Farms, Inc. v. Cty. Of Granville*, 170 N.C. App. 109, 113, 612 S.E.2d 156, 159 (2005). N.C. Gen. Stat. § 143-211(c) (2013) provides that

[i]t is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environment and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions.

This Court has previously held that this statute "evidences an intent to create a complete and integrated regulatory scheme to the exclusion of local regulation." *Granville Farms*, 170 N.C. App. at 115, 612 S.E.2d at 160.

In the instant case, according to the statutes, only NCDENR has authority to regulate plaintiffs' spray irrigation systems. Defendant does not. The General Assembly's statement of intent in N.C. Gen. Stat. § 143-211(c) evidences an intent to provide a complete regulatory scheme, thus preempting defendant from regulating wastewater systems designed to discharge effluent to the land surface.

Defendant contends that because N.C. Gen. Stat. § 130A-39 remained in full force and effect when the General Assembly enacted N.C. Gen. Stat. § 143-211, local boards of health are therefore allowed to make rules regulating wastewater systems regulated by the EMC. However, the statutes expressly create a different system of regulation for wastewater systems that discharge effluent to the land surface. The General Assembly asserted the intent to provide a complete regulatory scheme governing wastewater systems permitted pursuant to Chapter 143, and did not intend for local boards of health to have the power to regulate areas that were already completely regulated by the State through NCDENR and the EMC. Therefore, the trial court's conclusion that defendant did not have the authority to inspect plaintiffs' wastewater systems is supported by the facts and by appropriate law. Defendant's argument is overruled.

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IV. Motion to Dismiss and Judgment on the Pleadings

[7] Defendant next argues that the trial court erred by failing to grant its motion to dismiss or, alternatively, to grant its motion for judgment on the pleadings. We disagree.

“On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.” *Lynn v. Fed. Nat’l Mtge. Ass’n*, ___ N.C. App. ___, ___, 760 S.E.2d 372, 374 (2014) (citations omitted). On appeal, “[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Id.*, 760 S.E.2d at 374-75 (citation omitted). Similarly, “[a] trial court’s ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal.” *Samost v. Duke Univ.*, ___ N.C. App. ___, ___, 742 S.E.2d 257, 259 (2013) (citation omitted).

Defendant essentially contends that it was entitled to have its motion to dismiss granted because plaintiffs’ complaint requested relief that the court was not authorized to grant, and therefore the court lacked subject matter jurisdiction. However, as previously discussed, plaintiffs’ complaint set forth a justiciable claim and requested appropriate relief. Additionally, the trial court had subject matter jurisdiction over plaintiffs’ complaint. Therefore, defendant’s argument is without merit.

[8] Defendant contends in the alternative that it was entitled to judgment on the pleadings because, pursuant to N.C. Gen. Stat. § 130A-39, it adopted more stringent rules for the regulation of plaintiffs’ spray irrigation systems. “A motion for judgment on the pleadings . . . should not be granted unless ‘the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.’” *Samost*, ___ N.C. App. at ___, 742 S.E.2d at 260 (citation omitted). It is undisputed that plaintiffs’ wastewater systems are designed to discharge effluent to the land surface. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we previously held that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs’ wastewater systems, defendant was not entitled to judgment as a matter of law. Therefore, defendant’s argument is without merit.

V. Summary Judgment

[9] Defendant also argues that the trial court erred by granting summary judgment in favor of plaintiffs because its decision was unsupported by

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law. Specifically, defendant repeats its contention that the trial court erred in awarding summary judgment in favor of plaintiffs because defendant was entitled to judgment as a matter of law. We disagree.

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). “On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant.” *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007).

As previously discussed, according to the statutes, only NCDENR has authority to regulate plaintiffs’ spray irrigation systems. Defendant does not. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we have previously held that the trial court properly applied the law, and there were no genuine issues of material fact, we accordingly hold that the trial court did not err in granting plaintiffs’ motion for summary judgment.

VI. Attorneys’ Fees

[10] Finally, defendant argues that the trial court abused its discretion in awarding attorneys’ fees to plaintiffs because doing so was manifestly unsupported by reason. Specifically, defendant contends that the trial court lacked subject matter jurisdiction. We disagree.

In a proceeding under the Uniform Declaratory Judgment Act, “the court may make such award of costs as may seem equitable and just.” N.C. Gen. Stat. § 1-263 (2013). Additionally, “[i]n any action in which a . . . county is a party, upon a finding by the court that the . . . county acted outside the scope of its legal authority, the court may award reasonable attorneys’ fees and costs to the party who successfully challenged the . . . county’s action[.]” N.C. Gen. Stat. § 6-21.7 (2013). Such a decision is within the trial court’s discretion. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994) (“It was within the trial court’s discretion under [N.C. Gen. Stat. § 1-263] to apportion costs as it deemed equitable.”). In North Carolina, “to overturn the trial judge’s determination [of attorney’s fees and costs], the defendant must show an abuse of discretion.” *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 587 (2008) (alteration in original) (citation omitted).

PHILLIPS v. ORANGE CNTY. HEALTH DEP'T

[237 N.C. App. 249 (2014)]

In the instant case, the trial court declared that defendant, an agency of the county, was preempted by statute from inspecting plaintiffs' wastewater systems. The trial court's order provided that "the cost of this action in the amount of \$782.32 be charged to the Defendant and that Plaintiffs recover attorney fees from the Defendant in the amount of \$16,055.00 pursuant to NCGS 1-263."

Despite defendant's argument that the trial court abused its discretion by awarding attorneys' fees to plaintiffs, the trial court did have subject matter jurisdiction. This Court affords the trial court's decision to award attorneys' fees a substantial amount of deference, and defendant has failed to establish that the trial court's decision was "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). Accordingly, we affirm the trial court's award of attorneys' fees to plaintiffs.

VII. Conclusion

The trial court properly exercised subject matter jurisdiction over the instant case. Plaintiffs' wastewater systems are subject to regulation pursuant to Chapter 143 of the North Carolina General Statutes, and defendant is preempted from regulating plaintiffs' systems under the statutory scheme. Therefore, the Orange County Regulations do not apply in the instant case. Accordingly, the trial court properly denied defendant's motions to dismiss and for a judgment on the pleadings. Furthermore, the trial court properly granted plaintiffs' motion for summary judgment and did not abuse its discretion in awarding plaintiffs attorneys' fees. Therefore, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and GEER concur.

ROBERTSON v. STERIS CORP.

[237 N.C. App. 263 (2014)]

TERRI LYNN ROBERTSON AND MARY DIANNE GODWIN DANIEL, PLAINTIFFS-APPELLANTS

v.

STERIS CORPORATION, A DELAWARE CORPORATION; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC., A WISCONSIN CORPORATION; BRUNSWICK COMMUNITY HOSPITAL, INC., AKA COLUMBIA BRUNSWICK HOSPITAL, A NORTH CAROLINA CORPORATION; NOVANT HEALTH, INC., A NORTH CAROLINA CORPORATION; HCA, INC. A DELAWARE CORPORATION; SEALMASTER CORPORATION AKA SEALMASTER, INC., A MINNESOTA CORPORATION; MICHAEL WILBUR, AN INDIVIDUAL; K. BROWN, AN INDIVIDUAL; W. GREEN, AN INDIVIDUAL; R. MARTIN, AN INDIVIDUAL; AND JOHN DOE
DEFENDANTS A,B,C,D, AND E, DEFENDANTS

No. COA14-253 & No. COA14-254

Filed 18 November 2014

1. Jurisdiction—subject matter—written order—filed after judge’s resignation

The Clerk of Court was not divested of jurisdiction to properly enter the order following the resignation of the judge who signed an order. Where a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry.

2. Jurisdiction—subject matter—final order appealed—motion and resolution prior to appeal docketed

The trial court did not lack subject matter jurisdiction to hear intervenor’s motion for interest because plaintiffs’ appeal of the trial court’s final order did not divest the trial court of authority to hear that motion. Intervenor’s Rule 60(a) motion and the resolution of that motion occurred before plaintiffs’ appeal was docketed.

3. Jurisdiction—subject matter—Rule 60(a) motion—interest on award—correction of clerical error

Intervenor’s post-trial claim for interest on an award in quantum meruit was a correction of a clerical mistake that fell within the ambit of Rule 60(a). Failure to include interest mandated by N.C.G.S. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a).

4. Interest—on quantum meruit award—N.C.G.S. § 24-5(b)

The trial court did not err by granting intervenor interest on a quantum meruit award pursuant to N.C.G.S. § 24-5(b), even though intervenor only requested interest pursuant to N.C.G.S. § 24-5(a).

ROBERTSON v. STERIS CORP.

[237 N.C. App. 263 (2014)]

The trial court had the authority to address and correct this oversight regardless of the arguments intervenor made.

Appeal by Plaintiffs from orders entered 3 May 2013 and 25 July 2013 by Judge D. Jack Hooks, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 9 September 2014. Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure, these cases were consolidated for hearing as the issues presented to this Court by the appeals of Plaintiffs involve common questions of law.

The Lorant Law Firm, by D. Bree Lorant; and Womble, Carlyle, Sandridge & Rice, LLP, by Burley B. Mitchell, Jr. and Robert T. Numbers, II, for Plaintiffs-Appellants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for Appellees G. Henry Temple, Jr. and Temple Law Firm.

McGEE, Chief Judge.

Terri Lynn Robertson and Mary Dianne Godwin Daniel (“Plaintiffs”) were injured in a work-related accident in 2004. Plaintiffs initially hired G. Henry Temple, Jr. (“Temple”) of Temple Law Firm, PLLC to represent them, and Plaintiffs filed their complaint on 18 January 2007. For reasons unclear from the record, Plaintiffs never entered into a written fee agreement with Temple, and the record does not reflect whether Temple discussed his standard fee agreement with Plaintiffs.

Several named defendants were dismissed during the course of the litigation. The case was declared exceptional in July 2009, and “a protracted discovery period with numerous lengthy hearings regarding discoverable materials and sanctions” followed. An initial mediation was conducted, and the remaining defendants Sealmaster, Inc. and Steris Corporation (“Defendants”) offered settlement amounts. In an order dated 5 February 2013, the trial court found: “Temple determined more intensive discovery and trial preparation would be necessary for either an improved settlement position, or for the inevitable trial if the matter would not settle.”

Defendant Sealmaster, in March 2011, agreed to settle for an amount slightly higher than its original offer. Following a second mediation in March 2011, Defendant Steris also agreed to settle with Plaintiffs. The settlement agreement Temple obtained from Defendant Steris was more

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than twice the initial settlement offer. However, Plaintiffs did not follow through on the settlement agreement and Defendant Steris filed a motion to enforce the settlement agreement in June 2011.

Plaintiffs decided to hire a new attorney, and discharged Temple. A letter to this effect was mailed to Temple on 8 September 2011. Temple filed a motion to intervene and a motion in the cause on 5 October 2011, seeking to recover in *quantum meruit* for more than four and one-half years of costs and fees incurred working on Plaintiffs' case.

The trial court conducted a conference call on 13 October 2011 that included Plaintiffs, their new attorney, the remaining Defendants, and Temple. "After discussion as to the positions of the respective parties and counsel, an agreement in principle was reached to provide for final dismissal of this matter between the Plaintiffs and Defendants Seal Master and Steris and for payment of the previously negotiated Worker's Compensation liens for both Plaintiffs." These agreements included confidentiality agreements concerning the amount of damages Plaintiffs were awarded.

Temple's 5 October 2011 motions were heard on 9 October 2012. In a 7 February 2013 order, the trial court concluded that Temple was "entitled to recover in quantum meruit for legal services rendered and expenses reasonably incurred during representation of [P]laintiffs" because Temple's legal representation "had value to [P]laintiffs" and Temple had represented Plaintiffs with an expectation of payment. The trial court concluded that "[t]o deny the motion by [Temple] would result in a windfall to [P]laintiffs[.]" The trial court then ruled that Temple should receive a certain sum in *quantum meruit* "representing the attorney fees and costs" the trial court had addressed in its findings of fact, which included expenses and one third of the recovery "after common costs."

Plaintiffs appealed on 4 March 2013.¹ Temple filed a "Motion to Correct Judgment" on 25 March 2013, requesting that the trial court correct the 7 February 2013 order by including "interest on the quantum meruit award, which pre- and post-judgment interest would accrue pursuant to G.S. 24-5(a)." This matter was heard on 17 April 2013. Judge D. Jack Hooks, Jr. signed a written order, dated 19 April 2013, ruling that Temple was entitled to interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b), and awarded interest at the legal rate

1. This Court ultimately affirmed the trial court's *quantum meruit* award in *Robertson v. Steris Corp.*, __ N.C. App. __, 760 S.E.2d 313 (2014) ("*Robertson I*").

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from 5 October 2011, the date Temple filed motions in the cause and to intervene. Temple served Plaintiffs with the order on 26 April 2013. Judge Hooks resigned from office, which was effective 30 April 2013. The order was filed with the Brunswick County Clerk of Superior Court on 3 May 2013.

Plaintiffs filed a “Motion to Amend Order and Alternative Motion for Relief From Order” on 10 May 2013, seeking to have the trial court reverse its ruling granting Temple interest on the “quantum meruit award.” Judge Hooks was sworn in as an Emergency Judge of the Superior Court on 31 May 2013, and was assigned to hear Plaintiffs’ motions. The trial court denied Plaintiffs 10 May 2013 motions by order filed 25 July 2013. Plaintiffs then filed notices of appeal from the 3 May 2013 and 25 July 2013 orders on 23 August 2013. Plaintiffs docketed separate appeals from the two orders. Appeal from the 3 May 2013 order is before us in COA14-253, and appeal from the 25 July 2013 order is before us in COA14-254.² We address both appeals in this opinion. Additional facts may be found in *Robertson I*.

Appeal COA14-254

[1] Plaintiffs appeal from the trial court’s 25 July 2013 order, which, in relevant part, denied Plaintiffs’ motion to set aside the 3 May 2013 order on the basis of lack of subject matter jurisdiction. Plaintiffs argue that the trial court lacked jurisdiction to enter the 3 May 2013 order because the order was filed after Judge Hooks had resigned.

Judge Hooks signed the written order on 19 April 2013. Temple’s attorneys served Plaintiffs with this written and signed order on 26 April 2013. Judge Hooks’ resignation was effective 30 April 2013. The Brunswick County Clerk of Superior Court filed this written and signed order on 3 May 2013. It is clear this order was not entered until it was filed on 3 May 2013, three days after Judge Hooks’ resignation became effective. The question before us is whether the Clerk of Court was divested of jurisdiction to properly enter the order following Judge Hooks’ resignation.

2. We note that it was unnecessary for Plaintiffs to file separate appeals, as both orders could have been argued in a single appeal. Further, as the merits of COA14-254 deal solely with the issue of subject matter jurisdiction, they could have been addressed along with the issues in COA14-253 in a single appeal, even though this issue was not argued prior to entry of the 3 May 2013 order. *Burgess v. Burgess*, 205 N.C. App. 325, 328, 698 S.E.2d 666, 669 (2010) (citation omitted) (“the issue of subject matter jurisdiction may be raised for the first time on appeal”).

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According to the relevant portion of Rule 58 of the North Carolina Rules of Civil Procedure,

a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. . . . If service is by mail, three days shall be added to the time periods prescribed[.]

N.C. Gen. Stat. § 1A-1, Rule 58 (2013). “[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered.” *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted).

Before the adoption of Rule 58, our statutes expressly required a detailed entry in the court minutes in order to constitute entry of judgment. N.C.G.S. § 1-205 provided:

Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. N.C.G.S. § 1-205 (1953) (repealed by 1967 N.C. Sess. Laws ch. 957, § 4).

Reed v. Abrahamson, 331 N.C. 249, 253, 415 S.E.2d 549, 551 (1992). “In 1967, the General Assembly repealed the entry of judgment provision of section 1-205 and enacted the North Carolina Rules of Civil Procedure, including Rule 58[.]” *Id.* at 254, 415 S.E.2d at 551. Rule 58 was more complicated at the time *Reed* was decided, requiring:

Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such

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notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Reed, 331 N.C. at 251-52, 415 S.E.2d at 550 (quoting N.C. Gen. Stat. § 1A-1, Rule 58 (1990)).

With respect to abuse, neglect, and dependency orders, our Supreme Court has stated: "When the trial court fails to enter its order or to call the subsequent hearing pursuant to N.C.G.S. § 7B-807(b), that failure is a ministerial action subject to mandamus."

In re T.H.T., 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008). Failure to enter an order at the appropriate time without legitimate reason has been referred to as a "bureaucratic failure." *Id.* at 457, 665 S.E.2d at 61. Further, a judgment may be filed outside the session of court in which the matter was decided "so long as the hearing to which the order relates was held in term." *Pinckney v. Van Damme*, 116 N.C. App. 139, 155, 447 S.E.2d 825, 835 (1994) (citations omitted). Filing of an order or judgment has traditionally been the province of the clerk, not the judge. The current version of Rule 58 has simplified identifying the time of entry by tying entry of an order or judgment to the time the order or judgment is file-stamped by the clerk, a process which neither requires nor invites participation by the trial judge.

Though we find no authority directly on point, we hold that where, as in the matter before us, a judge signs an otherwise valid written order

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or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry. Our holding is not in conflict with the purpose of Rule 58, and we can conceive of no public policy interests counseling a different outcome. Plaintiffs in the present case were provided timely notice and a definite date of entry for the 3 May 2013 order. *King*, 146 N.C. App. at 494, 554 S.E.2d at 7.

Appeal COA14-253

Motion to Dismiss

Temple filed a motion to dismiss Plaintiffs' appeal in COA14-253 on 1 May 2014, arguing that Plaintiffs failed to timely file their notice of appeal in that matter. We make no decision on the merits of Temple's argument. Assuming, *arguendo*, Plaintiffs' notice of appeal was untimely, we treat Plaintiffs' appeal as a petition for writ of *certiorari*, and grant it. *See State v. SanMiguel*, 74 N.C. App. 276, 277–78, 328 S.E.2d 326, 328 (1985) (citations omitted) (“[T]he record does not contain a copy of the notice of appeal or an appeal entry showing that appeal was taken orally. In our discretion we treat the purported appeal as a petition for writ of *certiorari* and pass upon the merits of the questions raised.”). We deny Temple's 1 May 2014 motion to dismiss, and reach the merits of Plaintiffs' appeal in COA14-253.

Analysis

I.

[2] Plaintiffs first argue that “the trial court lacked subject matter jurisdiction to hear Temple's motion for interest because Plaintiffs' appeal of the trial court's final order divested the trial court of authority to hear that motion.”

“‘As a general rule, an appeal takes a case out of the jurisdiction of the trial court.’” *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975) (citation omitted). However, “Rule 60(a) specifically permits the trial court to correct *clerical mistakes* before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court[.]” *Id.* at 199, 217 S.E.2d at 542.

The trial court entered its order awarding Temple recovery in *quantum meruit* on 7 February 2013. Plaintiffs filed notice of appeal from this order on 4 March 2013. Temple filed a “Motion to Correct Judgment” pursuant to Rule 60(a) on 25 March 2013. The matter was

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heard, and the trial court entered an order on 3 May 2013 providing that “interest at the legal rate be added to the award of . . . attorney fees and necessary costs” that had been awarded in the 7 February 2013 order. Plaintiffs’ appeal from the 7 February 2013 order was finally docketed on 20 November 2013. Plaintiffs’ Rule 60(a) motion and the resolution of that motion occurred before Plaintiffs’ appeal in COA14-253 was docketed.

Therefore, the trial court, in response to Temple’s Rule 60(a) motion, had jurisdiction in its 3 May 2013 order to correct any clerical errors in its 7 February 2013 order. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013) (“Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.”); *Sink*, 288 N.C. at 199, 217 S.E.2d at 542.

II.

[3] In Plaintiffs’ second argument, they contend “Temple’s post-trial claim for interest is not a correction of a ‘clerical mistake’ that falls within the ambit of [Rule] 60(a).” We disagree.

“While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment.” “A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order.”

In re C.N.C.B., 197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted).

Plaintiffs argue that, by its 3 May 2013 order, the trial court created an additional obligation of “nearly fifty thousand dollars[.]” Plaintiffs further argue: “For Plaintiffs, both of whom are disabled and unable to work as a result of the events that gave rise to their underlying action, this new additional financial obligation is clearly a substantive change in the court’s original order.” However, the substantive change addressed in *C.N.C.B.* has nothing to do with a party’s physical condition or ability to pay. A change is only substantive if it changes the underlying order in a substantive way. “[T]he amount of money involved is not what creates

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a substantive right[.]” *Lee v. Lee*, 167 N.C. App. 250, 254, 605 S.E.2d 222, 225 (2004) (citation omitted). Instead, “it is the source from which this money is derived” that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a). *Id.*

In *Ice v. Ice*, this Court found that an award of interest on a distributive award was not a substantive change, as “[t]he subject of the litigation . . . was the amount of the distributive award; interest was only incidental and tangential[.]” *Ice*, 136 N.C. App. 787, 792, 525 S.E.2d 843, 847 (2000).

Id. In the present case, the value of Temple’s services rendered in support of Plaintiffs’ action was the subject of the litigation. Pursuant to *Lee* and *Ice*, the interest owed pursuant to the award in *quantum meruit* “was only incidental and tangential[.]” *Id.*; see also *Ward v. Taylor*, 68 N.C. App. 74, 80, 314 S.E.2d 814, 820 (1984).

N.C. Gen. Stat. § 24-5(b) states in part: “In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied.” N.C. Gen. Stat. § 24-5(b) (2013). Pursuant to N.C. Gen. Stat. § 24-5(b), monetary awards other than costs bear interest as a matter of law. *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 138, 463 S.E.2d 199, 202 (1995). The trial court determined that its “[f]ailure to address said award of interest was an error arising by oversight. As such, it may and should be corrected pursuant to [Rule] 60(a).” We hold that failure to include interest mandated by N.C. Gen. Stat. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a).

III.

[4] In Plaintiffs’ third argument, they contend that the trial court erred in granting Temple interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b). We disagree.

Plaintiffs argue that Temple only requested interest pursuant to N.C. Gen. Stat. § 24-5(a), not N.C. Gen. Stat. § 24-5(b), and that Temple is therefore limited to recovery, if any, pursuant to N.C. Gen. Stat. § 24-5(a). Temple was awarded *quantum meruit* based upon quasi-contract, not contract. “*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law.” *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (citation omitted). N.C.

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Gen. Stat. § 24-5(a) concerns amounts awarded for actions in contract, not quasi-contract. *Farmah v. Farmah*, 348 N.C. 586, 588, 500 S.E.2d 662, 663 (1998). The trial court was correct to look to N.C. Gen. Stat. § 24-5(b) when deciding Temple's Rule 60(a) motion for interest. *Id.* The fact that Temple mistakenly requested relief pursuant to N.C. Gen. Stat. § 24-5(a) is not determinative. "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time *on his own initiative* or on the motion of any party[.]" N.C. Gen. Stat. § 1A-1, Rule 60(a) (emphasis added). The trial court had the authority to address and correct its oversight regardless of the arguments Temple made in his Rule 60(a) motion and the related hearing.

Plaintiffs further argue that N.C. Gen. Stat. § 24-5(b) does not allow for interest on equitable remedies, such as quasi-contract, that involve monetary awards. Plaintiffs cite *Medical Mut. Ins. Co. of N.C. v. Mauldin*, 157 N.C. App. 136, 139, 577 S.E.2d 680, 682 (2003) ("This court has held repeatedly that equitable remedies which require the payment of money do not constitute compensatory damages as set forth in N.C. Gen. Stat. § 24-5(b)."). First, we note the two cases cited in *Mauldin*: *Hieb v. Lowery*, 134 N.C. App. 1, 516 S.E.2d 621 (1999) and *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985), do not hold that equitable remedies requiring money awards cannot constitute compensatory damages. This Court in *Hieb* held:

St. Paul's workers' compensation lien on the Hartford proceeds is neither derived from an action in contract nor from an amount "designated by the fact-finder as compensatory damages." See G.S. § 24-5; cf. *Bartell v. Sawyer*, 132 N.C. App. 484, 487, 512 S.E.2d 93, 95 (1999) (G.S. § 97-10.2(f) (1)(c) provides for reimbursement to defendant insurance company "for all benefits . . . paid or to be paid by the employer under award of the Industrial Commission" and "does not state that [insurance company is] entitled to any prejudgment interest").

Hieb, 134 N.C. App. at 19, 516 S.E.2d at 632. We held in *Appelbe* that the plaintiff's equitable distribution award was "neither due plaintiff by contract, nor [wa]s it compensatory damages." *Appelbe*, 76 N.C. App. at 394, 333 S.E.2d at 313. Neither of these opinions attempts to broaden its holding beyond the particular facts involved.

Second, our Supreme Court has held that N.C. Gen. Stat. § 24-5(b) does control the award of interest in quasi-contract actions:

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Defendants argue essentially that this is not a contract action governed by N.C.G.S. § 24-5(a), that N.C.G.S. § 24-5(b) applies, and that interest should have been awarded only from the date the action was instituted. We agree. Plaintiffs' claims were grounded in the equitable principles of quasi-contract which are different from the legal principles of contract law. The instant action is not one for breach of contract; it is an action other than contract. Therefore the awarding of interest is controlled by N.C.G.S. § 24-5(b) rather than (a).

Farmah, 348 N.C. at 588, 500 S.E.2d at 663, reversing *Farmah v. Farmah*, 126 N.C. App. 210, 484 S.E.2d 96 (1997) (the plaintiff recovered pre-judgment interest on claim for unjust enrichment); see also *Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 543-44, 534 S.E.2d 622, 629 (2000) (interest on actions in quasi-contract governed by N.C. Gen. Stat. § 24-5(b)). To the extent, if any, that the holding in *Mauldin* conflicts with *Farmah*, we are bound by *Farmah*. The trial court properly ruled that interest on Temple's quasi-contract claim for *quantum meruit* was controlled by N.C. Gen. Stat. § 24-5(b). Though the trial court did not expressly designate the award in *quantum meruit* as "compensatory damages," we hold that that designation is clearly inferred in the 3 May 2013 order.

Plaintiffs further argue that Temple "never commenced an action thus a date from which pre-judgment interest would begin to run could not be determined." We disagree.

"[A]n attorney may properly bring a claim for fees in *quantum meruit* against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial." *Robertson v. Steris Corp.*, __ N.C. App. __, __, 760 S.E.2d 313, 318 (2014). Plaintiffs, in a one-page argument including no authority directly on point, state that "the [trial] court cannot determine a date from which interest would begin to run." Plaintiffs contend this is because Temple never initiated an action against them, but merely brought a claim by filing a motion in their underlying action. Plaintiffs then invite this Court to peruse two of this Court's opinions "for analysis of when an action is deemed to commence for purposes of determining § 24-5(b) interest." "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiffs have not properly argued this issue as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

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Therefore, we do not address this argument. The date determined by the trial court as the date from which calculation of pre-judgment interest would begin stands. Because we affirm the trial court's award of pre-judgment interest, we do not address Plaintiffs' argument concerning post-judgment interest.

Affirmed.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DERRICK OBRIAN CARTER, DEFENDANT

No. COA13-1146

Filed 18 November 2014

1. Constitutional Law—effective assistance of counsel—failure to move to suppress evidence—could not be resolved on appellate record—dismissed

Defendant's argument that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a motion to suppress the evidence seized was dismissed without prejudice to its being asserted in a motion for appropriate relief. The IAC claim could not be resolved based on the record before the Court.

2. Police Officers—resisting, delaying, or obstructing a public officer—officer did not produce warrant—officer not engaged in lawful conduct

The trial court erred when it denied defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Because the officer who arrested defendant for resisting a public officer did not read or produce a copy of the warrant to defendant prior to seeking to search defendant's person, in violation of N.C.G.S. § 15A-252, the arresting officer was not engaged in lawful conduct.

3. Constitutional Law—right to confront witnesses—no hearsay admitted—no constitutional issues raised by nonhearsay

Defendant's argument in a possession of cocaine case that his constitutional right to confront an adverse witness was violated through testimony that contained inadmissible hearsay statements

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was overruled. No hearsay was admitted; defendant failed to cite any authority for his constitutional argument and the argument was deemed abandoned; and even assuming defendant's confrontation clause argument was properly before the court, the admission of nonhearsay raises no Confrontation Clause concerns.

4. Evidence—reliability—insufficient indicia of reliability—field tests—presence of cocaine

The trial court abused its discretion by allowing into evidence testimony of an investigator regarding field tests (NIKs) he conducted to detect the presence of cocaine. The State failed to demonstrate the reliability of the NIKs pursuant to any of the indices of reliability under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004) or any alternative indicia of reliability. However, the admission of the evidence amounted to harmless error where there was overwhelming evidence of defendant's guilt.

5. Evidence—photographic identification cards—failure to redact information—not prejudicial

Even assuming that the trial court erred in a drug possession case by allowing into evidence defendant's ID card photo and a DOC ID card without redacting the words "FELON" and "INMATE," any error was harmless, given defendant's testimony that he had been previously convicted of drug trafficking. There was no reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the challenged evidence.

Appeal by defendant from judgments entered 17 April 2013 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Kimberly P. Hoppin for defendant-appellant.

GEER, Judge.

Defendant Derrick OBrian Carter appeals from a judgment sentencing him, as a habitual felon, based on convictions for maintaining a dwelling to sell a controlled substance, possession of cocaine, possession of drug paraphernalia, resisting a public officer, and possession of

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marijuana. On appeal, defendant primarily challenges his conviction for resisting a public officer that arose out of defendant's refusal to allow an officer to search him pursuant to a search warrant. Because the uncontradicted evidence showed that the officer who arrested defendant for resisting a public officer did not read or produce a copy of the warrant to defendant prior to seeking to search defendant's person – thereby violating N.C. Gen. Stat. § 15A-252 (2013) – the arresting officer was not engaged in lawful conduct. The State, therefore, failed to present evidence sufficient to support a conviction of resisting a public officer. Because we find defendant's remaining arguments unpersuasive, we reverse only defendant's conviction for resisting a public officer and remand for resentencing.

Facts

The State's evidence tended to show the following facts. On 11 April 2012, Detective K.N. Harvey and Investigator Michael Burns, deputies with the Davidson County Sheriff's Office, met with a confidential source and arranged for a controlled drug purchase. The confidential source agreed to make a controlled purchase of crack cocaine at 286 Shirley Road (the "Shirley Road residence"), which is a mobile home where defendant lived. Investigator Burns knew defendant previously from "numerous dealings."

The confidential source and a person accompanying the source made the controlled purchase at the Shirley Road residence as planned. After the transaction, the deputies met the confidential source at a pre-arranged location and took possession of a quantity of crack cocaine obtained as a result of the controlled buy.

The following day, on 12 April 2012, the deputies applied for and obtained a search warrant authorizing a search of defendant's person and the Shirley Road residence. After obtaining the warrant, the deputies planned to "go to the residence, secure it, and basically conduct a search." Investigator Burns was the first to leave to conduct the search, but on his way to the Shirley Road residence, he passed a car going the opposite direction and noticed that defendant was riding in the passenger seat. Investigator Burns turned around, caught up with the vehicle, which was being driven by defendant's friend Perry Goble, and stopped it.

Investigator Burns approached Mr. Goble and asked him for his license. When Mr. Goble produced no license, Investigator Burns wrote him a citation. Investigator Burns then walked to the passenger side of the car where he informed defendant that defendant was the named subject of a search warrant. Investigator Burns ordered defendant out of

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the car multiple times to allow the officer to search him. Because defendant repeatedly refused to leave the car, Investigator Burns radioed for backup and informed defendant that he was under arrest.

Shortly after several other officers arrived, defendant got out of Mr. Goble's vehicle, and Investigator Burns handcuffed him and took him into custody for resisting a public officer. A search of defendant's person yielded only a cell phone and \$406.00 in cash. Defendant was given the option of being taken to the Davidson County Sheriff's Office for processing or back to the Shirley Road residence to be present as officers searched the mobile home. Defendant chose to go to the Sheriff's Office.

Several deputies conducted a search of the Shirley Road residence, which included two bedrooms, a kitchen, and a living room. The deputies seized items they believed were controlled substances or drug paraphernalia, took photographs and notes, tested for the presence of cocaine with narcotics indicator field test kits ("NIKS"), and catalogued all the property they seized.

On top of a glass table in the kitchen, deputies found a box of small plastic bags, a utility knife, and a set of black digital scales that were all sitting next to each other. There were white crumbs on the glass tabletop as well as on the scale's plate. In the kitchen sink, deputies found a Pyrex bowl three-quarters full of water. Deputies also observed a white "splatter" on the stove next to a burner. On top of a glass table in defendant's living room, deputies found two plastic bags that they believed to contain marijuana. Also in the living room, deputies found a wooden box that contained the remains of a marijuana "roach" and an identification card for defendant issued by the Department of Correction.

After deputies finished their search of the Shirley Road residence, they sent some of the material believed to be marijuana and some of the "off white rock substances" found sitting atop one of the scales to the Iredell Crime Lab for analysis. The deputies did not send the Pyrex bowl, the scales, or the knife for testing. The Crime Lab concluded that the material they received amounted to 5.1 grams of marijuana and 0.03 grams of cocaine.

Defendant was indicted for possession of cocaine with the intent to manufacture, sell, or deliver, maintaining a dwelling to sell a controlled substance, possession of marijuana, possession of drug paraphernalia, resisting a public officer, and being a habitual felon. The State elected at trial to proceed on a charge of possession of cocaine rather than possession of cocaine with the intent to sell and deliver.

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The jury found defendant guilty of each of the tried charges and determined that defendant is a habitual felon. The trial court sentenced defendant to a presumptive-range term of 33 to 52 months imprisonment for the possession of cocaine conviction and to a consecutive presumptive-range term of 33 to 52 months imprisonment for the consolidated charges of maintaining a dwelling to sell a controlled substance, possession of drug paraphernalia, resisting a public officer, and possession of marijuana. Defendant timely appealed to this Court.

I

[1] Defendant first argues that he received ineffective assistance of counsel (“IAC”) when his trial counsel failed to make a motion to suppress the evidence seized at the Shirley Road residence. To prevail on an IAC claim,

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

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

Our Supreme Court has held that “IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). But, if “the reviewing court determine[s] that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *Id.* at 167, 557 S.E.2d at 525.

We do not believe that this IAC claim can be resolved based on the record before this Court and, therefore, we dismiss this argument without prejudice to its being asserted in a motion for appropriate relief. See *State v. Johnson*, 203 N.C. App. 718, 722, 693 S.E.2d 145, 147 (2010) (finding premature defendant’s IAC claim based on trial counsel’s failure to make timely motion to suppress).

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II

[2] We next address defendant's contention that the trial court erred when it denied his motion to dismiss the charge of resisting, delaying, or obstructing a public officer. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is that amount of evidence "sufficient to persuade a rational juror to accept a particular conclusion." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005), *overruled on other grounds by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010).

The elements of the offense of resisting, delaying, or obstructing a public officer are: "(1) that the victim was a public officer; (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer; (3) that the victim was discharging or attempting to discharge a duty of his office; (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

The third element of resisting, delaying, or obstructing a public officer – that the victim was discharging or attempting to discharge a duty of his office – "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008). For example, in *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), the Supreme Court held that a defendant had a right to interfere with a police officer attempting to execute a search warrant when the arresting officer illegally entered the defendant's home without first complying with North Carolina's common law rule requiring the officer to announce his "authority and purpose" before entry. Although *Sparrow* recognized an officer's duty to enter a home to execute a search warrant, it explained that "one who resists an *illegal* entry is not resisting an officer in the discharge of the duties of his office." *Id.*, 173 S.E.2d at 906 (emphasis added).

Pertinent to this case, N.C. Gen. Stat. § 15A-252 (emphasis added) sets out the statutory requirements for an officer intending to execute a search warrant:

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Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent and responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant affixed to the premises or vehicle.

This Court has found a violation of N.C. Gen. Stat. § 15A-252 when a defendant was not given a copy of the search warrant before the search was conducted. *See State v. Vick*, 130 N.C. App. 207, 219, 502 S.E.2d 871, 879 (1998) (holding failure to give warrant to defendant prior to execution of search warrant was “violation of the plain language of section 15A-252”).

Here, Investigator Burns testified that at the time he stopped Mr. Goble’s vehicle, he “didn’t have anything to show Mr. Carter and say[,] ‘Mr. Carter, here is a search warrant I have for you[.]’” This uncontradicted evidence shows that Investigator Burns did not comply with N.C. Gen. Stat. § 15A-252 before searching defendant pursuant to the warrant. Consequently, Investigator Burns was not lawfully executing the warrant, and defendant had a right to resist him.

The State argues only that the stop of Mr. Goble’s car was lawful and, therefore, defendant was not entitled to resist arrest. Defendant does not, however, challenge the stop of Mr. Goble’s car, and the legality of the stop has no bearing on the legality of Investigator Burns’ conduct in executing the search warrant. The basis for the charge of resisting a public officer was defendant’s refusal to get out of the car and submit to a search of his person. Because the State failed to show that Investigator Burns complied with N.C. Gen. Stat. § 15A-252 before attempting to search defendant, we hold that the State failed to produce sufficient evidence that defendant resisted a public officer, and the trial court erred in denying defendant’s motion to dismiss that charge.

III

[3] Defendant next argues that his constitutional right to confront an adverse witness was violated through testimony by Investigator Burns that, defendant contends, contained inadmissible hearsay statements from the confidential source “identif[ying] [defendant] as the person who sold the alleged crack cocaine to the informant.” At trial, Investigator Burns testified extensively regarding the controlled purchase, including

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his interactions with the confidential informant and accompanying person before and after the controlled purchase.

With respect to defendant's hearsay argument, Rule 801(c) of the Rules of Evidence defines hearsay 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." (Emphasis added.) Defendant has not, however, pointed to any testimony by Investigator Burns that referenced any statement made by the confidential source, and we have found no such testimony in the record. Accordingly, no hearsay was admitted at trial.

We note that because defendant cites no relevant authority in support of his constitutional argument on appeal, his confrontation argument "is considered abandoned." *State v. Black*, 197 N.C. App. 731, 736, 678 S.E.2d 689, 693 (2009); N.C.R. App. P. 28(b)(6). Nonetheless, even assuming defendant's confrontation clause argument were properly before us, "the admission of nonhearsay raises no Confrontation Clause concerns." *State v. Alexander*, 177 N.C. App. 281, 285, 628 S.E.2d 434, 436 (2006).

IV

[4] Defendant next argues it was prejudicial error for the trial court to admit the testimony of Investigator Burns regarding field tests – the NIKs – he conducted to detect the presence of cocaine. Defendant contends that "[t]he State did not sufficiently establish the reliability of the field tests pursuant to 'any of the indices of reliability' under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004)] or 'any alternative indicia of reliability.'" (Quoting *State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011).) We review the trial court's admission of this testimony for abuse of discretion. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. A trial court abuses its discretion if its decision was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 179 N.C. App. 437, 463, 634 S.E.2d 594, 614 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007).

Our Supreme Court has stated that "expert witness testimony required to establish that the substances introduced . . . are in fact controlled substances must be based on a scientifically valid chemical analysis[.]" *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010). This Court addressed whether a trial court abused its discretion in allowing a law enforcement officer to testify that substances were cocaine based

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on use of a field test in *State v. Meadows*, 201 N.C. App. 707, 687 S.E.2d 305 (2010).

In *Meadows*, Captain John Lewis of the Onslow County Sheriff's Office analyzed the contents of a baggie found by another deputy sheriff using a "NarTest" machine "which displayed test results that the substance was crack cocaine." *Id.* at 708, 687 S.E.2d at 306. At trial, the trial court admitted the Captain's testimony identifying the seized substance as cocaine.

In holding that the trial court abused its discretion in admitting this testimony, this Court noted that the NarTest machine had not been approved by a state agency for identifying controlled substances and that our courts had not recognized it as an accepted method for identifying controlled substances. *Id.* at 711, 687 S.E.2d at 308. This Court continued:

The State did not present any evidence of the reliability of the NarTest machine beyond Captain Lewis's opinion that it was reliable based upon his personal experience of using the machine and the fact that some of the test results had been confirmed by the NarTest manufacturer. Indeed, the State's evidence does not even describe the method of analysis the NarTest machine uses or how it works; the evidence is simply that you put the substance to be analyzed into the machine and the machine uses "florescence" to determine what the substance is and prints out a result. The State did not present any evidence independent of information from the NarTest's manufacturer which would establish its reliability; although such information might exist, it is not in the record before us. We cannot find that the NarTest machine is sufficiently reliable based upon the evidence presented.

As the State failed to proffer evidence to support any of the "indices of reliability" under *Howerton* or any alternative indicia of reliability, we conclude that "the expert's proffered method of proof [is not] sufficiently reliable as an area for expert testimony[.]" [358 N.C.] at 458-60, 597 S.E.2d at 686-87. Without a "sufficiently reliable" method of proof, expert testimony was not properly admissible, and we need not address whether "the witness testifying at trial qualified as an expert in that area of testimony" and whether "the expert's testimony [was] relevant[.]" *Id.*

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at 458, 597 S.E.2d at 686. Accordingly, allowing Captain Lewis to testify as to the results of the NarTest machine was an abuse of discretion.

Id. at 712, 687 S.E.2d at 308-09.

Here, Investigator Burns gave the following testimony concerning the NIKs at trial:

Q What is a field test?

A We as investigators are supplied with a number of field test kits for various types of drugs. They react different with certain chemicals in these drugs and provide us with a color that's noticeable so we can distinguish whether the particular item is a controlled substance or not. For example, if I dropped some -- now we are into a Cocaine test kit -- it is not going to change color but if I drop Cocaine into a test kit, it will turn real bright blue. Some of the tests are liquid ampoules that you break. And some are wipes. On a Cocaine wipe when you take it out of the pack it is pink in color. If it comes into contact with Cocaine or anything with Cocaine, that particular item will turn bright blue. At that time I tested splatter on the stove. It immediately turned blue, which I immediately identified as Cocaine.

In addition, Investigator Burns testified that the NIK wipes also turned blue and indicated the presence of cocaine when swiped against the off white residue on the Pyrex, the white residue on the scales, and the white residue on the dining room table. He also testified that he has been in law enforcement for about 18 years, he had "approximately 400 hours of training specifically in the narcotics field," he had been "exposed" to cocaine "500 plus" times, and he "wouldn't say" that the NIKs were "unreliable."

There is no material difference between the testimony offered in *Meadows* that this Court concluded was inadmissible and Investigator Burns' field test testimony in this case. First, we note that NIKs similar to the ones used here have not previously been found by our courts to be a reliable method of controlled substance identification. *See James*, 215 N.C. App. at 589, 590, 715 S.E.2d at 886 (finding State "did not sufficiently establish the reliability of [a] NIK" consisting of "small 'moist towelette . . . about the size of a[n] alcohol wipe[]' . . . that . . . turned blue, thereby indicating that the substance tested positive for cocaine"). Further, the State did not present evidence describing the

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NIKs' method of chemical analysis, and the only testimony concerning the tests' reliability – Investigator Burns' testimony that the NIKs were not “unreliable” – was based only on his personal experience as a law enforcement officer.

Therefore, we hold that, in this case, the State, as in *Meadows*, failed to demonstrate the reliability of the NIKs pursuant to “any of the ‘indices of reliability’ under *Howerton* or any alternative indicia of reliability[.]” 201 N.C. App. at 712, 687 S.E.2d at 308-09 (quoting *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687). The trial court, therefore, abused its discretion in admitting Investigator Burns' testimony to the effect that the NIKs indicated the presence of cocaine in the Shirley Road residence.

However, defendant bears the burden of showing that “there is a reasonable possibility that . . . a different result would have been reached at the trial” had the trial court excluded the testimony regarding the field tests. N.C. Gen. Stat. § 15A-1443(a) (2013). It is well established that “[i]f there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless.” *State v. Crawford*, 104 N.C. App. 591, 598, 410 S.E.2d 499, 503 (1991).

In arguing the error was prejudicial, defendant contends that without Investigator Burns' erroneously admitted testimony that the items tested with the NIK wipes had cocaine residue on them, “the jury could have concluded that the items in [defendant's] residence alleged to be drug paraphernalia were not at all associated with the use of controlled substances[.]” Given the State's other evidence, we cannot conclude that there is a reasonable possibility that the jury, in the absence of the contested testimony, would have found defendant not guilty of possession of drug paraphernalia.

N.C. Gen. Stat. § 90-113.21(a) (2013) describes “drug paraphernalia” as “equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate . . . manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and . . . introducing controlled substances into the human body.” N.C. Gen. Stat. § 90-113.21(a)(5), (8), and (10) further provide that “drug paraphernalia” includes the following: scales and balances for weighing or measuring controlled substances; blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances; and containers and other objects for storing or concealing controlled substances. N.C. Gen. Stat. § 90-113.21(b) sets out a number

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of factors, along with “all other relevant evidence,” that may be considered in determining whether an object is drug paraphernalia. Two of the enumerated factors include “[t]he existence of any residue of a controlled substance on the object” and “[t]he proximity of the object to a controlled substance.” N.C. Gen. Stat. § 90-113.21(b)(4) and (5).

Here, the scales, plastic bags, and utility knife found in defendant’s kitchen were in close proximity to “white crumbs” that the Iredell Crime Lab determined to be crack cocaine. Investigator Burns gave unchallenged testimony that these items were typically used to package crack cocaine “for distribution.” Investigator Burns also gave detailed testimony as to why the Pyrex dish, based on its appearance, was likely used to “manufacture” crack cocaine. Additionally, defendant’s own witness Tessa Scott testified that “[defendant] would normally buy one ounce of powder Cocaine and cook it into crack” and that she had seen defendant “on 15 or more occasions cooking crack cocaine at . . . Shirley Road.” We hold that there was, therefore, overwhelming evidence that defendant was guilty of possessing drug paraphernalia. *See State v. Wade*, 198 N.C. App. 257, 273, 679 S.E.2d 484, 494 (2009) (holding evidence of 0.7 grams of cocaine and glass smoking pipe found on the defendant was “simply overwhelming” in support of paraphernalia conviction).

Defendant also contends that without Investigator Burns’ testimony that he found cocaine using the NIKs, there was “not sufficient evidence that [defendant] maintained this dwelling for the purpose of keeping or selling controlled substances.” N.C. Gen. Stat. § 90-108(a)(7) (2013) prohibits “knowingly keep[ing] or maintain[ing] any . . . dwelling house . . . or any place whatever . . . which is used for the keeping or selling of [controlled substances] in violation of this Article.” “In determining whether a defendant maintained a dwelling *for the purpose of selling illegal drugs*, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling.” *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005).

In addition to the overwhelming evidence that defendant possessed drug paraphernalia, Ms. Scott further testified that “[defendant] made a living selling crack cocaine” and that she was “not happy about telling the truth [about defendant selling crack cocaine] . . . [b]ecause I care about [defendant]. I don’t want him to go to prison.”

Thus, even without the field tests indicating the presence of cocaine at the Shirley Road residence, the evidence overwhelmingly supported defendant’s conviction for maintaining the Shirley Road residence to sell crack cocaine. *See State v. Cummings*, 113 N.C. App. 368, 374-75,

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438 S.E.2d 453, 457 (1994) (holding “[t]he State presented overwhelming evidence on defendant’s charge[] of . . . maintaining a place to keep or sell controlled substances” where “defendant controlled the cocaine found . . . [,] defendant was involved in selling cocaine from his house, and . . . defendant possessed items of obvious drug paraphernalia, some of which were found to have cocaine residue on them”). Consequently, the admission of the evidence regarding the NIKs amounted to harmless error.

V

[5] Finally, defendant argues that the trial court erred in admitting two items into evidence: a photograph containing an image of an identification card issued to defendant by the North Carolina Department of Correction (“ID card photo”) and the actual Department of Correction ID card (“DOC ID card”). The ID card photo portrayed an image of the DOC ID card lying in a wooden box along with a marijuana “roach.” Defendant argues that because “FELON” was written across the bottom of the ID card and the word “INMATE” was written across the top, the admission of the DOC ID card and the ID card photo was improper because it unfairly prejudiced him and was prohibited by Rules 403 and 404(b) of the Rules of Evidence.

At the outset, we note that the State, relying on the photo in the record on appeal, argues that the jury did not necessarily see the words “FELON” and “INMATE” written across the exhibit. However, the actual exhibit maintained by the Clerk of Superior Court shows that the words “FELON” and “INMATE” appear very clearly in the exhibit. Moreover, the ID card photo was published to the jury by being displayed using an overhead projector. The question, therefore, remains whether the trial court committed prejudicial error in allowing the admission of the ID card photo and the DOC ID card. We hold that even assuming, without deciding, that the trial court erred in admitting the evidence without redacting the words “FELON” and “INMATE,” any error was harmless.

In addition to the extensive evidence presented supporting defendant’s drug-related convictions, defendant also chose to testify and, therefore, was subjected to cross-examination regarding his prior convictions. When asked whether, within the past 10 years, he had been convicted of or pled guilty to any crimes that carried a “possible jail sentence of 60 days or more,” defendant responded “[d]rugs, trafficking” and, then, when asked to identify the specific offenses, stated: “I was convicted of trafficking, attempt to sell.” He further confirmed that he has been convicted of “trafficking cocaine by sale of more than

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28 grams.” Given this testimony, which essentially told the jury he had been previously convicted of being a drug trafficker, defendant has not shown that there is a reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the DOC ID card and the ID card photo.

Conclusion

We, therefore, reverse defendant’s conviction for resisting a public officer, but find no error with respect to his remaining convictions. Defendant’s conviction for resisting a public officer was consolidated with his felony conviction for maintaining a dwelling to sell a controlled substance and his other misdemeanor convictions. Our Supreme Court has held that because “it is probable that a defendant’s conviction for two or more offenses influences adversely to him the trial court’s judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.” *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). We, therefore, remand for resentencing.

No error in part; reversed and remanded in part.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA

v.

JARMAL FLOOD

No. COA14-179

Filed 18 November 2014

1. Evidence—findings of fact—sufficiency of evidence

The trial court did not err in a child sex offense case by making its findings of fact numbers 24–31 since they were accurate and supported by competent evidence.

2. Evidence—findings of fact—sufficiency of evidence—use of word “recommend”

The trial court did not err in a child sex offense case by making finding of fact number 32. the trial court’s finding that An agent

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implicitly acknowledging that her use of the word “recommend” could have been misconstrued by defendant” was supported by competent evidence.

3. Evidence—findings of fact—sufficiency of evidence—failure to mention break in time

The trial court did not err in a child sex offense case by making finding of fact number 34. Failure to mention a brief break in finding of fact 34 did not so misconstrue the timing of events as to render it unsupported by competent evidence.

4. Confessions and Incriminating Statements—motion to suppress—non-custodial interview—child sex offense investigation—voluntariness—improper promises by law enforcement—totality of circumstances

The trial court erred by granting defendant’s motion to suppress his incriminating statements during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. Although an agent made improper promises to defendant which appeared to have encouraged defendant to make incriminating statements, under the totality of circumstances defendant’s statements were not rendered involuntary by law enforcement as a matter of law. Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer.

Appeal by the State from order filed 20 December 2013, *nunc pro tunc* 30 August 2013, by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 9 September 2014.

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

Paul F. Herzog for Defendant.

McGEE, Chief Judge.

The State appeals the trial court’s order allowing Defendant’s motion to suppress incriminating statements made by Defendant during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. We reverse.

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I. Background

Defendant previously served in the New Hanover County Sheriff's Office for four years as a deputy sheriff, courtroom bailiff, and custody deputy, and he also completed Basic Law Enforcement Training. Defendant was arrested in 2007 and subsequently was convicted for sex by a substitute parent, on a charge unrelated to the present case. Defendant went to prison for that conviction and was on probation and receiving treatment as a sex offender when the following events occurred.

Detective Donald Schwab ("Detective Schwab") of the Hoke County Sheriff's Office received a report in early December 2011 that Defendant had sexually abused some children ("the children"). Defendant voluntarily met with Detective Schwab on 12 December 2011 at the Pender County Sheriff's Office, and Defendant denied committing the offenses. Defendant subsequently agreed to undergo a polygraph examination.

Agent Kelly Oaks ("Agent Oaks"), a certified polygraph examiner with the North Carolina State Bureau of Investigation ("SBI"), met with Defendant on 20 December 2011 at the Pender County Sheriff's Office. Agent Oaks conducted a polygraph examination with Defendant ("the polygraph"). Throughout this process, Defendant was not in custody, was given multiple breaks, and was told he was free to leave at any time. Defendant was even informed that he would not be arrested that day, no matter what he said to law enforcement.

Defendant failed the polygraph, and Agent Oaks interviewed Defendant about why he had not passed the polygraph ("the interview"). Defendant repeatedly denied that he had done anything wrong, but Agent Oaks pressed him on the issue for about fifty minutes. During the interview, Agent Oaks made numerous statements that she and Detective Schwab might help Defendant or make "recommendations" to the District Attorney's office, including recommending treatment rather than jail time, if Defendant confessed. At times, Agent Oaks indicated that the District Attorney's office would have discretion as to what it would do with their recommendations. Agent Oaks also stated that any offer to help Defendant would expire once their conversation ended.

Detective Schwab joined Agent Oaks and Defendant a little over forty minutes into the interview. Detective Schwab talked about Defendant's former role as a law enforcement officer. He also spoke to Defendant about sparing Defendant's mother from having to hear the details of the crime at trial, as well as sparing the children from having to testify. After almost five minutes of listening to Detective Schwab, Defendant asked

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to speak to his mother on the phone. Agent Oaks again admonished that any offer to help Defendant would expire once their conversation ended. Nonetheless, Detective Schwab obliged Defendant's request and lent Defendant his cell phone. All three then took a brief break and left the interrogation room.

During the break, Defendant spoke to his mother on the phone and then to Detective Schwab outside the interrogation room; Defendant asked Detective Schwab what he should do, and Detective Schwab repeated the same sentiments he had previously conveyed to Defendant in the interrogation room. Agent Oaks, Detective Schwab, and Defendant then reentered the interrogation room, and Defendant began making incriminating statements regarding his having had sexual contact with a child.

Defendant was indicted on 30 July 2012 for rape of a child by an adult, first-degree rape, taking indecent liberties with a child (seven counts), attempted first-degree rape, sexual activity by a substitute parent (three counts), first-degree sexual offense (two counts), and first-degree sexual exploitation of a minor (two counts). Defendant filed a motion on 30 May 2013 to suppress the statements he had made to Agent Oaks and Detective Schwab during the interview on 20 December 2011. In his motion to suppress, Defendant asserted that, during the interview, Agent Oaks made improper promises that she and Detective Schwab would help Defendant if he confessed, which deceived him and rendered Defendant's subsequent incriminating statements involuntary. Defendant argued, in part, that this violated his rights under the due process clause of the United States Constitution.

Defendant's motion to suppress was heard on 19 August 2013. The trial court orally allowed Defendant's motion to suppress and subsequently entered a written order ("the order"). The State appeals.

II. Standard of Review

On appeal from a suppression hearing, this Court will review the trial court's factual findings to determine if they 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. The trial court's conclusions of law are fully reviewable on appeal.

State v. Bordeaux, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010) (internal citations and quotation marks omitted).

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III. Trial Court's Findings of Fact

[1] The State first challenges the trial court's findings of fact 24–31 in the order:

24. That Agent Oaks, upon telling the Defendant that he had failed the polygraph, told him on numerous occasions that he needed to tell the truth in order to unburden himself of guilt, to avoid a public trial for himself, his family and the victim, and to help himself in connection with the charges.
25. That Agent Oaks also told the Defendant that she and Detective Schwab would or could make “recommendations” to the District Attorney and that, if he cooperated and told the truth, they would advise the District Attorney accordingly.
26. That Agent Oaks used the terms “recommend” or “recommendation” on numerous occasions and indicated to the Defendant that she and Detective Schwab could make recommendations in the cases.
27. That Agent Oaks also asked the Defendant if he wanted her “help” and advised him that, if he did want her help, he needed to “tell the truth,” because she knew from the polygraph results, the Defendant’s body language and the look in his eyes, that he had committed the offenses.
28. That, early in the interview, after the Defendant had taken the polygraph and had again denied the allegations, Agent Oaks discussed the Defendant’s future and sentencing possibilities and stated, essentially, “I would recommend treatment and extension of probation.”
29. That numerous references to “recommend” and “help” were thereafter made by Agent Oaks.
30. That, as the interview progressed, Agent Oaks further explained that, while she and Detective Schwab could make recommendations to the District Attorney, she could only speculate about the results in the cases.
31. That, by the time Agent Oaks explained the limits of any “recommendation” to the District Attorney, the

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Defendant had been told numerous times about possible recommendations and help, including a recommendation for “further treatment and probation.”

The State argues that findings of fact 24–31 “deprive the words Agent Oaks used [during the interview] of their context.” In support of this assertion, but without providing further explanation, the State presents this Court with numerous statements made by Agent Oaks during the interview that supposedly provide this missing “context.” Given its rather conclusory nature, we question whether the State’s argument here is a genuine challenge to the competency of the trial court’s findings of fact. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274 (holding that the State waived its challenge to the facts from a trial court’s order granting a defendant’s motion to dismiss because “the State never *directly* contend[ed] that the trial court’s findings of fact [were] not supported by competent evidence[.]” (emphasis added)). Even assuming *arguendo* that the State has presented this Court with an actionable argument, upon reviewing the statements provided by the State, we conclude that the trial court’s findings of fact 24–31 are accurate and supported by competent evidence.

[2] The State next challenges the trial court’s finding of fact 32: “That Agent Oaks, an experienced agent and polygraph examiner, acknowledged in her testimony that her use of the word ‘recommend’ was a poor choice of words, implicitly acknowledging that it could have been misconstrued by the Defendant.” Specifically, the State takes issue with the trial court’s finding that Agent Oaks “implicitly acknowledge[d] that [her use of the word ‘recommend’] could have been misconstrued by the Defendant.” To support its challenge to this finding, the State points only to Agent Oaks’ testimony during the suppression hearing. Agent Oaks testified that her use of the word “recommend” was merely meant to convey to Defendant that she was gathering information to share with the District Attorney’s Office.

Even if that were what Agent Oaks meant to convey, Agent Oaks’ intentions during the interview are irrelevant. *Cf. Moran v. Burbine*, 475 U.S. 412, 423, 1142, 89 L. Ed. 2d 410, 422 (1986) (“[T]he state of mind of the police is irrelevant to the question of the . . . voluntariness of respondent’s election to abandon his rights.”) (in the *Miranda* waiver context); *United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002) (“We engage in the same inquiry when analyzing the voluntariness of a *Miranda* waiver as when analyzing the voluntariness of statements under the Due Process Clause.”) (citing *Colorado v. Connelly*, 479 U.S. 157, 169, 93 L. Ed. 2d 473 (1986)). Instead, the question of whether Defendant’s

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incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him. *See State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (“[If] the confession is ‘the product of an essentially free and unconstrained choice by its maker,’ then ‘he has willed to confess [and] it may be used against him’; where, however, ‘his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.’” (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26, 36 L. Ed. 2d 854, 862 (1973))). During the suppression hearing, Agent Oaks testified that her use of “recommend” during the interview was “a poor choice of words.” Thus, the trial court’s finding that Agent Oaks “implicitly acknowledge[d] that [her use of the word ‘recommend’] could have been misconstrued by the Defendant” is supported by competent evidence.

[3] Finally, the State challenges finding of fact 34: “That, after Agent Oaks reiterated the possibility of [her making] recommendations to the District Attorney, although at this time she did use the phrase, ‘but it is up to them,’ and shortly after Detective Schwab joined the interview, the Defendant did make certain incriminating statements.” The State contends that this finding “does not accurately portray the time sequence in which the events it recounts occurred.” Specifically, the State argues that finding of fact 34 “makes it sound like [D]efendant made incriminating statements after Agent Oaks reiterated the possibility of recommendations to the District Attorney and shortly after Detective Schwab joined the interview, without making it sound like there was any break between those events.” Notably, there was a break between those events; Defendant took a short break to call his mother after Detective Schwab joined the interview, but before making the incriminating statements at issue.

However, the State never directly contends that the trial court’s findings of fact are not supported by competent evidence or that the order of events described are incorrect. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274–75 (holding that the State waived its challenge to the facts from a trial court’s order granting a defendant’s motion to dismiss because “the State never directly contend[ed] that the trial court’s findings of fact [were] not supported by competent evidence or that the officers conducting the interview were misquoted.”). The State does argue that finding of fact 34 “does not accurately portray the time sequence in which the events it recounts occurred.” However, findings of fact 8 and 9 in the trial court’s order state that Defendant took brief breaks

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throughout his meeting with Agent Oaks and Detective Schwab on 20 December 2011. That the trial court did not mention this particular brief break in finding of fact 34 does not so misconstrue the timing of events as to render it unsupported by competent evidence. For these reasons, the trial court's findings are supported by competent evidence and are binding on appeal.

IV. Trial Court's Conclusions of Law

[4] The State next argues that the trial court's conclusions of law are in error because Defendant's incriminating statements were voluntary. Under the Fifth Amendment of the Constitution of the United States, no one "shall be compelled in any criminal case to be a witness against himself". U.S. Const. Amend. V. "The self-incrimination clause of the Fifth Amendment has been incorporated in the Fourteenth Amendment and applies to states." *State v. Linney*, 138 N.C. App. 169, 178, 531 S.E.2d 245, 253 (2000). It is well-established that "obtaining confessions involuntarily denies a defendant's fourteenth amendment due process rights." *State v. Jones*, 327 N.C. 439, 447, 396 S.E.2d 309, 313 (1990) (citing *Ashcraft v. Tennessee*, 64 S. Ct. 921, 88 L. Ed. 1192 (1944)). Generally, to be admissible, a defendant's "confession [must be] the product of an essentially free and unconstrained choice by its maker[.]" *Bustamonte*, 412 U.S. at 225, 36 L. Ed. 2d at 862. When reviewing a defendant's confession, this Court must determine whether the statement was made voluntarily and understandingly. See *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). The voluntariness of a defendant's confession is based upon the totality of the circumstances. *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992). Factors considered by courts making this determination include, but are not limited to:

whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000); see also *State v. Martin*, 315 N.C. 667, 680–81, 340 S.E.2d 326, 334 (1986) (cognitive capacity of the suspect); *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (age of the suspect). In making this determination, the court "may not rely upon any one circumstance standing alone and in

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isolation.” *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986) (citation and quotation marks omitted).

The question before this Court is whether improper promises were made to obtain Defendant’s incriminating statements and whether Defendant was deceived therefrom or had his will overborne so as to render his incriminating statements involuntary. In its order, the trial court concluded

1. That the repeated use of the terms “recommend” and “recommendation” and “help” by an experienced law enforcement officer, particularly in view of admonitions from our appellate courts that such terms should not be used during interrogations or interviews, induced a hope or promise of reward or benefits, specifically treatment and probation, by the Defendant.
2. That, under the totality of the circumstances, even though the agent at times sought to explain or limit her use of the term “recommend” or “recommendation,” the aforesaid hope or promise of reward rendered the Defendant’s incriminating statements involuntary, and that the overall import of the use of those terms was to induce a hope of benefit or reward for a lighter sentence.
3. That the agents statements to the Defendant exceeded a mere indication of willingness of the agent to discuss the Defendant’s cooperation with the District Attorney.

The State claims that Agent Oaks’ statements to Defendant during the interview on 20 December 2011 were permissible. In support of this contention, the State argues that this case is much like *State v. Bailey*, 145 N.C. App. 13, 548 S.E.2d. 814 (2001). In *Bailey*, a suspect, who was later prosecuted, voluntarily participated in a polygraph examination as part of a child sex offense investigation. *Id.* at 16–17, 548 S.E.2d at 816-17. The suspect failed the polygraph, and the SBI agent administering it made statements to the suspect that “everything would probably have a little less consequence to it” and “[t]hings would probably go easier” if he confessed, which he then did. *Id.* at 17, 548 S.E.2d at 817. In spite of these statements by law enforcement, this Court held that the confession was voluntary because “there were no promises made to [the suspect], and it was made clear to [the suspect] that the district attorney,

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rather than [law enforcement], would ultimately determine how to handle the case.” *Id.* at 18, 548 S.E.2d at 817.

The State also cites *State v. Williams*, 67 N.C. App. 144, 312 S.E.2d 501 (1984), for the contention that Agent Oaks’ use of the words “recommend” and “recommendation” did not render her statements to Defendant improper. In *Williams*, officers used the words “recommend” and “recommendation” when speaking to a suspect but they clearly and consistently indicated to the suspect that they could only tell the District Attorney’s office that the suspect cooperated; the officers also never suggested that the suspect might gain anything in exchange for his confession. *See id.* at 147, 312 S.E.2d at 503. In total, the officers in *Williams* did nothing improper except use the words “recommend” and “recommendation” during their interrogation of the suspect. However, even then, this Court admonished “law enforcement officers to avoid entirely use of words such as ‘recommend’ and ‘recommendation,’ which in some circumstances . . . could render a confession involuntary.” *Id.*

Agent Oaks’ actions in the case before this Court are distinguishable from *Bailey* and *Williams*, as they delve deeper into the realm of impermissible conduct by law enforcement. During the interview, Agent Oaks suggested she would work with and help Defendant if he confessed and that she “would recommend . . . that [defendant] get treatment” instead of jail time. She also asserted that Detective Schwab “can ask for, you know, leniency, give you this, do this. He can ask the District Attorney’s Office for certain things. It’s totally up to them [what] they do with that but they’re going to look for recommendations[.]” Agent Oaks further suggested to Defendant that

if you admit to what happened here . . . [Detective Schwab is] going to probably talk to the District Attorney and say, “hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we’ve asked him to do. What can we do?” and talk about it.

At one point, Agent Oaks asked Defendant directly: “Do you want my help?” Agent Oaks also threatened that any possibility of help from her or Detective Schwab would cease after their conversation with Defendant ended, once even after Defendant asked to speak to his mother on the phone.

Although Agent Oaks’ statements to Defendant are peppered with occasional references to the District Attorney’s Office having discretion as to what it might do with her and Detective Schwab’s potential “recommendations,” it is clear that the purpose of Agent Oaks’ statements

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to Defendant was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed. *See State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975) (“[An] improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.”) (citations omitted). Indeed, Agent Oaks’ statements appear to promise that she and Detective Schwab would work with the District Attorney’s Office on Defendant’s behalf – if he confessed – in order to lessen the consequences of the charges that would likely be filed against him. Such promises are improper. *Cf. State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967) (confession rendered involuntary where law enforcement officer told the suspect that the officer would testify on the suspect’s behalf if he cooperated). At the very least, Agent Oaks’ actions fall outside the best practices that law enforcement officers should follow when interviewing suspects. *See State v. Branch*, 306 N.C. 101, 110, 291 S.E.2d 653, 659–60 (1982) (“[L]aw enforcement officers . . . should always be circumspect in any comment they make to a [suspect], particularly in connection with any confession the [suspect] is to give or has given. The better practice would be for law enforcement officers not to engage in speculation of any form with regard to what will happen if the [suspect] confesses.”).

Given that Agent Oaks made improper promises to Defendant, which appear to have encouraged Defendant to make incriminating statements, we now continue the totality of the circumstances analysis to determine whether Defendant was deceived thereby or had his will overborne and, therefore, was induced to make the incriminating statements involuntarily. Generally, a suspect’s confession can be rendered involuntary when induced by an officer’s statements that it would be harder for the suspect if he did not cooperate or that the suspect might obtain some material advantage by confessing. *See e.g., Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102 (statements inadmissible where “officers repeatedly told [the suspect] that they knew that he had committed the crime and that his story had too many holes in it; that he was ‘lying’ and that they did not want to ‘fool around’”); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (statements inadmissible where an officer offered to testify on the suspect’s behalf if he cooperated). However, such statements by law enforcement generally tend to render a suspect’s confession involuntary only when they are preceded by other circumstances which might provoke fright in the suspect or otherwise overbear his will. *See e.g., Pruitt*, 286 N.C. at 449, 458, 212 S.E.2d at 97, 102 (suspect in custody and interrogation was conducted in a “police-dominated atmosphere”); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (suspect in custody);

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but see Richardson, 316 N.C. at 604, 342 S.E.2d at 831 (“Promises or other statements indicating to [a suspect who is not in custody and has ‘considerable experience’ in the criminal justice system] that he will receive some benefit if he confesses do not render his confession involuntary *when made in response to a solicitation by the [suspect]*.” (emphasis added)).

Such additional circumstances are largely absent in the present case. It appears uncontroverted that, at the time of the interview, Defendant was a competent adult; he was not in custody, and there were no *Miranda* issues; Defendant was not held incommunicado; the length of the interview was reasonable; there were no physical threats or shows of violence against Defendant; Defendant was told repeatedly that he could leave at any time and was given multiple breaks; Defendant was even told that he was not going to be arrested that day, no matter what he said to law enforcement; and Defendant had extensive experience with the criminal justice system – both through four years of serving as a trained sheriff’s deputy and for a prior conviction of an unrelated sex offense against a child.

The Supreme Court of North Carolina was presented with a similar defendant in *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). In *Richardson*, the defendant was a competent adult with an extensive history with the criminal justice system. *Id.* at 604, 342 S.E.2d at 831. He voluntarily met with North Carolina law enforcement and subsequently confessed to committing crimes within the state, although at the time he was out on bond for a pending attempted burglary charge in Tennessee, was a suspect in several states for a string of related criminal activity, and was concerned that he might be convicted of being an habitual felon in Tennessee, which carried with it a life sentence. *Id.* at 596–97, 342 S.E.2d at 826. Much like in *Fuqua* where a suspect’s confession was rendered involuntary, an officer agreed to testify on the *Richardson* defendant’s behalf if he cooperated with the other investigations. *Id.* at 604, 342 S.E.2d 831. However, in distinguishing *Fuqua*, the *Richardson* Court held that the defendant’s confession was not involuntary because he initiated and “engaged in hard-headed bargaining” with the authorities in exchange for the officer’s testimony. *Id.* at 604, 342 S.E.2d at 831.

The present case largely falls between *Fuqua* and *Richardson*. As in both cases, law enforcement made promises to work on Defendant’s behalf if he confessed. However, *Fuqua* is distinguishable because Defendant was not in custody at the time those promises were made, nor is there any indication that the *Fuqua* defendant had extensive

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experience with the criminal justice system. *Richardson* is distinguishable because Defendant did not initiate and engage in active negotiations with law enforcement before making his incriminating statements, although this is slightly balanced out by the unique pressures that the *Richardson* defendant was under to cooperate with law enforcement to mitigate his circumstances. *See id.* at 596–97, 342 S.E.2d at 826.

Thus, the present case is more like *Richardson* than it is like *Fruqua*. Defendant was not in custody when he made his incriminating statements and had extensive experience in the criminal justice system. Defendant arguably had even more experience in the criminal justice system than the *Richardson* defendant whose only previous experience involved being investigated and prosecuted for crimes he had committed; Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer. This, combined with the non-custodial nature of the interview, strongly pushes this Court towards finding Defendant's incriminating statements voluntary. Indeed, although Agent Oaks' statements were improper, taking all of these factors into account, we cannot say that the circumstances leading up to and surrounding Defendant's confession were such as to overbear Defendant's will or deceive him.

This Court is mindful of the need to “apply well-recognized rules of law impartially to easy and hard cases alike[,] lest we make bad law which will erode constitutional safeguards [that have been] jealously guarded” by North Carolina courts. *See Pruitt*, 286 N.C. at 458-59, 212 S.E.2d at 103. We arrive at our conclusion attentive to the fact that any totality of the circumstances analysis is more difficult when both sides of the scale of voluntariness are weighted heavily. Under the totality of the circumstances, Defendant's incriminating statements during the interview were not rendered involuntary by law enforcement as a matter of law.

Reversed and remanded.

Judges BRYANT and STROUD concur.

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[237 N.C. App. 300 (2014)]

STATE OF NORTH CAROLINA

v.

GILES BRANTLEY FLOYD, DEFENDANT

No. COA14-190

Filed 18 November 2014

Criminal Law—postconviction motion for DNA testing—properly denied

The trial court did not err by denying defendant's postconviction motion for DNA testing pursuant to N.C.G.S. § 15A-269. While the results from DNA testing might have been considered relevant, had they been offered at trial, they are not material in this postconviction setting. Furthermore, the court was not required to conduct an evidentiary hearing.

Appeal by Defendant from an order entered 4 September 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel S. Hirschman, for the State.

Mark Hayes, for the Defendant.

DILLON, Judge.

Giles Brantley Floyd ("Defendant") appeals from an order denying his postconviction motion for DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2012). We affirm.

I. Background

Defendant was convicted of murdering his wife after her body was discovered by their daughter in their utility shop behind their home. His conviction was upheld by this Court. *State v. Floyd*, 143 N.C. App. 128, 545 S.E.2d 238 (2001), *disc. review denied*, 353 N.C. 730, 551 S.E.2d 111 (2001), *cert. denied sub nom, Floyd v. North Carolina*, 534 U.S. 1092, 122 S. Ct. 838, 151 L. Ed.2d 717 (2002), *reh'g denied*, 535 U.S. 952, 122 S. Ct. 1353, 152 L. Ed.2d 255 (2002).

On 22 October 2012 – fourteen years after his conviction - Defendant filed a motion in the trial court seeking postconviction DNA testing of

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items that were collected from the utility shop by investigators. Following a non-evidentiary hearing on the matter, the trial court entered an order denying the motion.

Defendant now appeals from that order. For the reasons set forth below, we affirm the order.

II. Analysis

A defendant may request postconviction DNA testing of evidence pursuant to N.C. Gen. Stat. § 15A-269, which allows for a court to order such testing if certain conditions are met. One of these conditions is that the evidence sought “[i]s material to defendant’s defense.” N.C. Gen. Stat. § 15A-269(a)(1) (2012). A defendant seeking the DNA testing “carries the burden to make the showing of materiality[.]” *State v. Gardner*, __ N.C. App. __, __, 742 S.E.2d 352, 356 (2013), *disc. review denied*, 749 S.E.2d 860 (2013). We have held that evidence is “material” for purposes of the statute if “there is a *reasonable probability* that its disclosure to the defense would result in a different outcome in the jury’s deliberation.” *State v. Hewson*, 220 N.C. App. 117, 122, 725 S.E.2d 53, 56 (2012) (internal marks omitted) (emphasis added).

In the present case, Defendant sought DNA testing of five cigarettes and a beer can that were found in the utility shop where the victim’s body was discovered. Defendant has contended that he did not kill his wife and that he believed that Karen Fowler, with whom he had had an adulterous affair for a number of years, or Ms. Fowler’s two sons, committed the murder. In his postconviction motion, he argued that the testing may show the presence of DNA from Ms. Fowler or her sons at the crime scene, which would support his theory.

We believe, however, that the trial court did not err in concluding that there was not a “reasonable probability” that the results from any DNA testing would result in a more favorable outcome in a trial, based on the evidence in the record pointing to Defendant’s guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there. *See State v. McLean*, __ N.C. App. __, __, 753 S.E.2d 235, 240 (2014) (stating that whether DNA evidence is material “can only be determined after . . . the judge has had an opportunity to compare [the] DNA evidence against the cumulative evidence presented at trial.”). Here, as we pointed out in our prior opinion in this case, the evidence pointing to Defendant’s guilt is overwhelming: The victim’s blood was found splattered on the Defendant’s boots and jeans on the day of the murder. Defendant had an affair for many years with Ms. Fowler, living with her at various times during his marriage to the

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victim. The victim had filed a divorce complaint against him approximately six weeks before her murder, but apparently reconciled with him a week later, whereupon they agreed that if she ever suspected him of renewing the affair, Defendant would vacate the home and would pay her \$500.00 per month in alimony. Witnesses testified hearing Defendant state within a month of the murder that he would be doing something in a couple of weeks that “you’ll read about . . . in the paper”; that he missed having sex with Ms. Fowler and still loved her; and that he would “rather go to jail before he paid [his wife] any money.” Telephone records reveal twelve calls between Defendant’s and Ms. Fowler’s home within nine days leading up to the murder, as well as five calls made to Ms. Fowler’s home after the murder. *See Floyd*, 143 N.C. App. at 129-31, 545 S.E.2d at 239-40.

While the results from DNA testing *might* be considered “relevant,” had they been offered at trial, they are not “material” in this postconviction setting. *See McLean*, __ N.C. App. at __, 753 S.E.2d at 239-40 (holding that a showing of materiality is a higher burden than a showing of relevancy under N.C. Gen. Stat. § 15A-267).

Defendant argues that the trial court erred in making findings in the order that he “failed to offer any evidence as to why the DNA testing is material to [his] defense” and that he “failed to offer any evidence as to why the said items of evidence are related to the homicide,” because the trial court was holding a non-evidentiary hearing. We agree that these findings were erroneous; however, we hold that the error is harmless because these findings are not needed to support the trial court’s conclusion. We have stated that the statute at issue “contains no requirement that the trial court make specific findings of facts, and we decline to impose such a requirement.” *Gardner*, __ N.C. App. at __, 742 S.E.2d at 356. A trial court’s order is sufficient so long as it states that the court reviewed the defendant’s motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met. *Id.* at __, 742 S.E.2d at 356-57. Accordingly, this argument is overruled.

Defendant also argues that the contents of his motion were sufficient to require the trial court to conduct an evidentiary hearing. While a trial court may conduct an evidentiary hearing, it is not required to do so in every case. Indeed, we have affirmed denials of motions for postconviction DNA testing where the trial court did not even conduct any hearing. *See, e.g., Gardner, supra*. In the context of a motion for appropriate relief, we have held that in determining whether an evidentiary hearing

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is necessary, “the ultimate question that must be addressed [by the trial court] . . . is whether the information contained in the record *and* presented in the [] motion . . . would suffice, if believed, to support an award of relief.” *State v. Jackson*, 220 N.C. App. 1, 6, 727 S.E.2d 322, 328 (2012) (emphasis added). We hold that for motions brought under N.C. Gen. Stat. § 15A-269, a trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

Here, Defendant indicates in his motion some evidence he would offer at a hearing. While such evidence *might* indicate how the results of DNA testing would produce “relevant” evidence, Defendant failed to show how DNA testing would produce “material” evidence; that is, he failed to show how such testing would produce evidence sufficient to create a reasonable probability of a different result, given the evidence already in the trial record. Rather, even if the DNA testing showed the presence of DNA from Ms. Fowler or her sons, the motion did not indicate how such results would create a *reasonable probability* that the verdict would have been any different. Accordingly, the trial court was not required to conduct an evidentiary hearing; and, therefore, this argument is overruled.

AFFIRMED.

Judges HUNTER, Robert C. and DAVIS concur.

STATE v. GENTILE

[237 N.C. App. 304 (2014)]

STATE OF NORTH CAROLINA

v.

JAMES JOSEPH GENTILE

No. COA14-438

Filed 18 November 2014

1. Search and Seizure—motion to suppress—illegal drugs—drug paraphernalia—anonymous tip—unlawful search of curtilage

The trial court did not err by granting defendant's motion to suppress illegal drugs and drug paraphernalia seized as the result of an unlawful search. When the detectives smelled the odor of marijuana, their purported general inquiry about the information received from an anonymous tip was a trespassory invasion of defendant's curtilage.

2. Appeal and Error—preservation of issues—failure to argue at trial

Although the State contended that the trial court erred by granting a motion to suppress even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful since it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause absent the odor of marijuana, the State waived this argument by failing to raise it at trial.

Appeal by the State from order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant.

ELMORE, Judge.

The State appeals from an order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court granting defendant's motion to suppress evidence seized as the result of an unlawful search. After careful consideration, we affirm.

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[237 N.C. App. 304 (2014)]

I. Facts

On 14 September 2012, James Joseph Gentile (defendant) filed a motion to suppress illegal drugs and drug paraphernalia seized by law enforcement officers from his residence. During the 9 September 2013 session of Johnston County Superior Court, the trial court heard defendant's motion and made the following pertinent findings of fact:

2. On September 9, 2011, Detective Rodney Langdon received an anonymous complaint that there was a marijuana grow operation in a detached garage adjacent to the residence located at 3236 Jackson-King Road, Willow Spring, Johnston County, North Carolina 27592.

...

5. After verifying ownership of the residence, Detective Langdon conducted surveillance on the 3236 Jackson-King Road residence on the dates of September 13, 15, and 17 of 2011. He testified that he observed no vehicles on the property on these dates or any persons outside the residence. However, the landscaping to the residence was maintained and it appeared as though the residence was occupied because on September 13, 2011, Detective Langdon, along with Detective Jay Creech, observed that no exterior lights were on, but on September 15 and 17 of 2011, Detective Langdon observed that each of the lights affixed beside the front door to the residence were illuminated.

6. On September 21, 2011, Detectives Langdon and Creech, at approximately 11:10 a.m., went to the address of 3236 Jackson-King Road to conduct a knock and talk investigation.

7. Detectives Langdon and Creech arrived at the residence in an unmarked patrol vehicle and parked near the entrance where the electronic gate was located on the driveway.

8. Detective Langdon pushed the button to the electronic gate in an attempt to make contact with someone at the residence; however, after pushing the button next to the key pad numerous times, nothing happened and he eventually heard what sounded like a dial tone through

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the intercom speaker. He announced “Sheriff’s Office” several times but no response was noted. The dial tone led the detective to believe that the intercom to the electronic gate was not functioning properly.

9. After pushing the button several times to the dial pad and not receiving any response, Detective Langdon observed vehicle tracks next to the left hand side of the electronic gate. Based on the detective’s training and experience, it appeared as though numerous vehicles had been traveling around the gate based on the track impressions observed in the grass on the left hand side of the gate. Detective Langdon testified that when he saw the track impressions on the grass next to the gate, this also led him to believe that the gate was broken as well.

10. Detective Langdon testified that the electronic gate was positioned only on the paved portion of the driveway and did not surround the entire property. There was an open field to the left of the gate looking toward the residence. There were no “No Trespassing” or any other signs positioned on the gate indicating that it was private property.

11. After observing the track impressions to the left of the electronic gate, Detectives Langdon and Creech then walked around the gate on the grass along the vehicle tracks on the left hand side of the gate. Detective Langdon testified that he and Detective Creech then walked the rest of the way up the paved portion of the driveway leading to the front door, which was approximately five hundred (500) feet in distance.

12. Detective Langdon testified that the residence was fairly large in size and had a detached two-car garage located directly at the end of the driveway next to the residence. The two-car detached garage was connected to the residence by a paved walkway.

13. Detective Langdon approached the front door to the residence and knocked multiple times. While waiting at the door, Detectives Langdon and Creech heard dogs barking, but testified that they could not tell from which direction the dogs were barking.

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14. After efforts to reach someone at the front door were unsuccessful, Detectives Langdon and Creech walked through what both detectives described as a “privacy fence” around a paved pathway to the backyard, thinking that since they had heard dogs barking, that the owner could be in the backyard, having not heard the knocking at the front door. However, the [sic] Detective Langdon stated in his affidavit that he “could hear several dogs barking towards the rear of the residence.”

15. Detective Langdon testified that he knocked on the backdoor, but was unable to make contact with anyone. While standing at the back door, Detective Langdon testified that he heard an air conditioner unit running near the rear of the two-car detached garage.

16. The weather on September 21, 2011 was cool and brisk and the temperature was approximately 72 degrees according to the temperature gauge on the patrol vehicle. Detective Langdon testified that since an air conditioner unit was not running to the main residence, but was running to the two-car detached garage, he believed that the two-car detached garage could be occupied.

17. While standing at the back door to the residence, Detective Langdon instructed Detective Creech to go stand in front of the house for officer safety purposes, and to see if he could locate anyone on the property while he walked to the two-car detached garage.

18. Using the paved walkway that connected the house to the backyard, as well as the two-car detached garage, Detective Langdon testified that he walked to the door of the detached garage and knocked in an attempt to locate the owner or any other persons on the property. Detective Langdon observed while knocking at the door that there were two surveillance cameras on the garage, neither of which faced the main residence.

19. Unable to make contact with anyone at the door to the two-car detached garage, Detective Langdon testified that as he was turning to leave the property, Detective Creech told him that he detected the odor of marijuana emitting from the front of the two-car detached garage.

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Detective Creech testified that while standing on the driveway approximately eight to ten feet from the front of the two-car detached garage, he immediately detected the overwhelming odor of marijuana and informed Detective Langdon.

20. Detective Langdon then stepped to Detective Creech's location at the front of the detached garage on the driveway and detected the "overwhelming pungent odor of marijuana" emitting from the front of the two-car detached garage.

21. Based upon the overwhelming "pungent odor of marijuana" and their training and experience the detectives left the residence and applied for a search warrant for the address of 3236 Jackson-King Road.

22. During the execution of the search warrant, the Detectives located two hundred twenty-eight (228) pounds, or one hundred forty-three (143) marijuana plants and approximately three (3) ounces of psilocybin along with digital post scales, gallon Ziploc bags and other miscellaneous drug paraphernalia items.

Based on these findings of fact, the trial court concluded that the evidence seized pursuant to the search warrant had been unconstitutionally obtained because "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." Thus, the trial court granted defendant's motion to suppress the seized evidence.

II. Analysis

[1] The State argues that the trial court erred in granting defendant's motion to suppress because it erroneously concluded as a matter of law that "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

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“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.” *State v. Weaver*, __ N.C. App. __, __, 752 S.E.2d 240, 244 (2013) (citation and quotation marks omitted). A search “conducted outside the judicial process, without prior approval by judge or magistrate, [is] per se unreasonable under the [f]ourth [a]mendment—subject only to a few specifically established and well-delineated exceptions.” *State v. Rhodes*, 151 N.C. App. 208, 213, 565 S.E.2d 266, 269 *writ denied, review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002) (citations and quotation marks omitted).

One such exception is the plain [smell] doctrine, under which a seizure is lawful when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items [smelled] constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause.

State v. Pasour, __ N.C. App. __, __, 741 S.E.2d 323, 324-25 (2012) (citations and internal quotation marks omitted).

The fourth amendment generally protects “persons, houses, papers, and effects[.]” U.S. Const. amend. IV. Fourth amendment protections also extend to the curtilage of an individual’s home. *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. In this state, the curtilage “will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.” *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

However, “no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper.” *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (citations and internal quotation marks omitted). However, where officers have no reason to believe that entering a homeowner’s curtilage will produce a different response than knocking on the residence’s front door, the Fourth Amendment is violated. *Pasour*, __ N.C. App. at __, 741 S.E.2d at 325-26.

Here, the detectives had far exceeded the scope of their right to generally inquire about the information received from the anonymous tip at the time they smelled the marijuana. When the detectives initially reached the house, they knocked on the front door for a “couple [of]

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minutes” but received no human response. They only proceeded to the back of the house because they heard barking dogs, and believed that an occupant might not have heard the knocks. However, the detectives could not determine from which direction the dogs were barking. There was no evidence of any vehicles on the property, persons present, lights illuminated in the residence, or furniture in the house, and the detectives believed that no one resided there. Accordingly, the sound of barking dogs, alone, was not sufficient to support the detectives’ decision to enter the curtilage of defendant’s property by walking into the back yard of the home and the area on the driveway within ten feet of the garage. See *Florida v. Jardines*, __ U.S. __, __, 185 L. Ed. 2d 495 (2013) (noting that a law enforcement officer without a search warrant may merely “approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave”).

As a result, when the detectives smelled the odor of marijuana, their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant’s curtilage, and they had no legal right to be in that location. Accordingly, the subsequent search of the residence based, in part, on the odor of marijuana was unlawful. Thus, the trial court did not err by granting defendant’s motion to suppress.

b.) Remaining Portions of Search Warrant Affidavit

[2] Next, the State argues that even if the detectives’ entry onto constitutionally protected areas of defendant’s property was unlawful, the trial court erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana. We disagree.

As defendant correctly points out, the State failed to preserve this issue on appeal. During the motion to suppress, the State argued that because the detectives were conducting a general inquiry about the information received from the anonymous tip and smelled the marijuana while on the driveway, they were in a place in which they had a right to be when they smelled the marijuana. Accordingly, the State argued that the motion to suppress should be denied. However, the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause. Thus, we dismiss this argument because the State did

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not preserve this issue for appellate review. *See State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) (“[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court.”).

III. Conclusion

In sum, we affirm the trial court’s order granting defendant’s motion to suppress because the evidence seized from defendant’s residence was obtained as a result of an unlawful search.

Affirmed.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA

v.

DEXTER DURANE HENRY

No. COA14-561

Filed 18 November 2014

1. Appeal and Error—preservation of issues—failure to object at trial on the same grounds

The issue of whether defendant’s Fourth Amendment rights were violated by an officer’s excessive force was not heard on appeal where defendant did not object at trial on those grounds.

2. Search and Seizure—frisk—reasonable suspicion

Although a defendant in a prosecution for cocaine possession and resisting a public officer did not preserve for appeal the argument that the officer lacked reasonable suspicion for a frisk, the officer had reasonable suspicion to conduct a frisk for weapons to ensure his safety. Moreover, his actions were not so unreasonably intrusive as to violate Defendant’s Fourth Amendment rights.

3. Drugs—constructive possession—struggle outside patrol car

The State’s evidence was sufficient to prove that defendant actually or constructively possessed the cocaine an officer found after their struggle on the ground near defendant’s rental car in a prosecution for possession of cocaine and resisting a public officer.

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Considered collectively, the patrol car video of the traffic stop, the officer's check of the area immediately before his initial contact with defendant, the absence of another person, the location of the cocaine, and defendant's repeated refusal to open his hand provided sufficient evidence to survive defendant's motion to dismiss.

4. Indictment and Information—no variance with evidence—plural and singular usage

The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a public officer due fatal variances between the indictment and the evidence. Defendant's motion was based on the indictment's statement that defendant refused to drop what was in his "hands," while the evidence was that he refused to drop what was in his right "hand." Not every variance that involves an essential element of the offense charged is necessarily material.

5. Indictment and Information—no variance with evidence—resisting an officer—when a traffic stop is complete

Although defendant did not properly preserve the issue for appellate review, there was not a fatal variance between the indictment and the evidence on a charge of resisting a public officer where defendant contended that a traffic stop was over before any resistance occurred. The officer had not yet returned defendant's license and registration at the time he ordered defendant out of his vehicle to conduct a frisk for weapons.

Appeal by Defendant from judgment entered 30 October 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

William D. Spence for Defendant.

STEPHENS, Judge.

Defendant Dexter Durane Henry was convicted in Johnston County Superior Court of one count of possession of cocaine and one count of resisting a public officer. He then pled guilty to having attained habitual felon status. Defendant appeals from the trial court's denial of his motion to suppress evidence that he alleges was obtained in violation of his

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Fourth Amendment rights, as well as from the trial court's denial of his motions to dismiss the charges against him for insufficient evidence and fatal variances between the indictment and the evidence presented at trial. After careful review, we hold that the trial court did not err in denying Defendant's motion to suppress or either of his motions to dismiss.

Facts and Procedural History

On 5 March 2012, Defendant was indicted on one count of possession of cocaine and one count of resisting a public officer, arising from an altercation that ensued after Defendant's vehicle was stopped for a safe movement violation along Buffalo Road in Johnston County on 1 February 2012. The evidence introduced at Defendant's trial, which began on 28 October 2013, tended to show that, at approximately 10:00 a.m. on 1 February 2012, Johnston County Sheriff's Deputy Greg Collins ("Deputy Collins") was patrolling for traffic violations when he saw a gray Hyundai suddenly come to a complete stop in the middle of a blind curve. The posted speed limit was 45 miles per hour, and Deputy Collins later testified that he and three or four other motorists behind the Hyundai were forced to stop abruptly to avoid hitting it. While the cars were stopped, Deputy Collins watched as a female ran out from a cemetery beside the road and climbed into the Hyundai's passenger seat. At that point, Deputy Collins ran a check on the vehicle's license plate, which "came back to a leased vehicle" from Charlotte. When the Hyundai continued driving north, Deputy Collins followed it for about a mile, then activated his blue lights to conduct a traffic stop as the car turned into a driveway.

As Deputy Collins approached the driver's side of the vehicle, he looked around at his surroundings to ensure his own safety and confirmed that nothing had been thrown on the ground from the vehicle. Then Deputy Collins reached the driver's side door and recognized Defendant as the driver, based on "a lot of involvement dealing with him" on multiple occasions involving narcotics during Deputy Collins's previous employment with the Selma Police Department. Deputy Collins noticed Defendant "seemed nervous" and "was sitting there shaking." When Deputy Collins asked Defendant for his license and registration, Defendant reached over with his left hand to open the vehicle's glove box while keeping his right arm in a position where Deputy Collins could not see it. Then Deputy Collins asked Defendant where he and his female passenger were going; Defendant said nothing but his passenger said they were headed to an ATM, which struck Deputy Collins as odd, given that the car had been traveling in the opposite direction of the closest available ATM. The passenger replied that Defendant was driving her

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to pick up her ATM card, but Deputy Collins noticed that although they claimed to be friends, neither Defendant nor his passenger appeared to know each other's names.

After Deputy Collins asked Defendant to step out of the vehicle, he "noticed there was something in [Defendant's] right hand, [but] couldn't tell what it was" because Defendant had his right hand "closed with his thumb and index finger rubbing it together" in a clinched fist. Deputy Collins asked Defendant if he was holding his car keys, but Defendant said they were still in his car, which Deputy Collins confirmed. Deputy Collins asked Defendant multiple times to open his hand, but Defendant repeatedly refused. This led Deputy Collins to suspect Defendant might be carrying a weapon, so he ordered Defendant to turn around and place his hands on top of the vehicle in order to conduct a *Terry*-style frisk. See *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). When Defendant partially complied with this order but still refused to drop what was in his hand, a scuffle ensued, which was captured by the video camera in Deputy Collins's patrol car and during which Deputy Collins "was able to get both [Defendant's] hands up above the car and pin [Defendant] against the car." At that point Defendant "started lunging across the cab of the vehicle and extending his right hand" but still refused to open it and "kept saying there's nothing in my hand." Eventually, Deputy Collins "took [Defendant] off his balance, spun him around and dropped him, put him on the ground[,]" where the two men continued to struggle. After refusing still more requests to open his hand, Defendant stated, "there's a tissue in my hand," but nevertheless refused to drop it until Deputy Collins "had to force [Defendant's] right hand behind his back and forcibly removed the item that was in his hand." The item Defendant had been holding was, in fact, a tissue.

Deputy Collins placed Defendant under arrest for resisting a public officer, then conducted a search incident to arrest to ensure that Defendant had no weapons. Once the immediate area was secured, Deputy Collins continued his search and found a plastic baggie containing an off-white rocky substance near the left rear driver's side of the vehicle where he and Defendant had been struggling. Subsequent SBI testing showed the substance to be approximately 0.55 grams of crack cocaine.

Before his trial, Defendant filed a motion to suppress the evidence against him, alleging it was the fruit of an unreasonable search that violated his Fourth Amendment rights. Although he did not object to the constitutionality of the traffic stop, Defendant contended Deputy Collins lacked reasonable suspicion to conduct a *Terry* frisk, arguing primarily that the mere fact of his previous drug convictions was insufficient to

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justify a search for contraband. However, at a hearing on 29 October 2013, Deputy Collins testified that he had initiated a *Terry* frisk out of concern for officer safety because, in addition to Defendant's suspicious behavior inside the car, he knew Defendant was a convicted felon, he knew Defendant's prior convictions involved drug offenses, and he knew, based on his training and experience, that drug offenders often possess weapons. Deputy Collins further testified that he knew, based on his training and experience, that "[w]eapons come in all different sizes and shapes . . . [,] a lot of times they [are] conceal[ed,]" and "[a] weapon is most dangerous in a person's hand."

In addition to Deputy Collins's testimony about his concern for officer safety, the trial court also considered this Court's decision in *State v. Summey*, 150 N.C. App. 662, 564 S.E.2d 624 (2002). In *Summey*, we held that officers who stopped a vehicle reported to have just been involved in a drug transaction did not violate the Fourth Amendment when they forced a passenger who had suspiciously hidden her hand underneath a piece of fabric to open her hand, based in part on their training that "until [the officers] see an open palm they have reason to believe a suspect could be armed with a weapon." *Id.* at 667, 564 S.E.2d at 628. Here, given the totality of the circumstances, the trial court concluded that Deputy Collins did have reasonable suspicion to conduct a *Terry* frisk and, accordingly, denied Defendant's motion to suppress.

Later that same day, a jury found Defendant guilty of the Class I felony of possession of cocaine and the Class 2 misdemeanor of resisting, delaying, or obstructing a public officer. On 30 October 2013, Defendant pled guilty to having attained habitual felon status, thereby enhancing his punishment for the felony possession conviction from Class I to Class E.¹ Defendant was sentenced within the presumptive range for a Class E habitual felon at his prior record level to an active term of 38 months minimum and 58 months maximum imprisonment, with the sentence for his Class 2 misdemeanor conviction consolidated therein. Defendant gave timely oral notice of appeal.

I. Motion to Suppress

[1] Defendant first argues that the trial court erred in denying his motion to suppress the crack cocaine, which he alleges Deputy Collins obtained as the result of an unreasonably intrusive search. Specifically, Defendant alleges his Fourth Amendment rights were violated because Deputy Collins used excessive force in taking Defendant to the ground

1. In the transcript of plea, Defendant reserved his right to appeal "all other matters."

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and opening his hand, which resulted in an unreasonable seizure. We disagree.

This Court has set forth the appropriate standard of review for a motion to suppress as follows:

It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which [the] defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, *appeal dismissed*, ___ N.C. ___, 664 S.E.2d 311 (2008) (citations, internal quotation marks, and brackets omitted). However, our Supreme Court has made clear that, “[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1) (providing the process by which issues are preserved for appellate review). Where a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because “[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.” *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). While recognizing “the fact that these evidentiary rules may seem at times technical,” our Supreme Court has explained that the rationale for them is “bottomed on strong policy foundations and on the principle that the trial judge is present at the trial, and to him is entrusted the conduct of the trial.” *State v. Ward*, 301 N.C. 469, 478, 272 S.E.2d 84, 89 (1980).

In the present case, Defendant's argument to this Court is that the trial court erred in denying his motion to suppress because Deputy Collins used excessive force, rendering the search unconstitutionally intrusive and the subsequent seizure unreasonable. In support of his argument, Defendant cites *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966) (holding that a substantially intrusive search

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may render a seizure unreasonable), and also attempts to distinguish the facts of this case from those present in *Summey* by emphasizing that the actions and conduct of Deputy Collins were more forceful and more intrusive than those of the officer who merely applied pressure to the back of the female defendant's hand to force it open in *Summey*. Defendant's argument before the trial court, however, was that Deputy Collins lacked reasonable suspicion that Defendant was armed and dangerous to justify a *Terry* frisk for weapons. Although the trial court gave Defendant an opportunity to distinguish this case from the facts present in *Summey*, Defendant never raised the issue of excessive force to the trial court.

Because Defendant failed to raise excessive force as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it. *See Eason*, 328 N.C. at 420, 402 S.E.2d at 814; *Benson*, 323 N.C. at 321, 372 S.E.2d at 519.

[2] Moreover, by failing to raise it on appeal, Defendant has also waived his original argument that Deputy Collins lacked reasonable suspicion for a *Terry* frisk. In any event, given this Court's holding in *Summey* and the totality of the circumstances present here, we conclude the trial court was correct in finding there was reasonable suspicion to conduct a *Terry* frisk. In *Summey*, police officers had been informed that the vehicle the defendant was riding in had recently been involved in a drug transaction, saw the defendant hide her hand "in such a manner which was clearly indicative of her having either a small weapon or drugs closed in her palm[,] and asked her to open it multiple times "to alleviate their concern that she might be concealing a weapon" before forcing her to open her hand. 150 N.C. App. at 669, 564 S.E.2d at 629. In the present case, Deputy Collins knew Defendant had prior convictions for drug offenses, observed Defendant's nervous behavior inside his vehicle, and saw him deliberately conceal his right hand and refuse to open it despite repeated requests. Furthermore, he knew from his training and experience that people who deal in narcotics frequently carry weapons, and that many weapons are small enough to conceal within a person's hand. Thus, like the officers in *Summey*, Deputy Collins had a reasonable suspicion to conduct a *Terry* frisk for weapons to ensure his safety.

Furthermore, even if Defendant had properly preserved his excessive force argument for appellate review, it too would fail in light of our decision in *Summey*. In applying the framework set forth by the United States Supreme Court in *Schmerber*, the *Summey* Court concluded that the officers' "use of pressure to open [the] defendant's hands was

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justifiable in view of the officers' need to ensure that [the] defendant was not in possession of a weapon capable of inflicting injury" and found no evidence indicating the amount of force used was so overly intrusive as to render the seizure unreasonable. *Id.* In the present case, although Deputy Collins used more force than the officers in *Summey* did, our case law indicates that his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights. *See, e.g., State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996) (holding that requiring the defendant to pull his pants down in the middle of an intersection so that police might search for cocaine was not intolerable in intensity and scope such that the search was unreasonably intrusive); *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995) (holding police officer's application of pressure to the defendant's throat causing him to spit out three plastic baggies containing crack cocaine was not unreasonably intrusive in light of the risk of losing evidence and the potential health risk to the defendant). Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress.

II. Motion to Dismiss for Insufficient Evidence

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine at the close of all the evidence on the grounds that the State failed to present sufficient evidence to establish every element of the offense charged. Specifically, Defendant alleges that the State's evidence was insufficient to prove that he actually or constructively possessed the cocaine Deputy Collins found after their struggle on the ground near the rear driver's side of Defendant's rental car. We disagree.

In reviewing a defendant's challenge to a denial of his motion to dismiss based on insufficient evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Barnhart*, __ N.C. App. __, __, 724 S.E.2d 177, 179 (2012) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000) (citation omitted). In determining whether substantial evidence exists, "the question for the trial court is not one of weight, but of the sufficiency of the evidence." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Moreover, "[i]n this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that

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evidence.” *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation and internal quotation marks omitted). Thus, “contradictions and discrepancies do not warrant dismissal of the case [but instead] are for the jury to resolve.” *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). Even circumstantial evidence “may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. Where the evidence presented is circumstantial, the court must consider “whether a reasonable inference of [the] defendant’s guilt may be drawn from the circumstances” and if it does, “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.” *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation and internal quotation marks omitted; alterations in original). Ultimately, “if substantial evidence exists to support each essential element of the crime charged and that [the] defendant was the perpetrator, it is proper for the trial court to deny the motion.” *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). However, if the evidence is “sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Our Supreme Court has held that “[t]o obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) [the] defendant possessed the substance; and (2) the substance was a controlled substance.” *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Possession may be either actual or constructive. *See State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). “Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both the power and intent [to control its disposition or use, even though he does not have actual possession.” *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation and internal quotation marks omitted). If a controlled substance is found “on premises under the defendant’s control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury.” *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). If, however, the defendant does not have exclusive control of the premises, then “other incriminating circumstances must be established for constructive possession to be inferred.” *Id.* Nevertheless, this Court has held that “[t]he State is not required to prove that the defendant owned the

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controlled substance, or that [the] defendant was the only person with access to it.” *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citation omitted). Indeed, “the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.” *State v. Harvey*, 281 N.C. 1, 12–13, 187 S.E.2d 706, 714 (1972) (citation and internal quotation marks omitted).

In the present case, Defendant argues the trial court erred in denying his motion to dismiss because he did not have exclusive control of the premises where the cocaine was found and the State failed to establish “other incriminating circumstances” sufficient to infer constructive possession. To support his argument, Defendant relies on our Supreme Court’s holding in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), that a strong suspicion of constructive possession alone is not sufficient to survive a motion to dismiss. *Id.* at 311, 154 S.E.2d at 344. Defendant correctly notes that his car was stopped at the residence of his female passenger, which was not a premises under his exclusive control, and emphasizes that the State presented no DNA or fingerprint evidence to link him directly to the baggie of crack cocaine Deputy Collins found there. Defendant further contends that neither his nervousness, his prior drug convictions, nor the fact Deputy Collins had reasonable suspicion to search him for weapons provides evidence of his actual or constructive possession, and he also suggests that the crack cocaine could just as easily have been dropped on the ground by his female passenger, or even tossed there by a passing motorist. Although he concedes that the location the baggie was found at the rear driver’s side of his vehicle where he struggled with Deputy Collins is indeed an incriminating circumstance, Defendant maintains that this amounts to no more than “mere association or presence[] linking [him] to the [crack cocaine]” and that more is required to establish constructive possession under these circumstances given this Court’s decision in *Alston*. 131 N.C. App. at 519, 508 S.E.2d at 318.

However, Defendant’s argument ignores crucial distinctions between the facts of his case and those present in the cases he cites, such as *Alston* and *Chavis*, where the evidence was held insufficient to establish constructive possession. In *Alston*, we held the trial court erred in denying the defendant’s motion to dismiss the charge that he was a felon in possession of a firearm because the handgun in question was purchased and owned by his wife and there was no other evidence he ever possessed it apart from the fact it was found lying on the console next to

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his seat in a car he did not own that his wife was driving. 131 N.C. App. at 519, 508 S.E.2d at 319. In *Chavis*, our Supreme Court held there was no constructive possession where police saw a defendant walking on a sidewalk wearing a hat that was later found discarded nearby containing marijuana because there was no evidence the marijuana was in the hat when the defendant possessed it, nor did the officers see him remove or discard the hat. 270 N.C. at 311, 154 S.E.2d at 344. The common thread that runs through these and similar cases is that the police never saw the defendant possess or discard the contraband which, because it was found in an area that the defendant did not maintain exclusive control over, could have been present there as the result of possession by someone else. See also, e.g., *State v. Lindsey*, 219 N.C. App. 249, 725 S.E.2d 350, reversed and remanded on other grounds, 366 N.C. 325, 734 S.E.2d 570 (2012) (reversing conviction for constructive possession where an officer observed the defendant flee his vehicle through a restaurant parking lot but did not witness him taking any action consistent with disposing of marijuana and cocaine in two separate locations in the parking lot from which drugs were recovered); *State v. Acolaste*, 158 N.C. App. 485, 581 S.E.2d 807 (2003) (reversing conviction for constructive possession where police lost sight of the defendant while chasing him through an area over which he did not maintain exclusive control, saw him make a throwing motion toward some bushes, but found nothing there and instead recovered drugs from the roof of a detached garage located in the opposite direction from the bushes).

By contrast, in the present case, there is far less room to doubt that the baggie of crack cocaine came directly from Defendant's clinched right fist. During the hearing on Defendant's motion to suppress, the trial court extensively reviewed video footage of the traffic stop taken by the camera in Deputy Collins's squad car, which showed that while the two men were struggling on the ground, Defendant's hand dropped something that looked like an "off-white rock substance" that "bounce[d] and hit the ground" in the same location beside the rear driver's side of the vehicle where Deputy Collins found the baggie of crack cocaine. Although the video did not show the baggie at the precise instant it came out of Defendant's hand or as it fell through the air, Deputy Collins did testify that he checked the area immediately before his initial contact with Defendant and found nothing, and there was no evidence that anyone else had access to the area between that time and the time Deputy Collins found the crack cocaine. Considered collectively with the location where the crack cocaine was found, which even Defendant concedes is an incriminating circumstance, and given Defendant's refusal to open his hand after repeated requests, we conclude the State provided

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evidence of additional incriminating circumstances sufficient to establish an inference of constructive possession and to survive Defendant's motion to dismiss. Moreover, when taken in the light most favorable to the State, the video also provides at least circumstantial evidence of actual possession sufficient to support a reasonable inference of Defendant's guilt and send the case to the jury. *See Scott*, 356 N.C. at 596, 573 S.E.2d at 869. Therefore, because the State presented evidence "which places [Defendant] within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession," *see Harvey*, 281 N.C. at 12–13, 187 S.E.2d at 714, we hold that the trial court did not err in denying Defendant's motion to dismiss the charge of possession of cocaine based on insufficient evidence.

III. Fatal Variance

[4] Finally, Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting, obstructing, or delaying a public officer due to what he alleges are fatal variances between the indictment and the evidence introduced at trial. We disagree.

It is well established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment" and that "[t]he State's proof must conform to the specific allegations contained" therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). Thus, "a fatal variance between the *allegata* and the *probata*" is properly the subject of a motion to dismiss for insufficiency of the evidence to sustain a conviction. *State v. Nunley*, 224 N.C. 96, 97, 29 S.E.2d 17, 17 (1944). The rationale for this rule is "to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because "[i]n order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* (citation omitted). This Court has previously recognized that "an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414 S.E.2d 65, 67 (1992).

In the present case, Defendant moved to dismiss at the close of the State's evidence based on fatal variance because "the indictment alleged that [he] had refused to drop what was in his hands (plural) and the evidence at trial showed [he] had refused to drop what was in his right

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hand (singular).” Defendant contends the trial court erred in denying his motion because this variance was material since it involved an essential element of the offense charged, specifically the manner in which he resisted Deputy Collins. Essentially, Defendant’s argument is premised on the logic that because a fatal variance must be material, and a material variance must involve an essential element, any variance that involves an essential element must be material and therefore fatal. This argument is without merit.

Contrary to Defendant’s logic, this Court’s case law makes clear that not every variance that involves an essential element of the offense charged is necessarily material. For example, in *State v. McKoy*, this Court rejected a defendant’s argument that there was a fatal variance between the indictments against him for second-degree rape and second-degree sexual offense and the evidence introduced at his trial because even though the indictments identified the victim by her initials, they failed to state her full name and were not punctuated by periods, which he contended were essential elements because both offenses must be committed against “another person.” 196 N.C. App. 650, 653, 675 S.E.2d 406, 409, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). In upholding the conviction, the *McKoy* Court emphasized that the fatal variance rule was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments, and ultimately rooted its holding in the rule’s rationale that indictments must “provide[] sufficient notice to [the d]efendant for [the d]efendant to prepare his defense and protect him from double jeopardy.” *Id.* at 659, 675 S.E.2d at 412.

Here, Defendant attempts to support his argument with citations to our holdings in *State v. Skinner*, 162 N.C. App. 434, 590 S.E.2d 876 (2004) and *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253 (2005), *disc. review denied*, 360 N.C. 366, 630 S.E.2d 447 (2006). These cases are easily distinguished from the present facts insofar as they demonstrate what actually makes a variance “material.” In *Skinner*, this Court found a fatal variance where the defendant was tried for assault with a deadly weapon based on an indictment that did not correctly identify what type of deadly weapon he used to commit the assault; although the indictment alleged that he beat the victim with his hands, the evidence introduced at trial showed that he beat the victim with a hammer. 162 N.C. App. at 445, 590 S.E.2d at 884. In *Langley*, we found a fatal variance where the defendant was indicted for possession of a firearm by a felon but the evidence introduced at trial showed he actually possessed a sawed-off shotgun, which under our State’s then-extant scheme for classifying firearms could not constitute sufficient proof of the offense

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charged. 173 N.C. App. at 196, 618 S.E.2d at 255. In both cases, these variances were material because they fundamentally altered the nature of the offense charged, which disadvantaged their respective defendants in preparing for their trials and, if uncorrected, could have potentially exposed them to double jeopardy.

In sum, we conclude that the alleged fatal variance urged by Defendant—the difference between “hand” (singular) and “hands” (plural)—is more like the *McKoy* victim’s unpunctuated initials than the difference between “hand” vs. “hammer” in *Skinner* or the difference between “handgun” vs. “sawed-off shotgun” in *Langley*. It is difficult to discern how the mistaken addition of the letter “s” prevented the indictment from providing Defendant sufficient notice of the general manner in which he resisted Deputy Collins or how it could leave Defendant exposed to double jeopardy. Further, apart from his bald assertion that the variance was material, Defendant offers no elaboration as to any prejudice he might have suffered as a result. We therefore conclude that the trial court did not err in denying his motion to dismiss for fatal variance.

[5] Defendant also attempts to raise a second fatal variance argument, contending that although the indictment alleged that Deputy Collins was attempting to discharge an official duty by conducting a traffic stop, the evidence at trial proved that the traffic stop was already over before any resistance by Defendant occurred. However, because Defendant did not specifically raise this argument before the trial court, it has not been properly preserved for appellate review. *See Eason*, 328 N.C. at 420, 402 S.E.2d at 814; *see also* N.C.R. App. P. 10(b)(1). In his brief, Defendant attempts to invoke this Court’s jurisdiction pursuant to Rule 2 of our Rules of Appellate Procedure, but even if we agreed to suspend or vary our typical requirements, Defendant’s argument would fail. This Court has previously held that a traffic stop is not terminated until after the officer returns the driver’s license or other documents to the driver. *See State v. Kincaid*, 147 N.C. App. 94, 555 S.E.2d 294 (2001); *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). In the present case, although Defendant had provided his license and registration, Deputy Collins had not yet returned them at the time he ordered Defendant out of his vehicle to conduct a *Terry* frisk for weapons. Because the traffic stop had not yet ended, we find no fatal variance between the indictment and the evidence presented on this ground either.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

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[237 N.C. App. 325 (2014)]

STATE OF NORTH CAROLINA

v.

STEVEN KEITH JASTROW, DEFENDANT

No. COA14-276

Filed 18 November 2014

1. Robbery—attempted—two counts—two people in residence—separate rooms

There was sufficient evidence to support defendant's two separate attempted robbery convictions where defendant argued that the evidence showed that he robbed a single residence in the presence of two people, but, when the robbery occurred, the two victims were in different rooms.

2. Robbery—attempted—two counts unexpected person in house

The trial court did not err by denying defendant's motion to dismiss a conviction for attempted robbery with a dangerous weapon where defendant argued that he only participated in the plan to rob one of the two residents of the house. If two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime, and is also guilty of any other crime committed by the other in pursuance of the common purpose. Viewed in the light most favorable to the State, the facts were sufficient to show that the robbery of the unexpected person was pursuant to the group's common purpose.

3. Constitutional Law—right to counsel—pro se appearance—colloquy with defendant

The trial court did not err by allowing defendant to proceed pro se where the colloquy between the trial court and defendant was not as cogent as in most cases. That was because defendant repeatedly interrupted the court or refused to answer straightforward questions, apparently from his belief that he was not bound by the laws of North Carolina and the United States and that the trial court could not exercise jurisdiction over him. When the record is reviewed as a whole, the trial court's discussion with defendant was sufficient to satisfy the statutory criteria. However, in most cases, the best practice is for trial courts to use the 14 questions approved in *State v. Moore*, 362 N.C. 319, and set out in the Superior Court Judges' Benchbook.

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Appeal by defendant from judgment entered 16 September 2013 by Judge Ted S. Royster, Jr. in Davie County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

Michael E. Casterline, for defendant-appellant.

DIETZ, Judge.

Defendant Steven Keith Jastrow appeals from his conviction and sentence on two counts of attempted robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon.

Jastrow served as the “inside man” in a scheme to rob a known drug dealer at his home. On the night of the robbery, the drug dealer’s brother also was present, forcing Jastrow’s co-conspirators to split up and separately confront both brothers to demand drugs and money. Jastrow argues that one of his attempted robbery convictions must be set aside because, although there were two victims, there was only one attempted robbery, not two separate ones. He also argues that he cannot be held responsible for the separate robbery of the drug dealer’s brother, which he contends was not part of the conspirators’ original plan. Finally, Jastrow argues that the trial court erred by granting his request to represent himself without first conducting the proper statutory inquiry.

For the reasons set forth below, we hold that there was sufficient evidence to support Jastrow’s conviction on two separate counts of attempted robbery with a dangerous weapon. We also hold that the trial court conducted a proper inquiry under N.C. Gen. Stat. § 15A-1242 before permitting Jastrow to represent himself. Accordingly, we find no error.

Facts and Procedural History

In September 2011, Jastrow lived at home with his mother, stepfather, and half-brother, along with two other men, Ryan Bernatz and Kyle Horton. Bernatz and Horton were drug users and had begun running low on money and drugs. Jastrow, Bernatz, and Horton hatched a plan to rob one of Jastrow’s friends, Patrick Smith. Jastrow occasionally bought marijuana from Patrick and believed Patrick would be a good person to rob because he was young, did not have a gun, and would not fight back. Jastrow also told his co-conspirators that the front door of Patrick’s house always was left unlocked.

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Horton testified that the group discussed the planned robbery between five and seven times. They decided Jastrow would be the “inside man” for the robbery because he knew Patrick and had previously been to his house. Jastrow drew Bernatz and Horton a map of Patrick’s house and illustrated where Patrick’s bedroom was located and where the money and drugs would be found.

On 3 October 2011, Horton gave Jastrow twenty dollars to purchase marijuana from Patrick in order to scope out Patrick’s home. Once inside, Jastrow texted Bernatz and told him that Patrick’s brother, Hugh Smith, also was present at the home and was sitting on the couch in the living room.

After waiting in the car for about an hour, Bernatz, armed with a machete, and Horton, carrying a gun, made their way to the front door of the house. Horton opened the front door and immediately approached Hugh on the couch. Bernatz went straight to the back bedroom where Jastrow and Patrick were located. Horton approached Hugh with the gun drawn and told him to “[g]ive up the stuff. Get on the ground. Don’t make a move. Get on the ground. Give up the stuff.” Horton testified that by “stuff,” he meant “[d]rugs and money. Basically this is a robbery.” When Hugh did not comply, Horton hit him on the head with the gun. When Hugh continued to resist, Horton yelled for Bernatz saying “[g]et in here before I have to hurt this guy.”

At the same time that Horton first approached Hugh, Bernatz went straight back to Patrick’s bedroom and opened the door. Bernatz pointed the machete at Patrick and asked him “[w]here is it?” and told him to “[g]ive it up. I know you have it. Where is it[?]”

After hearing Horton yell for help from the living room, Bernatz exited Patrick’s bedroom and hit Hugh on the head with the blunt end of the machete. Patrick then jumped on Bernatz’s back and an altercation broke out between Horton, Bernatz, Patrick, and Hugh. During the altercation, Horton fired his gun at Patrick. He then fired his gun three more times at Hugh. Horton and Bernatz fled from the house into the woods.

Jastrow was not involved in this violent melee and left the house either during the fight or just after it ended. Bernatz called Jastrow, attempting to locate him, but Bernatz’s cell phone died shortly into the conversation. All three men eventually made it back to Jastrow’s house. The next day, Jastrow spoke to the police, portrayed himself as an innocent bystander, and told the police he did not know the men who robbed Patrick and Hugh.

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In early October 2011, law enforcement received an anonymous phone call naming Bernatz and Horton as potential suspects in the robbery. Officers went to Jastrow's school to speak with him about Bernatz and Horton. While interviewing Jastrow at his school, the officers realized that Jastrow was lying because his story had changed from his initial statement. The police later executed a search warrant at Jastrow's home and recovered incriminating evidence.

On 10 September 2012, the State indicted Jastrow on two counts of felony attempted robbery with a dangerous weapon, two counts of attempted murder, and one count of felony conspiracy to commit robbery with a dangerous weapon. The State later dismissed the two counts of attempted murder, but Jastrow went to trial on the remaining charges.

At the close of the State's evidence, Jastrow moved to dismiss one charge of robbery with a dangerous weapon for insufficient evidence, but the court denied the motion. Jastrow did not present any evidence at trial.

The jury found Jastrow guilty of all charges and he was given consecutive sentences of 64 to 86 months for one count of attempted robbery with a dangerous weapon and 64 to 86 months for conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon. Jastrow timely appealed.

Analysis**I. Sufficiency of the Evidence**

[1] Jastrow first argues that the trial court erred in denying his motion to dismiss one of the counts of attempted robbery with a dangerous weapon because there was insufficient evidence to support two separate attempted robbery convictions.

"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). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

When a defendant moves to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*,

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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, 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).

Jastrow was charged with two counts of attempted robbery with a dangerous weapon. The statute governing this offense criminalizes “attempts to take personal property from another” as well as attempts to take personal property “from any place of business, residence, or banking institution or any other place where there is a person or persons in attendance.” N.C. Gen. Stat. § 14-87(a) (2013).

Jastrow argues that the evidence at trial shows that he robbed a single residence in the presence of two people, rather than separately robbing two people at a residence. Jastrow relies on *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974), and similar cases to support his theory that, although there were two people in the house, only one robbery took place.

The cases on which Jastrow relies are readily distinguishable: they involve defendants who robbed a *business* of its personal property by taking it from multiple employees present on the business premises. In *Potter*, for example, our Supreme Court held that only one robbery took place where the defendant obtained the bank’s property from two tellers at two different cash registers. 285 N.C. at 254, 204 S.E.2d at 659.

That is not the situation here. To be sure, the evidence suggests that Jastrow and his co-conspirators initially planned to rob only Patrick, whom they knew to have drugs and money. But when the robbery occurred, the two victims, Patrick and Hugh, were in different rooms. One armed robber, wielding a machete, went into Patrick’s bedroom and demanded drugs and money from him. At the same time, the second robber, wielding a gun, approached Hugh and likewise demanded drugs and money.

This case thus presents different facts from *Potter* because “the persons threatened were not employees of one employer victimized by the taking of the employer’s property. Each person threatened was a victim, each being robbed of his personal property.” *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974) (distinguishing *Potter*).

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In sum, viewing the evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference, we hold that there was sufficient evidence to support two separate attempted robbery convictions. From this evidence, the jury could have concluded that Jastrow and his co-conspirators attempted to rob Hugh of his own drugs, money, or other personal property in addition to whatever drugs and money they hoped to rob from Patrick.

[2] Jastrow also argues that there is insufficient evidence to support the second conviction for attempted robbery with a dangerous weapon because Jastrow only participated in the plan to rob Patrick, not Hugh. This argument conflicts with our case law.

In *State v. Ferree*, this Court held that “[a] defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design.” 54 N.C. App. 183, 184-85, 282 S.E.2d 587, 588 (1981). Thus, if two or more persons join together to commit a crime, “each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose.” *Id.* at 185, 282 S.E.2d at 588.

There was sufficient evidence to convict Jastrow on two separate counts of attempted armed robbery under *Ferree*. On the night of the robbery, Jastrow entered Patrick’s house and secretly communicated with his co-conspirators through text messages, informing them that Patrick was not alone and that Hugh also was in the house. He did not ask his co-conspirators not to rob Hugh, nor did he try to call off the robbery. To the contrary, one of the co-conspirators testified that after learning Hugh was present, Jastrow indicated a desire to follow through with the plan, texting messages such as “where are you guys at? Are you guys coming in or not? It’s getting late. Okay?” More importantly, after discovering that Patrick was not alone and that Hugh also was present, Jastrow began texting his co-conspirators about the drugs and money that he saw inside the house, referring now to what “they” both had, rather than just to what Patrick had.

Viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference, these facts are sufficient to show that the attempted robbery of Hugh was in pursuit of the group’s common purpose to plan and execute a robbery to acquire drugs and money from both Patrick and Hugh. Accordingly, the trial court did not err in denying Jastrow’s motion to dismiss.

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II. Jastrow's Request to Represent Himself

[3] Jastrow next argues that the trial court erred in allowing him to proceed *pro se* because the trial court failed to make a proper inquiry into whether his waiver of counsel was knowing, intelligent, and voluntary. Specifically, Jastrow argues that the trial court failed to satisfy the statutory requirements of Section 15A-1242 of the General Statutes, which governs a trial court's decision to permit self-representation.

"Before allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). "A defendant must first clearly and unequivocally waive his right to counsel, and elect to proceed *pro se*. Thereafter, the trial court must determine whether the defendant knowingly, intelligently and voluntarily waived his right to in-court representation by counsel." *State v. Anderson*, 215 N.C. App. 169, 170, 721 S.E.2d 233, 234 (2011), *aff'd per curiam*, 365 N.C. 466, 722 S.E.2d 509 (2012) (internal citations and quotation marks omitted).

To assist with this determination, the General Assembly enacted a statute that requires trial courts to inquire about the defendant's intent to represent himself and conclude that the defendant satisfies a three-factor test:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2013). In assessing the adequacy of this statutory inquiry, "the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). Our Supreme Court has

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held that the inquiry required by N.C. Gen. Stat. § 15A-1242 satisfies constitutional requirements. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476.

Here, Jastrow clearly and unequivocally expressed his desire to fire his appointed counsel and represent himself during this criminal proceeding. Before the trial began, the court addressed Jastrow's request to represent himself. The court discussed with Jastrow the benefits of keeping his appointed attorney and the potential harmful consequences of self-representation, as required by Section 15A-1242. To be sure, this colloquy between the trial court and Jastrow is not as cogent as in most cases. But that is because Jastrow repeatedly interrupted the court or refused to answer straightforward questions. Jastrow's behavior apparently stems from his belief that he is not bound by the laws of North Carolina and the United States, and that the trial court could not exercise jurisdiction over him.

For example, as the court attempted to explain to Jastrow the benefits of his appointed counsel, the following exchange took place, which is representative of Jastrow's overall behavior:

THE DEFENDANT: For the record, I do not transverse. I am juris property in personam. I am me. Therefore, no one else can represent me.

THE COURT: You are saying you don't want anybody else?

THE DEFENDANT: For the record, I do not transverse. I am me. Nobody can represent me.

THE COURT: We would be in a lot of trouble if I didn't transverse. We would not get anything done.

THE DEFENDANT: I do not transverse. I am only here on special appearance to challenge subject matter jurisdiction and personal jurisdiction. Can this court show it has subject matter jurisdiction? Once jurisdiction is challenged, it cannot be decided and must be decided underneath legal precedence. I would like to state for the record once jurisdiction is challenged, the Court cannot proceed when it appears that the Court lacks jurisdiction. The Court has no authority but to reach authority and to dismiss merits. *Melrow versus United States*. There's no discretion to lack jurisdiction under *Julius versus U.S.* What's challenged jurisdiction cannot be assumed, it must be proved to exist. This would be *Stuck versus Medical Examiners*. All of these legal precedence showing that jurisdiction subject

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matter or personal jurisdiction, once challenged cannot just be assumed, it must be decided. It must be proven. In this courtroom, this commercial court, this admiralty maritime law court is not a common law court. It is a commercial court. Underneath General Statutes it is the color of the law, regulations of color of the law on that.

Simply put, Jastrow's obstinate behavior and his insistence that the trial court had no jurisdiction over him made it difficult for the court to succinctly walk through the Section 15A-1242 factors. But we are satisfied that, when the record is reviewed as a whole, the trial court's discussion with Jastrow was sufficient to satisfy the statutory criteria.

First, the trial court informed Jastrow that his appointed counsel was willing to continue representing him and described the benefits of keeping his counsel, emphasizing that his counsel was "a very competent attorney. He represents his clients diligently to the best of his ability."

Second, the trial court fully informed Jastrow of the charges he faced and the possible range of punishment he could receive if convicted, stressing that he could receive "up to 201 months" for the Class D felonies and "up to 85 months" for the class E felony.

Finally, Jastrow's responses to the trial court indicated that he understood and appreciated the consequences of waiving his right to counsel at trial. Jastrow was unsatisfied with the arguments his appointed counsel put forward in his defense, and wished to represent himself to assert what he believed were meritorious legal defenses, but were in fact a series of frivolous arguments about the trial court's jurisdiction and the government's ability to prosecute Jastrow in a court of law.

Viewed objectively, it was certainly not in Jastrow's interests to proceed *pro se* and assert these arguments. But the Sixth Amendment does not permit a trial court to deny a request for self-representation simply because the defendant would be better off keeping his lawyer. As the U.S. Supreme Court explained in *Faretta v. California*, "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. 806, 834 (1975). Nevertheless, when a defendant knowingly, voluntarily, and intelligently chooses to reject his Sixth Amendment right to counsel and to represent himself, "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* (internal quotation marks and citation omitted).

Here, Jastrow's conduct and his responses to the court's questions demonstrated that he understood the consequences of waiving counsel

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and that he chose to do so because he believed his own legal arguments and defense at trial would be better than those provided by his appointed counsel. That decision was knowing, intelligent, and voluntary. Accordingly, we hold that the trial court conducted the necessary inquiry and properly permitted Jastrow to represent himself under N.C. Gen. Stat. § 15A-1242.

We note that Jastrow's conduct later in the case confirmed that his request to represent himself was knowing, intelligent, and voluntary. During jury selection, Jastrow questioned jurors to ensure that "me being my own counsel, being in personan [sic]" would not affect their decision. In his opening statement, Jastrow told the jury "[t]here is not many times you will see an individual stand up before the jurists competent to handle his own affairs and represent himself." Finally, during trial, Jastrow continued to assert legal arguments concerning the court's jurisdiction and his belief that he could not be subjected to prosecution by the State. These facts confirm the trial court's conclusion—based on its colloquy with Jastrow before trial—that Jastrow's decision to represent himself was knowing, intelligent, and voluntary. That decision was part of a strategy Jastrow employed to appear sympathetic to the jury and to raise legal arguments (albeit frivolous ones) that his counsel was unwilling to assert.

Although we find no error in the trial court's Section 15A-1242 colloquy, we take this opportunity to remind trial courts that our Supreme Court has approved a series of 14 questions that can be used to satisfy the requirements of Section 15A-1242. See *State v. Moore*, 362 N.C. 319, 328, 661 S.E.2d 722, 727 (2008). "While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of 'thorough inquiry' envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242." *Id.*

The trial court in this case did not ask many of the questions the Supreme Court approved in *Moore*. Given Jastrow's refusal to answer even the most straightforward questions from the court, and his tendency to launch into lengthy, nonsensical tirades about jurisdiction and sovereignty, it is unlikely that asking the *Moore* questions in this case would have added to the trial court's inquiry.¹ But in most cases, the best

1. Indeed, in the middle of trial, Jastrow was arraigned on other, unrelated charges and again insisted on representing himself. In that colloquy, the trial court asked the *Moore* questions and Jastrow, predictably, refused to answer most of them, stating that "I do not acknowledge anything that the Court is trying to tell me and I do not transverse."

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practice is for trial courts to use the 14 questions approved in *Moore*, which are set out in the Superior Court Judges' Benchbook provided by the University of North Carolina at Chapel Hill School of Government. This will ensure that the court addresses each of the statutory criteria and also will assist with appellate review.

Conclusion

For the foregoing reasons, we hold that there was sufficient evidence to support Jastrow's conviction on two counts of attempted robbery with a dangerous weapon. We also hold that the trial court conducted the required inquiry under N.C. Gen. Stat. § 15A-1242 and properly permitted Jastrow to represent himself. Accordingly, we find no error.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA

v.

BILLY FRANK LARKIN

No. COA14-321

Filed 18 November 2014

1. Search and Seizure—motion to suppress—vehicle search—inevitable discovery

The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to suppress evidence that resulted from a search of his vehicle. The State proved inevitable discovery based on the information contained in the search warrant and the detective's testimony that he would have searched for defendant's vehicle, no matter the location.

2. Burglary and Unlawful Breaking or Entering—jury instruction—recent possession

Although defendant contended that the trial court erred in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by instructing the jury on the doctrine of recent

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possession with respect to the Breese offenses, the trial court actually submitted the instruction in connection with the Johnson offenses. Defendant did not challenge the application of the doctrine to the Johnson offenses.

3. Burglary and Unlawful Breaking or Entering—motion to dismiss—sufficiency of evidence—shoeprint evidence

The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to dismiss the charges for the Breese offenses. The State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, was sufficient to support defendant's convictions.

4. Criminal Law—joinder—motion to sever cases

The trial court did not abuse its discretion in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to sever the cases into three trials. Because defendant did not challenge the fairness and impartiality of the jury, joinder of the cases did not prevent defendant from receiving a fair trial.

Appeal by defendant from judgments entered on or about 19 September 2013 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General John F. Oates, Jr., for the State.

Brock & Meece, P.A. by C. Scott Holmes, for defendant-appellant.

STROUD, Judge.

Billy Frank Larkin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of two counts of first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering, offenses arising from three separate incidents. Defendant argues that the trial court erred by (1) denying his motion to suppress evidence that resulted from a search of his vehicle; (2) instructing the jury on the doctrine of recent possession with respect to one of the incidents; and (3) denying

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his motion to sever the cases into three trials. Defendant also contends that insufficient evidence supports his convictions arising from one of the incidents. We find no error.

I. Background**A. Johnson Incident**

Around 5:00 pm on 5 November 2010, Robbie Johnson left his photography equipment on a couch in his Carolina Beach condominium. This photography equipment included a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera. The following morning, on 6 November 2010, Johnson discovered that his photography equipment was missing from his condominium. That day, defendant sold a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera to a camera store in Raleigh.

On 8 November 2013, Johnson visited the Raleigh camera store after discovering that it had recently acquired photography equipment matching the description of his missing property. Johnson brought registration cards that contained the missing items' serial numbers. Johnson and the store manager discovered that the serial numbers of the photography equipment sold by defendant matched Johnson's serial numbers. The camera store returned all four items to Johnson.

B. Breese Incident

On 7 November 2010, Nancy Breese left her Bose CD changer and radio on a chest in her Kure Beach house. Breese earlier had recorded the serial numbers associated with the Bose CD changer and radio. Breese went to bed that night around 9:00 p.m. During the middle of the night, Breese heard noises and yelled, thinking it was her cat. When Breese rose from bed the next morning, she immediately noticed that her Bose CD changer and radio were missing.

On 7 April 2011, in an investigation unrelated to the Breese incident, police officers conducted a search of defendant's hotel room in Fayetteville and discovered a Bose CD changer and radio. The serial numbers of the Bose CD changer and radio matched the serial numbers recorded by Breese.

C. Madsen Incident

Around 11:00 p.m. on 7 November 2010, Don Madsen went to bed in his Carolina Beach condominium. Around 3:00 a.m., Madsen woke up and saw the shadow of a person. Madsen yelled, jumped out of bed, and chased the intruder. The intruder ran away from Madsen and onto

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Madsen's balcony, and Madsen pursued the intruder until he jumped off of Madsen's balcony and ran out of sight. Madsen did not get a good look at the intruder.

Madsen noticed that an envelope containing a set of keys was missing from his condominium. Madsen also noticed a pair of tennis shoes on his patio that were not his. One of the shoes had a car key tied in its laces. At 12:15 p.m. on 8 November 2010, Detective Humphries of the Carolina Beach Police Department ("CBPD") discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the soles of the shoes found on Madsen's patio.

D. Search of Defendant's Corvette

In April 2011, the Wrightsville Beach Police Department ("WBPD") seized defendant's Corvette in Fayetteville and transported it to an impound lot in Wilmington. This seizure was unrelated to any of the incidents described above. Officer James Carl Mobley told Detective Humphries that, while working for the WBPD, he had encountered defendant and remembered that defendant had worn a pair of tennis shoes with a Corvette key interlaced in his right shoe. On or about 20 April 2011, Detective Humphries obtained a search warrant for defendant's Corvette based upon information that he had received from the WBPD, and he tried the car key that had been interlaced in one of the shoes left on Madsen's patio in the seized Corvette. The key fit the Corvette, thus linking defendant to the key found in the shoes.

E. Course of Proceedings

On or about 27 June 2011, a grand jury indicted defendant for felonious breaking or entering and felonious larceny after breaking or entering in connection with the Johnson incident, first-degree burglary and felonious larceny pursuant to burglary in connection with the Breese incident, and first-degree burglary in connection with the Madsen incident. On or about 13 September 2013, defendant moved to suppress evidence resulting from the CBPD's search of his Corvette. On or about 14 September 2013, defendant moved to sever the charges into three trials. On 4 October 2013, *nunc pro tunc* for 16 September 2013, the trial court denied (1) defendant's motion to suppress after concluding that the State had proved that the CBPD would have inevitably discovered defendant's Corvette; and (2) defendant's motion to sever after finding that all three incidents occurred within a three-day span, within 2.5 miles of each other, and involved breaking into a personal beachfront residence to commit a larceny.

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Defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. At the close of all the evidence, defendant moved to dismiss all charges. The trial court denied the motion. On or about 19 September 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to two consecutive terms of 85 to 111 months' imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Evidence

A. Standard of Review

[1] Defendant first contends that the trial court committed plain error in admitting evidence obtained from the CBPD's search of defendant's Corvette. Although defendant moved to suppress this evidence before trial, defendant failed to object to its admission at trial and thus failed to preserve error. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). But we may review for plain error the denial of a defendant's pretrial suppression motion, if the defendant specifically and distinctly argues on appeal that the trial court committed plain error. *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 896 (2012) (citing N.C.R. App. P. 10(a)(4)); *Stokes*, 357 N.C. at 227, 581 S.E.2d at 56.

For an appellate court to find plain error, it must first be convinced that, "absent the error, the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988) (citation omitted). "The defendant has the burden of showing that the error constituted plain error." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

State v. Wade, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012).

Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next "that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L.Ed. 2d 382 (2003). So, if the defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.

Here, apart from Detective Humphries' lay opinion that a shoeprint outside Breese's house matched the shoes left on Madsen's patio, the only evidence that links defendant to the Madsen incident is the evidence that the key found in the shoe operated defendant's Corvette.

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It is probable that had this evidence been suppressed, the jury would have reached a different result; thus, we must consider whether the trial court's denial of defendant's suppression motion and admission of this evidence was in error. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459.

"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). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878.

The trial court made the following findings of fact:

1. On November 8, 2010, Detective Harry Humphries was employed by the Carolina Beach Police Department as Senior Detective.
2. On November 8, 2010 Detective Humphries was assigned a burglary case that occurred in Carolina Beach.
3. During the course of that investigation a pair of tennis shoes and a key, interlaced in the shoes, were seized from the scene of the burglary. At the time of the crime, there were no known suspects.
4. Detective Humphries determined through conversations with Jeff Gordon Chevrolet that the key was for a Chevrolet Corvette.
5. Officer Mobley was hired by the Carolina Beach Department in late 2010 while at the same time working as a sworn reserve officer with the Wrightsville Beach Police. He was not assigned to work the November 8, 2010 burglary.
6. In April 2011, Officer Mobley was assigned to the CID unit of the Carolina Beach Police Department for two weeks as part of a new hire training program.
7. During that two week time, Detective Humphries had a conversation with Officer Mobley in which Officer Mobley told Detective Humphries that he was involved in the arrest of Billy Larkin.
8. Officer Mobley told Detective Humphries that at the time of Billy Larkin's arrest, Mr. Larkin was wearing a pair of tennis shoes with a Corvette key interlaced in the right shoe.

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9. Officer Mobley told Detective Humphries that he escorted Billy Larkin to the location where his Corvette was located and Billy Larkin took the key out of the laces and opened the Corvette with said key.

10. The State of North Carolina stipulated that in April 2011, Wrightsville Beach Police Department was conducting a parallel investigation of Bill[y] Larkin for burglaries and seized Billy Larkin's 2000 Chevrolet Corvette in violation of the 4th Amendment of the U.S. Constitution from his residence in Fayetteville, North Carolina.

11. As a result of the seizure, Wrightsville Beach Police Department brought the vehicle from Fayetteville, North Carolina to Wilmington, NC and stored it at a local impound lot.

12. Carolina Beach Police Department did not assist or have any connection to the seizure of the vehicle and did not have knowledge of the seizure, at the time it was seized.

13. On April 20, 2011, based upon information received from Officer Mobley as to the observations of Billy Larkin, the type of Corvette he drove, the similar types of cases being investigated by Wrightsville Beach Police Department, and the location of the vehicle at the impound lot, Detective Humphries applied for and received a search warrant for Billy Larkin's 2000 Chevrolet Corvette, Georgia registration ACM 4256.

14. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.

15. Detective Humphries testified he would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC he would have gone to look for it no matter the location.

16. During the course of the search, it was determined that the key Carolina Beach Police seized from the November 8, 2010 burglary matched the 2000 Chevrolet Corvette, Georgia Registration ACM 4256 owned by Billy Larkin.

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Based on these findings of fact, the trial court made several conclusions of law including the following:

4. The inevitable discovery exception can be applied in this case.
5. Detective Humphries conducted an independent investigation and procured a search warrant, the validity of which was never questioned in this case, based upon untainted evidence received from Officer Mobley.
6. Officer Mobley came in contact with Billy Larkin in Wrightsville Beach prior to the seizure of the vehicle. He made his observations about Billy Larkin's shoes, interlaced key, the 2000 Chevrolet Corvette, and the fact that the key in possession of Billy Larkin fit the 2000 Chevrolet Corvette prior to the seizure of that vehicle.
7. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.
8. Detective Humphries did rely on information from Officer Mobley as to the location of the vehicle.
9. Detective Humphries would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC, he would have gone to look for it no matter the location.
10. Based on the preponderance of evidence, the information gained from Detective Humphries' search of the 2000 Chevrolet Corvette owned by Bill[y] Larkin ultimately or inevitably would have been discovered by lawful means, and as therefore should be admissible.

Defendant did not challenge the validity of Detective Humphries' search warrant at the trial court. Although defendant contends on appeal that he challenged the validity of the search warrant at the trial court, after examining the record, we determine that, although he challenged the constitutionality of Detective Humphries' search, he did not challenge the validity of Detective Humphries' search warrant. In other words, he did not challenge the issuance of the warrant itself or the information upon which it was based; he challenged the search only because

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the Corvette had been illegally seized by the WBPB before Detective Humphries executed the search warrant. We thus narrow our inquiry to whether the State proved inevitable discovery based on the information contained in Detective Humphries' search warrant and Detective Humphries' testimony that he would have searched for defendant's Corvette, no matter the location. *See State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) ("The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal.").

B. Inevitable Discovery Exception

Under the "exclusionary rule," evidence obtained from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation. *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Likewise, under the "fruit of the poisonous tree doctrine," evidence that is the "fruit" of the unlawful conduct is also inadmissible. *Id.*, 637 S.E.2d at 872 (citing *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)).

But under the "inevitable discovery" exception, if the State can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful, independent means, then the information is admissible. *See State v. Garner*, 331 N.C. 491, 502, 417 S.E.2d 502, 508 (1992) (citing *Nix v. Williams*, 467 U.S. 431, 444, 81 L.Ed. 2d 377, 387-88 (1984)). The State need not prove an ongoing independent investigation; we use a flexible case-by-case approach in determining inevitability. *Id.* at 503, 417 S.E.2d at 508. If the State carries its burden, thus leaving the State in no better and no worse position than if it had not obtained the evidence unlawfully, we do not consider any question of good faith, bad faith, mistake, or inadvertence. *Id.* at 508, 417 S.E.2d at 511.

It is crucial in this case to distinguish between the information that the CBPD had about defendant's Corvette prior to the execution of the search warrant and the information derived from the search itself. The only important information derived from the actual search—trying the key found on the Madsen patio in the ignition of the Corvette—was that the key operated that Corvette. The CBPD had all of the other information about the Corvette, including the fact that it belonged to defendant, prior to the execution of the search.

Defendant argues that the information regarding "[t]he identity, ownership and location of the vehicle came from the [WBPB] directly as a result of the unconstitutional seizure." Although it may have been

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possible for this information to have been derived from the illegal seizure, the evidence supports the trial court's findings of fact that this information was not derived from the illegal seizure of the vehicle. To the extent that there was any conflict in the evidence, the trial court resolved this conflict in favor of the State. Detective Humphries testified that he directly called the WBPB to get the registration information and VIN number. The parties stipulated that the WBPB's seizure of defendant's Corvette in Fayetteville, which arose from a separate investigation, violated the Fourth Amendment. The trial court found that the CBPD did not participate in the unlawful seizure. The trial court also found that Detective Humphries of the CBPD did not rely on any evidence stemming from the WBPB's unlawful seizure in procuring his search warrant. The trial court further found that, had the WBPB not seized the Corvette, Detective Humphries would have applied for a search warrant and would have searched for the Corvette, no matter its location.

As noted above, defendant did not challenge the issuance of the search warrant itself¹; defendant challenged only the information derived from the search, which was the fact that the key found on Madsen's patio matched defendant's Corvette. The basis for defendant's motion was that defendant's Corvette was located, at the time that the search warrant was issued, in the impound lot, instead of wherever it might have been if it had not been illegally seized. But, based upon the application for the search warrant and the search warrant itself, the CBPD was seeking a "2000 CORVETTE BLACK IN COLOR GA. REG ACM 4256 BELONGING TO MR BILLY LARKIN." Based upon the record before us, the information provided by Officer Mobley about his investigation of defendant for other offenses, including the fact that defendant kept his Corvette key in his shoe strings and the identifying information about defendant and his Corvette, was not obtained from the illegal seizure of the Corvette.

These findings support the trial court's conclusion that the State proved inevitable discovery. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at

1. The Application for Search Warrant in the record appears to be incomplete, as the portion of the application as to the "facts to establish probable cause for the issuance of a search warrant" is cut off mid-sentence. The Application form, AOC-CR-119, Rev. 9/02, notes that "If more space is needed for any section, continue the statement on an attached sheet of paper with a notation saying 'see attachment.'" There is no notation of attachment or attachment in our record. But as defendant has not challenged the issuance of the search warrant itself, the incomplete application does not impair our review. The portion we have clearly identifies the defendant's Corvette.

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878. The State had the information identifying both defendant and his particular Corvette and was engaged in seeking that Corvette. Detective Humphries found the Corvette more quickly, since he learned that it was being held in the impound lot in Wilmington and he could execute the warrant there, but he would have done the same thing whether he found the car at defendant's home or if it was located elsewhere by law enforcement on the lookout for this particular vehicle.

Courts have previously considered a discovery of evidence as "inevitable" where the police have sufficient identifying information about the specific item sought and where it appears that in the normal course of an investigation, the item would have been discovered even without the information that was obtained illegally. In *Garner*, pursuant to an unlawful search, police officers discovered the identity of the gun merchant who sold a certain gun. 331 N.C. at 497-98, 417 S.E.2d at 505. In response to the defendant's motion to suppress, the State proffered evidence that this gun merchant filed its sales with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") and that police normally check ATF records after recovering a gun. *Id.* at 503-04, 417 S.E.2d at 509. Because the police had the gun's serial number and would have checked the ATF records had they not previously discovered the gun merchant's identity, the North Carolina Supreme Court held that the State had proved inevitable discovery. *Id.* at 504, 417 S.E.2d at 509.

In *State v. Juniper*, the Ohio Fifth Court of Appeals held that the State had proved that the police inevitably would have discovered the defendant's vehicle where police knew the make, model, identification number, and approximate year of the vehicle and the vehicle was located at the defendant's friend's home, about five to ten minutes from the defendant's home. 719 N.E.2d 1022, 1028-29 (Ohio Ct. App. 1998), *appeal dismissed*, 705 N.E.2d 1242 (Ohio 1999). Similarly, in *U.S. v. Halls*, the Eighth Circuit held that the State had proved inevitable discovery where police had a complete description of the defendant's vehicle and knew the defendant's exact travel route. 40 F.3d 275, 277 (8th Cir. 1994), *cert. denied*, 514 U.S. 1076, 131 L.Ed. 2d 579 (1995).

Like the police in *Juniper* and *Halls*, the CBPD knew the make, model, registration number, and year of defendant's Corvette. Defendant did not counter with any evidence to suggest that the CBPD would not have easily discovered the Corvette at the time of the warrant's execution; on the contrary, earlier that month, the WBPD had seized defendant's Corvette at defendant's residence in Fayetteville. Suppressing the evidence would impermissibly place the State "in a *worse* position

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simply because of some earlier police error or misconduct.” *See Nix*, 467 U.S. at 443, 81 L.Ed. 2d at 387. The State thus proved by a preponderance of the evidence that Detective Humphries, armed with the knowledge of the vehicle’s make, model, registration number, and year, inevitably would have discovered defendant’s Corvette.

Defendant’s reliance on *State v. Wells* is misplaced. ___ N.C. App. ___, ___, 737 S.E.2d 179, 181 (2013). There, this Court held that the State failed to prove inevitable discovery because it failed to proffer any supporting evidence. *Id.* at ___, 737 S.E.2d at 182. In contrast, here, the State proffered Detective Humphries’ search warrant that contained a complete description of defendant’s Corvette and Detective Humphries’ testimony that he would have searched for the Corvette, no matter the location. We therefore find that *Wells* is distinguishable. Accordingly, we hold that the trial court did not err in denying defendant’s motion to suppress or in its admission of the evidence at trial and thus also did not commit plain error.

III. Jury Charge

[2] Defendant contends that the trial court erred in submitting a jury instruction on the doctrine of recent possession in connection with the Breese offenses. But the trial court did not submit this instruction in connection with the Breese offenses; rather, it submitted it in connection with the Johnson offenses. Defendant does not challenge the trial court’s application of the doctrine of recent possession to the Johnson offenses. We therefore hold that the trial court did not commit error in the jury charge.

IV. Motion to Dismiss

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 to dismiss, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must

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consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed. 2d 818 (1995).

B. Analysis

[3] In his argument that the jury charge contained error, defendant also contends that insufficient evidence supports his convictions arising from the Breese incident. Defendant moved to dismiss all charges at the close of all the evidence and thus has preserved error to challenge the sufficiency of the evidence. *See* N.C.R. App. P. 10(a)(3).

In connection with the Breese incident, defendant was convicted of first-degree burglary and felonious larceny pursuant to burglary. Relying on *State v. Hamlet*, defendant contends that his possession of Breese’s Bose CD changer and radio five months after they were stolen from Breese’s house was insufficient to convict him of the Breese offenses. *See* 316 N.C. 41, 46, 340 S.E.2d 418, 421 (1986).

In *Hamlet*, the defendant possessed a stolen television, property that is “normally and frequently traded in lawful channels[,]” approximately thirty days after the television was discovered to have been stolen pursuant to a breaking or entering. *Id.* at 45, 340 S.E.2d at 421. The North Carolina Supreme Court held that this evidence alone was insufficient to support defendant’s convictions of breaking or entering and larceny. *Id.* at 46, 340 S.E.2d at 421. *Hamlet*, however, is distinguishable. Unlike in *Hamlet*, here, the State proffered evidence in addition to evidence of defendant’s possession of the stolen goods. Detective Humphries testified that at 12:15 p.m. on 8 November 2010, he discovered a shoeprint in some sand outside Breese’s house that, in his lay opinion, matched the soles of the shoes found on Madsen’s patio. Accordingly, we examine the sufficiency of the State’s shoeprint evidence.

In reviewing the sufficiency of shoeprint evidence, we apply the *Palmer* “triple inference” test:

[E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

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State v. Ledford, 315 N.C. 599, 611, 340 S.E.2d 309, 317 (1986) (quoting *State v. Palmer*, 230 N.C. 205, 213, 52 S.E.2d 908, 913 (1949)). A lay witness may testify as to the identity of a shoeprint and its correspondence with shoes worn by a defendant. *Id.*, 340 S.E.2d at 317. Here, Detective Humphries found the shoeprint in some sand outside of Breese's house, only several hours after the Breese offenses were committed and only several hours after defendant left the corresponding shoes on Madsen's patio a few miles away. Accordingly, we hold that the shoeprint evidence satisfies the *Palmer* "triple inference" test. *See id.*, 340 S.E.2d at 317; *Palmer*, 230 N.C. at 213, 52 S.E.2d at 913. We thus hold that the State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, is sufficient to support defendant's convictions for the Breese offenses.

V. Motion to Sever

A. Standard of Review

We review a trial court's denial of a motion to sever for an abuse of discretion. *State v. McDonald*, 163 N.C. App. 458, 463, 593 S.E.2d 793, 796, *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). But, if the joined charges possess no transactional connection, then the trial court's decision to join is improper as a matter of law. *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999). A defendant waives his right to sever if he fails to renew his pretrial motion to sever "before or at the close of all the evidence." N.C. Gen. Stat. § 15A-927(a)(2) (2013); *see also State v. Agubata*, 92 N.C. App. 651, 661, 375 S.E.2d 702, 708 (1989) (holding that defendant who moved to sever at the first day of trial but failed to renew his motion at the close of all the evidence waived his right to sever). If a defendant waives his right to sever, our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *State v. Silva*, 304 N.C. 122, 127-28, 282 S.E.2d 449, 452-53 (1981).

Here, defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. But defendant did not renew his motion at the close of all the evidence. Consequently, defendant waived his right to sever, and our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *See Agubata*, 92 N.C. App. at 661, 375 S.E.2d at 708; *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *Silva*, 304 N.C. at 127-28, 282 S.E.2d at 452-53.

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B. Analysis

[4] Defendant challenges the trial court's denial of his motion to sever. "Two or more offenses may be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2013). Under this rule, we determine (1) whether the offenses have a transactional connection; and (2) whether the defendant can receive a fair hearing on more than one charge at the same trial. *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (citing *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000)).

In determining whether offenses have a transactional connection, we consider (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case. *State v. Peterson*, 205 N.C. App. 668, 672, 695 S.E.2d 835, 839 (2010); *Perry*, 142 N.C. App. at 181, 541 S.E.2d at 749. Two factors frequently examined are a common *modus operandi* and the time lapse between offenses. *State v. Williams*, 355 N.C. 501, 530-31, 565 S.E.2d 609, 627 (2002), *cert. denied*, 537 U.S. 1125, 154 L.Ed. 2d 808 (2003). If joinder hinders or deprives the defendant of his ability to present his defenses, the trial court should not join the charges. *Williams*, 355 N.C. at 529, 565 S.E.2d at 626; *Silva*, 304 N.C. at 126, 282 S.E.2d at 452. "[T]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *Peterson*, 205 N.C. App. at 672, 695 S.E.2d at 839.

Defendant was charged with breaking into three personal beach-front residences to commit a larceny therein within 2.5 miles of each other and within a three-day span. The offenses thus have a transactional connection. *See Perry*, 142 N.C. App. at 181, 541 S.E.2d at 749; *Williams*, 355 N.C. at 530-31, 565 S.E.2d at 627.

Defendant contends that the joinder of the cases prejudiced him and mentions that, during jury selection, two venirepersons indicated that it would be difficult for them to be fair and impartial given the number of charges. But defendant did not include a transcript of the jury selection in our record and did not assert that these venirepersons actually served on the jury. Because defendant does not challenge the fairness and impartiality of the jury, we conclude that joinder of the cases did not prevent defendant from receiving a fair trial. Accordingly, we hold that

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the trial court did not abuse its discretion in denying defendant's motion to sever. *See Perry*, 142 N.C. App. at 180-81, 541 S.E.2d at 748.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
PHABIEN DARRELL McCLAUDE

No. COA14-584

Filed 18 November 2014

1. Conspiracy—motion to dismiss—sufficiency of evidence—no agreement

The trial court erred by denying defendant's motion to dismiss the conspiracy charge. The State did not present sufficient evidence of an agreement.

2. Drugs—possession of cocaine with the intent to sell and/or deliver—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the possession of cocaine with the intent to sell and/or deliver charge. Defendant's own statements coupled with his conduct indicated that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support.

3. Witnesses—denial of motion for additional time to locate witness—denial of motion to reopen evidence for witness testimony

The trial court did not err by denying defendant's request for additional time to locate a witness and his motion to reopen the evidence so that the witness could testify. The trial court acted within its authority to expedite the trial proceedings in light of credible information that the witness had not been subpoenaed and

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the witness's attorney had indicated that he would not be testifying. Further, defendant failed to advance any argument that he was prejudiced as a result of the trial court's denials.

Appeal by defendant from judgments entered 15 January 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

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

McCOTTER ASHTON, P.A., by Rudolph A. Ashton, III, for defendant.

ELMORE, Judge.

On 14 January 2014, a jury unanimously found defendant guilty of misdemeanor possession of marijuana, possession of cocaine with the intent to sell and/or deliver (PWISD cocaine), and conspiracy to sell and/or deliver cocaine (conspiracy). The trial court sentenced defendant to consecutive active prison terms of 15-27 months based on the PWISD cocaine conviction and 15-27 months based on the conspiracy conviction. For the possession of marijuana conviction, defendant received a suspended sentence of 20 days imprisonment and was placed on supervised probation for 8 months to be served upon his release from prison. Defendant appeals. After careful consideration, we vacate the conspiracy conviction and remand for resentencing.

I. Facts

On 11 June 2013, Johnston County Deputy Sheriff Billy Britt was on patrol duty at the intersection of N.C. 96 North and N.C. 42 West when he noticed a vehicle cross the center line of the road on two separate occasions. As a result of the traffic violation, Deputy Britt conducted a traffic stop of the vehicle. Deputy Britt approached the vehicle, and he smelled a strong odor of marijuana emanating from the vehicle. He asked the occupants whether any marijuana was inside the vehicle, and Phabien Darrell McClaude (defendant), who was located in the front passenger seat, indicated that he and the driver, Jonathan Hall, had previously smoked marijuana in the car. Upon Deputy Britt's request, defendant and Hall exited the vehicle, and Deputy Britt conducted a protective search of defendant's person. Deputy Britt found a small bag of marijuana in defendant's trouser pocket and subsequently handcuffed

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defendant. Both Hall and defendant became visibly nervous, but they indicated that nothing else was inside the vehicle.

Thereafter, Deputy Britt conducted a search of the vehicle. As he began to search the center of the vehicle, Hall appeared increasingly discomposed as he “wring[ed] and twist[ed] . . . all around,” and shuffled and tapped his feet. Deputy Britt then pulled out the ashtray and could see the floor panel beneath the center console. Deputy Britt found a black box underneath the console, and after opening the box, he found 7.2 grams of a substance that was later determined to be powder cocaine. At this point, Hall started to walk away from the scene, forcing another deputy to place him in handcuffs.

Deputy Britt re-approached defendant, who then began to make voluntary statements. Defendant proceeded to inform Deputy Britt that he had outstanding child support warrants, concealed marijuana in his underwear, and was “just trying to make a [sic] enough money to pay for . . . child support[.]” Deputy Britt then placed defendant under arrest and transported him to the Johnston County Jail. In relevant part, the State charged defendant with PWISD marijuana, PWISD cocaine, and conspiracy.

At trial, defendant made motions to dismiss these charges for insufficient evidence, each of which was denied by the trial court. Defendant also attempted to present evidence by calling Hall as a witness but was unable to locate him. Defendant requested that he be given additional time to locate Hall, but the trial court denied the request. During jury deliberations, defendant found Hall and made a motion to the trial court to reopen the evidence so that Hall could testify, but the trial court denied defendant’s motion. The jury returned with verdicts of guilty of misdemeanor possession of marijuana, PWISD cocaine, and conspiracy.

II. Analysis**a. Motion to Dismiss the Conspiracy Charge**

[1] Defendant argues that the trial court erred by denying defendant’s motion to dismiss the conspiracy charge for insufficient evidence. Defendant contends the State presented insufficient evidence to establish that he and Hall made an agreement to sell and deliver cocaine. We agree.

“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

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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).

To withstand a motion to dismiss the charge of conspiracy to sell and/or deliver cocaine, the State must provide substantial evidence that: 1.) The defendant and at least one other person entered into an agreement; 2.) The agreement was to commit the crime of the sale and/or delivery of cocaine; and 3.) The defendant and the other person(s) intended that the agreement be carried out at the time it was made. N.C.P.I.-Crim. 202.80. However, "the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations and quotation marks omitted).

The State directs us to *State v. Worthington*, in support of the proposition that defendant and Hall had "a mutual implied understanding" sufficient to establish a conspiracy. In *Worthington*, this Court indicated that the State can prove a conspiracy by showing "a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (citation and internal quotation marks omitted). Based on this principle, we held that the State presented sufficient evidence of a conspiracy to withstand a motion to dismiss despite the absence of any evidence of "an express agreement between the defendants[.]" *Id.* at 162, 352 S.E.2d at 703. However, the facts in *Worthington* are markedly dissimilar to those at issue here.

In *Worthington*, an undercover S.B.I. Agent purchased cocaine from the co-conspirator, law enforcement officers discovered the money used to buy the cocaine in the possession of both the defendant and

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the co-conspirator, the co-conspirator's name and phone number were written in a notebook found in the defendant's residence, the notebook listed "payments and balances for dated transactions[,]" and the co-conspirator "repeatedly referred to 'his man,' the manner in which 'his man' liked to arrange a drug deal, and 'his man's' ability to transact a half-pound cocaine deal." *Id.* at 152-163, 352 S.E.2d at 697-703. The evidence in *Worthington* that unerringly indicated an implied understanding between the co-conspirator and the defendant is simply lacking in this case.

Instead, we find *State v. Euceda-Valle* controlling. 182 N.C. App. 268, 276, 641 S.E.2d 858, 864 (2007). In *Euceda-Valle* this Court held that the State failed to present substantial evidence of the existence of a conspiracy because "mere suspicion" or a "mere relationship between the parties or association" is insufficient. *Id.* at 276, 641 S.E.2d at 864-65 (citation and internal quotation marks omitted). In that case, an officer conducted a traffic stop. *Id.* at 270-71, 641 S.E.2d at 860-61. The defendant and alleged co-conspirator were seated inside the vehicle, both individuals were nervous, an odor of air-freshener emanated from the vehicle, and after a canine sniff and search of the vehicle, officers located 4.98 kilograms of cocaine hydrochloride in the trunk. *Id.* Importantly, we observed that the State provided no evidence of "conversations between the two men; unusual movements or actions by defendant and/or [alleged co-conspirator]; large amounts of cash on alleged [co-conspirator]; the possession of weapons; or anything else suggesting an agreement." *Id.* at 276, 641 S.E.2d at 864.

Similarly, defendant and Hall never conversed, no cash was found in the vehicle or linked to Hall despite the presence of cocaine, and neither person possessed a weapon. Although Hall was visibly nervous throughout the encounter and made some unusual movements indicating that he might have known that cocaine was in the vehicle, such evidence does not amount to substantial evidence of an agreement to commit the crime of the sale and/or delivery of cocaine. Hall stated only that "[w]e smoked weed and that's it." Moreover, while defendant admitted his own intent to sell cocaine by stating, "I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and I was able to cut it good[,]" nothing expressly or impliedly connected Hall to defendant's admission of his intent to sell the cocaine. In fact, defendant said Hall was merely driving the vehicle because he did not have a license.

Thus, the State did not present sufficient evidence of an agreement to support the conspiracy charge. *See State v. Benardello*, 164 N.C. App.

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708, 711, 596 S.E.2d 358, 360 (2004) (holding that the evidence was insufficient to establish the existence of conspiracies to commit murder or to shoot into occupied properties because a phone conversation, the only evidence supporting a conspiracy, discussed resolving a money issue but made “no mention of shooting, killing or violence of any kind”); compare *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433-34 *aff’d*, 359 N.C. 423, 611 S.E.2d 833 (2005) (ruling that the State presented substantial evidence of the existence of a conspiracy to traffic in cocaine when the defendant was in a truck with two individuals, 79.3 grams of cocaine were located in the vehicle, one of the occupants possessed thousands of dollars in cash, and officers found a loaded firearm in the vehicle). Accordingly, the trial court erred by denying defendant’s motion to dismiss the conspiracy charge.

b. Motion to Dismiss the PWISD Cocaine Charge

[2] Next, defendant argues that the trial court erred by denying his motion to dismiss the PWISD Cocaine charge for insufficiency of the evidence. We disagree.

In order to withstand a motion to dismiss the charge of PWISD Cocaine, the State must present substantial evidence that defendant possessed a controlled substance with the “intent to sell or distribute the controlled substance.” *State v. Richardson*, 202 N.C. App. 570, 572, 689 S.E.2d 188, 191 (2010) (citation and internal quotation marks omitted). Possession of a controlled substance can be actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005). “A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing.” *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). Additionally, the State must demonstrate “other incriminating circumstances before constructive possession may be inferred.” *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174 (citation and internal quotation marks omitted).

Here, defendant contests the sufficiency of the State’s evidence as it relates to the elements of “possession” and the “intent to sell or distribute.” However, the evidence shows that Deputy Britt observed defendant in the passenger seat reaching towards the center of the car before the traffic stop, and he located the cocaine in the center console of the vehicle, between the driver and passenger’s seat. Moreover, defendant admitted to actually possessing and intending to sell the cocaine, since he stated, “[m]an, I don’t sling dope anymore, I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and

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I was able to cut it good.” Based on Deputy Britt’s training and experience, he interpreted this slang to mean “buying an amount of -- in this case cocaine and adding other ingredients to it in some way, shape or form to make it a larger amount.” Defendant also revealed to Deputy Britt that he bought one gram of cocaine “and was able to make it into twelve.”

Thus, defendant’s own statements coupled with his conduct indicate that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support. Accordingly, the trial court did not err by denying defendant’s motion to dismiss the PWISD cocaine charge.

c. Request for Additional Time to Locate a Witness and Motion to Reopen Evidence

[3] Defendant also argues that the trial court erred by denying both his request for additional time to locate Hall and his motion to reopen the evidence so that Hall could testify. We disagree.

The standard of review regarding whether a trial court should grant a recess due to a missing witness is reviewed for an abuse of discretion. *State v. Elliott*, 25 N.C. App. 381, 383, 213 S.E.2d 365, 367-68 (1975). Similarly, “[b]ecause there is no constitutional right to have one’s case reopened, the decision to reopen a case is strictly within the trial court’s discretion.” *State v. Hoover*, 174 N.C. App. 596, 599, 621 S.E.2d 303, 305 (2005). This broad discretion stems from the trial court’s “inherent authority to supervise and control trial proceedings.” *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986).

The relevant facts show that after defendant’s motions to dismiss were denied, the trial court took a 15 minute break at 10:34 a.m. and excused the jury. During this time, defendant’s attorney notified the trial court that he was attempting to make contact with a potential witness, Hall. Hall was not under subpoena but had been present in the courtroom earlier in the day. The prosecutor told the trial court that he had spoken with Hall’s attorney who stated that his client was not going to testify. The trial court nevertheless allowed defendant’s attorney a “few minutes” to locate Hall. Defendant’s attorney was unsuccessful and informed the trial court that he had been unable to locate Hall. The jury returned at 11:03 a.m. and defendant stated that he would not present any evidence. The trial court, defendant, and the State then conducted the charge conference outside the presence of the jury. After the charge conference, defendant’s attorney requested additional time to locate Hall, and the following colloquy occurred:

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DEFENDANT'S ATTORNEY: We can't get any additional time to get our witnesses here?

TRIAL COURT: I thought the witness was not going to testify.

DEFENDANT'S ATTORNEY: Plus you've already closed the evidence.

TRIAL COURT: I guess the answer to that question is no. Did you talk to his lawyer?

DEFENDANT'S ATTORNEY: I did speak to his lawyer. His lawyer is in Harnett County.

TRIAL COURT: Okay.

The jury re-entered the courtroom at 11:38 a.m. to hear closing arguments and receive jury instructions. The jury started deliberations at 12:29 p.m. At some point during deliberations, defendant's attorney learned that Hall had returned (although Hall was not in the courtroom), so he made a motion to reopen the evidence so that Hall could testify. The trial court denied the motion, stating:

Let the record reflect that the witness was earlier here in the courtroom prior to both sides resting. He left this courtroom and did not return.

Let the record further reflect that this witness, as I understand, was not under subpoena to be here but was here this morning on his own, left on his own, and that the Court has been advised that the jury has reached a verdict with regards to this matter. The motion by defense to reopen this case so that the witness can testify is hereby denied.

The trial court did not abuse its discretion by denying both defendant's request for additional time to locate Hall and his motion to reopen the evidence. The trial court acted within its authority to expedite the trial proceedings in light of credible information that Hall had not been subpoenaed (and thus not required to be present), and Hall's attorney had indicated that Hall would not be testifying. Moreover, defendant had ample opportunity to locate Hall during trial. Approximately 30 minutes elapsed from the time defendant's attorney made the trial court aware of his efforts to contact Hall until the moment at which he requested additional time to locate Hall. Over 1.5 hours later, just as the jury reached

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a verdict, defendant's attorney made a motion to reopen the evidence, although Hall was still absent from the courtroom.

Additionally, defendant carries the burden of establishing prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2013) (requiring that in non-constitutional matters, defendant show "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").

On appeal, defendant fails to advance any argument in his brief to the effect that he was prejudiced as a result of the trial court's denial of his request for additional time and motion to reopen evidence. Thus, defendant's arguments necessarily fail. *See Davis*, 317 N.C. at 318-19, 345 S.E.2d at 178 (holding that the trial court did not err by denying the defendant's motion to reopen evidence so that he could play a tape for the jury "where counsel for the defense, after more than adequate opportunity, failed timely to produce the necessary equipment to play the tape[,] and even if the trial court erred, the defendant could not establish prejudicial error).

III. Conclusion

In sum, we hold that the trial court did not err by denying defendant's: 1.) motion to dismiss the PWISD charge, 2.) request for additional time to locate a witness, and 3.) motion to reopen the evidence. However, the trial court erred by denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. Thus, we vacate the conspiracy conviction and remand for resentencing.

No error, in part, vacated and remanded, in part.

Judges BRYANT and ERVIN concur.

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[237 N.C. App. 359 (2014)]

STATE OF NORTH CAROLINA

v.

WILLIAM MCKINLEY RICKS

No. COA14-408

Filed 18 November 2014

Motor Vehicles—driving while impaired—public vehicular area—vacant lot

The trial court erred in a driving while impaired prosecution where there was insufficient evidence that a cut-through on a vacant lot was a public vehicular area. There was no evidence concerning ownership of the vacant lot, nor was there evidence that the vacant lot had been designated as a public vehicular area by the owner; the fact that people walked and bicycled across the vacant lot as a shortcut did not turn the lot into a public vehicular area. Even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C.G.S. § 20-4.01(32)(a).

Appeal by defendant from judgment entered 14 November 2013 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Amanda S. Zimmer for defendant-appellant.

McCULLOUGH, Judge.

William McKinley Ricks (“defendant”) appeals from judgment entered upon his conviction for habitual impaired driving. For the following reasons, we reverse.

I. Background

Defendant was arrested on 24 September 2012 and later indicted by a Nash County Grand Jury on 3 December 2012 on a charge of habitual impaired driving. On 13 November 2013, the case was called for jury

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trial in Nash County Superior Court, the Honorable Quentin T. Sumner, Judge presiding.

The State's evidence at trial tended to show the following: At approximately 7:30 p.m. on 24 September 2012, T. D. White, a former patrol officer with the City of Rocky Mount Police Department, responded to a call from dispatch reporting a moped accident in the area of South Church Street and Bassett Street. White described the area as a vacant lot at the intersection of South Church Street and Bassett Street surrounded by businesses on both sides. White testified it appeared there had been a building on the lot at some point, but all that remained was a driveway cutting directly across the lot from South Church Street to Bassett Street. White referred to the driveway as a cut through and testified to having seen people walk and ride bicycles across it. White recalled that the driveway appeared to have been paved at one time, but was now dirt. White explained that the foot and bicycle traffic kept the area mowed down. There were no fences or barriers preventing access to the lot or cut through. White testified the cut through was wide enough to drive a motor vehicle through, explaining that he pulled his patrol car into the cut through when dealing with defendant. White also testified that he had seen cars use the cut through to turn around. Yet, it was mostly used for foot and bicycle traffic. White never found out who owned the lot.

The fire department was already on the scene when White arrived. White recalled that the fire truck had pulled up on the sidewalk and was parked on the edge of the vacant lot and the firemen were gathered around a man on a moped in the vacant lot. As White approached, a fireman informed White that the man on the moped, later identified as defendant, had laid the moped down in the lot but appeared uninjured. The fireman added that he believed defendant might be impaired.

When White first encountered defendant, defendant was already back on the moped with the engine running. White asked defendant to turn the moped off and to step off of the vehicle. Defendant complied, but struggled and stumbled as he dismounted the moped. White then asked defendant to take his helmet off. Upon the removal of defendant's helmet, White immediately detected a strong odor of alcohol on defendant's breath. White then asked defendant to produce his I.D. Defendant again complied, but fumbled through his wallet for approximately 30 to 45 seconds to retrieve an I.D. that White could clearly see in the wallet. During their ensuing conversation, defendant informed White that he had consumed one drink earlier in the day around noon. White, however, was suspicious about the accuracy of this statement since he noticed

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defendant's speech was slurred and the odor of alcohol was still present on defendant's breath.

White informed defendant that he suspected that defendant was impaired and asked defendant to submit to field sobriety tests. Defendant complied, but did not perform the tests to the satisfaction of White. As a result of defendant's slurred speech, the odor of alcohol, and defendant's poor performance on the field sobriety tests, White formed the opinion that defendant was appreciably impaired by alcohol and arrested defendant for suspicion of DWI. As White took defendant into custody, defendant argued that he was on private property.

Defendant was transported to the police department where Officer David Bowers administered a breath analysis. Bowers testified the results of the breath test revealed defendant had a blood alcohol level of 0.17.

At the conclusion of the State's evidence, defendant moved to dismiss on the basis that the State failed to prove defendant was in a public vehicular area. In response to defendant's motion, the State argued that the vacant lot was "an area used by the public at any time for vehicular traffic[]" and pointed to evidence that the cut through on the vacant lot was used by pedestrians and bicyclists, the cut through was large enough to fit a police cruiser, and there were no signs, fences, or shrubs of any sort to keep the public out. Upon consideration of the arguments, the trial court denied defendant's motion. Defendant did not put on any evidence.

During a brief charge conference, the trial court informed the parties that he would instruct on impaired driving, inserting the following definition of public vehicular area: "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." Neither party objected.

Defendant then attempted to argue the definition of public vehicular area in accordance with N.C. Gen. Stat. § 20-4.01(32), beyond that specified by the trial court in the charge conference. The State objected to defendant's argument on two separate occasions. The trial court sustained those objections.

At the conclusion of the trial, the jury found defendant guilty of driving while impaired. Defendant then admitted to the existence of prior driving while impaired convictions and pled guilty to the charge of habitual impaired driving. Judgment was entered on 14 November 2013 and

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defendant was sentenced to a term of 19 to 32 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred in (1) denying his motion to dismiss; (2) instructing the jury concerning the definition of a public vehicular area; and (3) sustaining the State's objections to his closing argument. We address each issue.

Defendant first argues the trial court erred in denying his motion to dismiss because there was insufficient evidence that he was operating the moped in a public vehicular area.

"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).

In North Carolina, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2013).

In the present case, the only element of impaired driving in dispute is whether defendant was in a public vehicular area; the evidence is clear that defendant was driving a vehicle, had a blood alcohol concentration above 0.08, and was not operating the moped on a highway or street. Now on appeal, defendant argues, just as he did below, that there

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was insufficient evidence that the cut through on the vacant lot was a public vehicular area. Specifically, defendant points out that there was no evidence of who owned the property or that the property was dedicated for public use.

In support of his argument, defendant cites *State v. Lesley*, 29 N.C. App. 169, 223 S.E.2d 532 (1976) and *State v. Bowen*, 67 N.C. App. 512, 313 S.E.2d 196 (1984). In both cases, this Court addressed whether the trial courts erred in concluding and instructing the juries that the respective defendants were in public vehicular areas when discovered by law enforcement officers. In *Lesley*, this Court reversed the defendant's conviction in a case in which police found the defendant slumped down in the driver's seat of his car which was parked with the engine running in an unobstructed driveway from a public highway to an abandoned Pepsi-Cola Bottling Plant with "for rent" and "for sale" signs posted in the windows. *Lesley*, 29 N.C. App. at 170, 223 S.E.2d at 533. In reversing, this Court opined that there was sufficient evidence from which the jury could find the defendant guilty of operating a motor vehicle under the influence of alcohol from the public highway onto the driveway, but held the "evidence in the record . . . [was] not sufficient to support the trial court's conclusion that the driveway leading from [the public highway] to the Pepsi-Cola Bottling Plant [was] a 'public vehicular area[.]'" *Id.* at 171, 223 S.E.2d at 533. Similarly in *Bowen*, this court reversed the defendant's conviction in a case in which police "found [the] defendant, apparently asleep, at the wheel of his truck, which was sitting with the engine running in the only driveway into a condominium complex." *Bowen*, 67 N.C. App. at 513, 313 S.E.2d at 196. In reversing, this Court noted the sharply conflicting evidence before the trial court.

The evidence that [it] was a public vehicular area indicated that there was a "For Sale" sign apparently inviting in the public, and that there appeared to be no obstruction to public access; the officers were unaware that it was a condominium complex. Evidence to the contrary indicated that "No Trespassing" signs were posted, that there was no parking set aside for the public, and that the driveway had not been dedicated for public use.

Id. at 514-15, 313 S.E.2d at 197. As a result of the conflicting evidence, this Court concluded "the evidence did not suffice to support the trial court's conclusion *as a matter of law* that the driveway was a 'public vehicular area' within the meaning of the statute." *Id.* at 515, 313 S.E.2d at 197.

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In response to defendant's argument, the State contends that this case is distinguishable from *Lesley* and *Bowen*. The State further contends there is sufficient evidence in this case to show that the cut through on the vacant lot was a public vehicular area.

Upon review of the cases, we agree that *Lesley* and *Bowen* are distinguishable. In those cases, although this Court found the trial courts erred by concluding and instructing the juries that the areas in which the defendants were discovered were public vehicular areas, this Court found there was sufficient evidence to support the impaired driving convictions and granted new trials. *Lesley*, 29 N.C. App. at 171, 223 S.E.2d at 533; *Bowen*, 67 N.C. App. at 515-16, 313 S.E.2d at 197-98. In the present case, the trial court did not remove the issue of whether the cut through was a public vehicular area from the jury's consideration by concluding or instructing that the cut through was a public vehicular area as a matter of law. Instead, the trial court denied defendant's motion to dismiss and allowed the jury to decide the issue. Nevertheless, we hold the trial court erred in this case because there was insufficient evidence that the cut through was a public vehicular area.

In full, a "public vehicular area" is defined in N.C. Gen. Stat. § 20-4.01(32) (2013) as:

Any area within the State of North Carolina that meets one or more of the following requirements:

- a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
 1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

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3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).
- b. The area is a beach area used by the public for vehicular traffic.
- c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.
- d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

In contrast, a “private road or driveway” is defined as “[e]very road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.” N.C. Gen. Stat. § 20-4.01(30) (2013).

Both below and now on appeal, the State asserts that, pursuant to N.C. Gen. Stat. § 20-4.01(32)(a), the definition for public vehicular area only requires a showing that “the area is used by the public for vehicular traffic at any time.” The State then argues the following evidence is sufficient to allow the jury to decide if the vacant lot was a public vehicular area: White has observed people walking and riding bicycles across the vacant lot; the traffic has maintained a dirt path, or cut through, across the vacant lot connecting South Church Street and Bassett Street; the cut through was wide enough to fit a police cruiser; and there are no barriers or signs preventing access. Upon review, we disagree with the State’s interpretation of N.C. Gen. Stat. § 20-4.01(32)(a) and the State’s argument that the evidence was sufficient.

Although the examples included in N.C. Gen. Stat. § 20-4.01(32)(a) are listed “by way of illustration and not limitation[,]” they are a component of the relevant definition and cannot be ignored. It is evident from the examples listed that the definition of a public vehicular area set out in N.C. Gen. Stat. § 20-4.01(32)(a) contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas

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used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public. Furthermore, N.C. Gen. Stat. § 20-4.01(32)(d) provides that “private property used by vehicular traffic and designated by the private property owner as a public vehicular area” is a public vehicular area. If the State’s assertion that any area used by the public for vehicular traffic at any time is a public vehicular area is correct, the remainder of the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32), including subsection (d), is superfluous.

In the present case, there is no evidence concerning the ownership of the vacant lot; nor is there evidence that the vacant lot had been designated as a public vehicular area by the owner. Moreover, a vacant lot is dissimilar to any of the examples provided in N.C. Gen. Stat. § 20-4.01(32)(a) that are generally open to the public. The fact that people walk and bicycle across the vacant lot as a shortcut does not turn the lot into a public vehicular area. In order to show an area meets the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a), we hold there must be some evidence demonstrating the property is similar in nature to those examples provided by the General Assembly in the statute. There was no such evidence in this case. Thus, we hold the trial court erred in denying defendant’s motion to dismiss.

Although we reverse defendant’s conviction based on defendant’s first issue on appeal, we briefly emphasize that, as noted above, the entire definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. Consequently, even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C. Gen. Stat. § 20-4.01(32)(a).

III. Conclusion

For the reasons discussed above, we hold the trial court erred in denying defendant’s motion to dismiss, instructing the jury concerning the definition of a public vehicular area, and sustaining the State’s objections to defendant’s closing argument.

Reversed.

Judges ERVIN and BELL concur.

STATE v. SPENCE

[237 N.C. App. 367 (2014)]

STATE OF NORTH CAROLINA

v.

ROBERT EARL SPENCE, JR.

No. COA14-317

Filed 18 November 2014

1. Appeal and Error—preservation of issues—right to public trial—purpose of objection apparent from context

Defendant preserved for appellate review his argument that the trial court violated his Sixth Amendment right to a public trial when it closed the courtroom during the prosecuting witness's testimony. It was apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom.

2. Constitutional Law—right to public trial—Waller factors

The trial court did not violate defendant's Sixth Amendment constitutional right to a public trial when it closed the courtroom during the prosecuting witness's testimony. The trial court's findings of fact were supported by the evidence, and the findings were adequate to support a courtroom closure pursuant to the four factor test set forth in *Waller v. Georgia*, 467 U.S. 39.

3. Rape—first-degree rape—jury instructions—invited error

Defendant's argument that the trial court committed plain error by instructing the jury in a manner that permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act was dismissed. Any error stemming from the trial court's instructions was invited by defendant.

4. Sexual Offenses—first-degree sex offense charges—insufficient evidence

The trial court erred in a first-degree rape and first-degree sex offense case by denying defendant's motion to dismiss certain first-degree sex offense charges. There was insufficient evidence of each element of the challenged charges.

5. Rape—first-degree rape—prosecuting witness referred to as victim

The trial court did not commit plain error in a first-degree rape case by referring to the prosecuting witness as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to

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her as “the victim” in its final jury instructions. The use of the words “the victim” did not have a probable impact on the jury’s finding of guilt in this case.

Appeal by defendant from judgments entered 18 June 2013 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

W. Michael Spivey, for defendant.

ELMORE, Judge.

Robert Earl Spence, Jr. (defendant) appeals from judgments entered upon his convictions for four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative. Defendant was sentenced to three consecutive terms of active imprisonment each for a minimum of 230 months and a maximum of 285 months.

I. Facts

The State indicted defendant on three counts of rape, sex offense, and incest in each of six cases (eighteen counts in total) stemming from alleged sexual misconduct between defendant and his daughter (“Donna¹”). At trial, the State presented evidence that defendant continually sexually abused Donna when she was five years old until she was twelve. Donna recalled the locations where the abuse occurred but was unable to remember dates or time-frames. The State attempted to establish the time-frames by establishing the years in which defendant lived at the various locations of the alleged abuse. The approximate time-frames established that defendant separated from his wife in 2002, moved out of the family home and briefly lived with his cousin, Dartanian Hinton, followed by his oldest brother, Ellis Rodney McCoy. Defendant lived with McCoy from approximately 2003 until early 2005. Subsequently, defendant lived with his younger brother, David Edison Spence, for the duration of 2005. During the final months of 2005 or early in 2006, defendant resided with ATN Hinton for about five or six months. Thereafter, defendant married and moved into the home of his new wife, Joann Freeman. In July 2006, defendant divorced Ms. Freeman, re-married, and moved into another house with his third wife, Angel Spence.

1. Donna is a pseudonym used to protect the identity of the minor.

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During her trial testimony, Donna became nervous, visibly upset, and began to directly ask defendant questions about his conduct towards her. In response, the trial court recessed court and, over defendant's objection, ordered that the courtroom remain closed for the duration of Donna's direct and cross-examination testimony.

At the close of all the evidence, defendant made a motion to dismiss three of the first-degree sex offense charges that were alleged to have occurred in 2001, 2004, and 2005 for insufficiency of the evidence. The trial court denied defendant's motion, and the charges were submitted to the jury.

While reading the jury instructions, the trial court, without any objection by defendant, followed the pattern jury instructions by referring to Donna as "the victim." During deliberations, the jury asked the trial court whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. The trial court, without any objection by defendant, answered, "the use of the word 'any object' refers to parts of the human body as well as inanimate or foreign objects. So that is the definition of the term 'object.' And then under that definition the penis being a part of the human body, that would be within the definition of an object."

The jury returned with unanimous verdicts of guilty of four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative.

II. Analysis**a. Preservation of Constitutional Issue**

[1] Defendant first contends that the trial court erred by violating his sixth amendment constitutional right to a public trial when it closed the courtroom during Donna's testimony. The State contends that defendant failed to preserve this issue on appeal. We disagree.

N.C. Appellate Procedure Rule 10(a)(1) mandates 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." N.C.R. App. P. 10(a)(1). Accordingly, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) (citation and quotation marks omitted). This general rule applies to constitutional

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questions, as constitutional issues not raised before the trial court “will not be considered for the first time on appeal.” *Id.*

Pursuant to the sixth amendment of the United States constitution, a criminal defendant is entitled to a “public trial.” U.S. Const. amend. VI.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46, 81 L. Ed. 2d 31, 38 (1984) (citations and quotation marks omitted).

In order to preserve a constitutional issue for appellate review, a defendant must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right. *State v. Rollins (Rollins I)*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 76 (2012).

Here, the trial court ordered that bystanders in the courtroom, who included people on defendant’s witness list, remain outside the courtroom for the remainder of the alleged victim’s testimony. Defendant’s attorney objected in response to the closure of the courtroom:

DEFENDANT’S ATTORNEY: Your Honor, just if your Honor could note defendant’s objection. People that are here that are on my witness list who have been seated in the audience haven’t contributed to this disruption and haven’t been making faces or gestures which would in any way cause the upset that the witness has been displaying and I object to them being removed, but I understand the Court has enormous discretion in the matter. I just don’t like it. . . . I’m concerned that the jury may feel that somehow my part of the audience had something to do with the witness’s behavior and I don’t think that’s the case and I wouldn’t want to let that be inferred or implied in the Court’s ruling, so if the Court could fashion some statement to that effect I’d be grateful.

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Before defendant cross-examined Donna, the trial court ordered that the courtroom remain closed, and defendant objected to the closure once again.

TRIAL COURT: All right. I've considered whether there's any particular reason to allow bystanders to be in the courtroom during the cross-examination and I'm inclined to continue the order closing the courtroom during the remainder of this witness's testimony, including cross-examination, so that would be for the same reasons and findings of fact that I made previously. That would be my intention. . . . [D]o you want to be heard?

DEFENDANT'S ATTORNEY: Just an objection, but if I could go out for a minute and tell my people they don't need to stick around.

TRIAL COURT: Again, clarify that once she is off the stand they would be welcome back.

It is apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicates defendant's constitutional right to a public trial. Thus, we hold that defendant preserved this issue on appeal. *See State v. Comeaux*, __ N.C. App. __, __, 741 S.E.2d 346, 349 (2012) *review denied*, __ N.C. __, 739 S.E.2d 853 (2013) (ruling that the “[d]efendant’s objection to ‘clear[ing] the courtroom’” preserved the defendant’s argument on appeal that his constitutional right to a public trial was violated); *see also Rollins I*, __ N.C. App. at __, 729 S.E.2d at 76 (holding that the defendant preserved appellate review of an alleged violation of his constitutional right to a public trial “based on his contention [at trial] that ‘[c]ourt should be open’”).

b. Constitutional Right to a Public Trial

[2] We now address the merits of defendant's argument that the trial court violated defendant's constitutional right to a public trial. For the reasons set forth below, we hold that the trial court did not violate defendant's constitutional right.

“In reviewing a trial judge's findings of fact, we are ‘strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively

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binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). This court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007).

"[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38. In accordance with this principle, N.C. Gen. Stat. § 15-166 (2013) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

However, when deciding whether closure of the courtroom during a trial is appropriate, a trial court must: (1) determine whether the party seeking the closure has advanced "an overriding interest that is likely to be prejudiced" if the courtroom is not closed; (2) ensure that the closure is "no broader than necessary to protect that interest"; (3) "consider reasonable alternatives to closing the proceeding"; and (4) "make findings adequate to support the closure." *Waller*, 467 U.S. at 48, 81 L. Ed. 2d at 39. The findings regarding the closure must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45, 81 L. Ed. 2d at 38 (citation and quotation marks omitted). In making its findings, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Rollins (Rollins II)*, __ N.C. App. __, __, 752 S.E.2d 230, 235 (2013) (citation omitted).

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Here, the trial court originally issued oral findings of fact in support of its decision to close the courtroom:

THE COURT: Outside the presence of the jury, in my discretion I determined that it would be in the best interest of justice to exclude all bystanders from this courtroom while Ms. Spence continues with her testimony. I have no complaint about the way that the bystanders are conducting themselves. It's simply that there are approximately, I would say, thirty adults, many of whom are friends or family members, who appeared at this trial that are obviously -- have an interest in these proceedings in the gallery. I've also observed that Ms. Spence is nervous and upset as she testifies and as essentially may be expected. In any event, in my discretion and in my judgment simply allowing this courtroom to be as free from distractions as possible would be in the best interest of justice, so what I've done is simply required that all bystanders remain outside for the remainder of this witness's direct testimony. I'll revisit this after we take our lunch recess and I'll revisit it at the close of the direct testimony of this witness, but that would be my order at this time.

When the trial court re-visited its ruling after the close of the alleged victim's direct testimony, it stated:

TRIAL COURT: All right. I've -- I will say that since the audience members were asked to leave the courtroom I do think that the testimony has been easier to -- for the jurors to understand anyway. There's been less crying and less nervousness, so I'm going to continue in my discretion to continue that order throughout the remainder of the direct examination.

The trial court's original findings of fact relating to its decision to close the courtroom are supported by competent evidence. During the alleged victim's testimony, she exhibited nervousness and cried, such that her testimony was difficult to understand. She eventually became so upset that she asked defendant directly, "[w]hy did you do this to me? Why? Why?" The trial court determined that the numerous adult bystanders in the courtroom, in part, contributed to the alleged victim's emotional state, and in order to re-establish courtroom order, the trial court recessed the trial for a few minutes.

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Under the first *Waller* factor, the trial court articulated that the overriding interest that was likely to be prejudiced absent a courtroom closure was courtroom order, the alleged victim's emotional well-being, and the jury's ability to hear the alleged victim's testimony. The trial court also considered the second *Waller* factor, ensuring that the closure was not too broad, as it only ordered closure during the alleged victim's testimony once courtroom order was threatened and re-visited its ruling after the lunch recess and before cross-examination.

However, the trial court's original order did not indicate that it considered reasonable alternatives to the closure. As such, the absence of findings on the third *Waller* factor prevented us from conducting a proper review of the propriety of the closure.

Therefore, we remanded this matter for the trial court to enter a supplemental order containing supported findings of fact and conclusions of law related to the third *Waller* factor. In its supplemental order, the trial court addressed the third *Waller* factor:

10. The Court considered reasonable alternatives to the closure of the courtroom.

11. In considering reasonable alternatives, having previously observed that taking a recess to allow the alleged victim to compose herself did not have any beneficial effect on her emotional state or the ability of the Court and jurors to hear and understand her testimony, the Court concluded that the taking of additional recesses would not likely lead to a different outcome.

12. The Court considered, as an alternative to closing the courtroom, arranging for the remote testimony of the victim via closed circuit television. However, the Court excluded that possibility because the alleged victim did not appear to be emotionally distressed by the physical proximity of the Defendant and a remote testimony arrangement would impair the Defendant's rights to confront the alleged victim and would impair the ability of the jury to fully assess her credibility. Therefore, the Court found that closure of the courtroom to all nonessential personnel was the most reasonable alternative.

These supplemental findings are supported by competent evidence in light of the trial court's own observations of the victim and other individuals inside the courtroom.

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In sum, the trial court's orders together considered Donna's young age, nature of the charges, familial relationship with defendant, other non-essential personnel present in the courtroom, necessity of Donna's non-hearsay testimony, limited time and scope of the courtroom closure, and consideration of reasonable alternatives to closing the courtroom. Thus, the findings were adequate to support a courtroom closure pursuant to the fourth *Waller* factor. Accordingly, the trial court did not violate defendant's constitutional right to a public trial.

c. Jury Instructions

[3] Defendant also argues that the trial court committed plain error by instructing the jury in a manner that permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act of penile vaginal penetration. Specifically, defendant argues that "the error occurred because the trial court erroneously instructed the jury that a penis could be considered an 'object' for purposes of establishing a sexual act by either genital or anal penetration." As a result, defendant contends that the jury became confused about whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1443(c) (2013), "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." Accordingly, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Hope*, ___ N.C. App. ___, ___, 737 S.E.2d 108, 111 (2012), *review denied*, 366 N.C. 438, 736 S.E.2d 493 (2013) (citation and internal quotation marks omitted).

Our Supreme Court has addressed the concept of "inviting error" within the context of jury instructions. *State v. Sierra*, 335 N.C. 753, 759-60, 440 S.E.2d 791, 795 (1994). In *Sierra*, the defendant, on appeal, argued that the trial court should have instructed the jury on second-degree murder. *Id.* At trial, however, the defendant specifically declined the trial court's offer to provide such an instruction on two separate occasions. *Id.* Our Supreme Court held that "defendant is not entitled to any relief and will not be heard to complain on appeal" despite any possible error by the trial court because he acquiesced to the trial court's jury instructions. *Id.*

Similarly, in *State v. Weddington*, the defendant argued to our Supreme Court that the trial court erred by failing to properly clarify a jury question regarding the time at which the intent to kill must be formed for the charge of first-degree murder. 329 N.C. 202, 210, 404

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S.E.2d 671, 677 (1991). At trial, however, defendant agreed with the trial court's decision to merely reinstruct the jury on each element of the offense. *Id.* Our Supreme Court held that "[t]he instructions given were in conformity with the defendant's assent and are not error. The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant." *Id.* (citation omitted).

Comparable to *Sierra* and *Weddington*, the jury in the case at bar asked whether "the penis is considered an object" for the purposes of "penetration" for the charge of first-degree sex offense. In deciding how to answer the jury, the trial court stated, in relevant part:

TRIAL COURT: What I'm inclined to say is that the legal definition of an object is any object, inanimate or animate, so part of the body may be an animate object or some other item would be an inanimate object. The definitions of sexual acts have been provided to the jury. They include some specific sexual acts such as anal intercourse, which is penetration by the penis into the anus, and then rape, which is penetration of the vagina by the penis, so those are where there's a more specific definition, that's the definition that should be used.

The trial court then asked defendant's attorney about his thoughts on the issue, and defendant's attorney responded, "I agree. . . . [O]r the Court can reinstruct them on that count, just see what happens." The trial court then responded:

TRIAL COURT: I'm just going to read the definition[,] and under that definition of penis [sic] is a part of body and so as a matter of law, since the Supreme Court has said that any object embraces parts of the human body as well as inanimate or foreign objects, and the answer to the question is yes, the penis is considered an object.

In response to the trial court's proposed answer to the jury question, defendant's attorney stated, "[t]hat's fine." After the trial court answered the jury's question in the exact manner proposed above, he asked the parties, "I didn't go on to distinguish between vaginal intercourse and sexual intercourse offense, but do either of you feel that further clarification is needed for the jury?" Defendant's attorney responded, "[n]o."

Thus, defendant's attorney actively participated in crafting the trial court's response to the jury question, overtly agreed with the trial court's

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interpretation that a penis could be considered an “object,” and denied the trial court’s proposed clarification between vaginal intercourse and a sexual act for purposes of a sexual offense. Accordingly, we rule that defendant invited any error stemming from the trial court’s instructions and dismiss this issue on appeal. *See Hope*, ___ N.C. App. at ___, 737 S.E.2d at 113 (dismissing issue on appeal because the defendant invited error by “objecting to the correct instruction, requesting the incorrect instruction, and by choosing to forgo a self-defense instruction”); *see also State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996) (ruling that the defendant invited error and declining to review issue on appeal “because, as the transcript reveal[ed], defendant consented to the manner in which the trial court gave the instructions to the jury”).

d. Motion to Dismiss

[4] Next, defendant argues that the trial court erred by denying his motion to dismiss certain first-degree sex offense charges (11 CRS 226769, 11 CRS 226773 and 11 CRS 226774) for insufficiency of the evidence. We agree.

“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).

In relevant part, an individual is guilty of a first-degree sex offense if the person “engages in a sexual act . . . [w]ith 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. § 14-27.4(a)(1) (2013). A “sexual act” is defined as “cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse.” Importantly,

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a “sexual act” is also “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 (2013). An “object” for the purposes of this statute “embrace[s] 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).

First-degree rape requires an individual to “engage[] in vaginal intercourse . . . [w]ith 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 (2013). Vaginal intercourse is defined as “penetration, however slight, of the female sex organ by the male sex organ.” *State v. Combs*, __ N.C. App. __, __, 739 S.E.2d 584, 586 (2013) *review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

Because the crime of first-degree sex offense excludes vaginal intercourse, and vaginal intercourse is a specific element of first-degree rape that requires penile penetration, a “sexual act” of penetration by “any object into the genital” opening under N.C. Gen. Stat. § 14-27.4 constitutes first-degree rape if the “object” is a penis. *See State v. Leeper*, 59 N.C. App. 199, 202, 296 S.E.2d 7, 9 (1982) (holding that “[w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms[,]” the particular statute will control “unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto”).

Here, each of the first-degree sex offense indictments subject to defendant’s motion to dismiss alleged that defendant “unlawfully, willfully and feloniously did engage in a sex offense with D.SP., by force and against that victim’s will.” 11 CRS 226769 alleged that the offense occurred between 1 January and 31 December of 2001, 11 CRS 226773 alleged that the offense occurred between 1 January 2004 and 31 December 2004, and 11 CRS 226774 alleged that the offense occurred between 1 January 2005 and 31 December 2005.

With regard to 11 CRS 226769, the only evidence that a sex offense had occurred was when Donna read an entry from her journal that chronicled her prior abuse and other witnesses testified about statements Donna made to them prior to trial. This evidence indicated that the sexual abuse by defendant began in 2001 in Donna’s parents’ home when she was five or six years old. In one particular instance, defendant penetrated Donna’s anal opening and engaged in anal intercourse with her in a trailer. While the State purported to use this evidence to corroborate Donna’s testimony, it could not use the testimony for substantive

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purposes. *See State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000) (“It is well established that . . . prior statements admitted for corroborative purposes may not be used as substantive evidence.”). The trial court appropriately instructed the jury:

Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict with or be consistent with testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made and that it conflicts with or is consistent with the testimony of the witness at this trial you may consider this and all facts and circumstances bearing on the witness’s truthfulness in deciding whether you will believe or disbelieve the witness’s testimony.

Although the State provided evidence of vaginal intercourse during this time period, such conduct was sufficient to support defendant’s first-degree rape conviction, not a first-degree sex offense. Thus, the State failed to provide substantial evidence of a first-degree sex offense in 2001, and the trial court erred by denying defendant’s motion to dismiss this charge in 11 CRS 226769.

Similarly, Donna’s in-court testimony shows that in 2004 and 2005, defendant engaged in vaginal intercourse with her on numerous occasions. Such conduct was sufficient evidence of first-degree rape, and defendant was convicted of such charges. Although Donna’s journal entry and other witness testimony about statements made by Donna before trial indicated that defendant committed a “sexual act” through anal intercourse with Donna at McCoy’s house between 2004 and 2005, there is no substantive evidence that during this time period, defendant committed a “sexual act” by way of cunnilingus, fellatio, anilingus, anal intercourse, or penetration by any object (other than a penis) into Donna’s genital or anal opening. *Leeper, supra*. Accordingly, the State failed to provide substantial substantive evidence of a “sexual act” for the first-degree sex offense charges in 11 CRS 226773 and 11 CRS 226774.

We also note that in its brief, the State points to substantial evidence at trial to support first-degree sex offenses occurring in 2006, but fails to cite any substantive evidence in the record of such conduct in 2001, 2004, or 2005. Nevertheless, the State argues that we should apply the rule of leniency to the case at bar.

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Generally, “[t]he date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.” *State v. Pettigrew*, 204 N.C. App. 248, 253, 693 S.E.2d 698, 702 (2010) (internal citation and quotation marks omitted). With regard to child sexual abuse cases, the courts of this State “are lenient . . . where there are differences between the dates alleged in the indictment and those proven at trial.” *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002) (citation omitted). The rationale for this relaxed standard is “in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child’s uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.” *Id.* (citation and internal quotation marks omitted). This policy of leniency applies unless defendant “demonstrates that he was deprived of his defense because of lack of specificity[.]” *Id.* (citation and internal quotation marks omitted).

We do not believe the rule of leniency is applicable to the case at bar. The State mischaracterizes the issue as one of time variance, when it is, in fact, a question of sufficiency of the evidence. Had the State, at trial, shown that the specific sexual offense *conduct* that was alleged to have occurred in 2001, 2004, and 2005 happened on a different date, the rule of leniency would apply. However, the first-degree sexual offense indictments contain identical language and lack specificity as to particular conduct. The only substantive evidence of sexual-offense conduct elicited at trial occurred in 2006, and defendant was convicted of that offense. Thus, the State’s theory on appeal would require us to impute the conduct in 2006 to 2001, 2004, and 2005, which would result in punishing defendant more than once for the same conduct in violation of the double jeopardy clause of the U.S. constitution. *See State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 708 (1986) (“[W]hen a person is . . . convicted and sentenced for an offense, the prosecution is prohibited from . . . sentencing him a second time for that offense[.]”).

e. Referring to Donna as “the victim”

[5] Finally, defendant argues that the trial court erred by referring to Donna as the “alleged victim” in its opening remarks to the jury and then repeatedly referring to her as “the victim” in its final jury instructions. We disagree.

Defendant concedes on appeal that he never objected to the trial court referring to Donna as “the victim.” Thus, we review this issue for plain error, not *de novo* as a statutory violation. *See State v. Phillips*, ____

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N.C. App. ___, ___, 742 S.E.2d 338, 341 (2013), *review denied*, ___ N.C. ___, 753 S.E.2d 671 (2014) and *review dismissed*, ___ N.C. ___, 753 S.E.2d 671 (2014) (“[W]here our courts have repeatedly stated that the use of the word ‘victim’ in jury instructions is not an expression of opinion, we will not allow defendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the issue was preserved.”). “In deciding whether a defect in the jury instruction constitutes ‘plain error’, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.” *State v. Richardson*, 112 N.C. App. 58, 66, 434 S.E.2d 657, 663 (1993) (citation omitted).

Pursuant to N.C. Gen. Stat. § 15A-1232, “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.” N.C. Gen. Stat. § 15A-1232 (2013).

Defendant relies on *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *review allowed, writ allowed*, ___ N.C. ___, 753 S.E.2d 666 (2014) and *review denied*, ___ N.C. ___, 753 S.E.2d 667 (2014), in support of his argument that the trial court erred in referring to Donna as “the victim,” as it was an expression of an improper opinion to the jury. We are unpersuaded.

In *Walston*, the trial court, over defendant’s repeated objections, used the word “the victim” instead of “the alleged victim” in its jury instructions, which followed the pattern jury instructions. *Id.* at ___, 747 S.E. 2d at 727. This Court reviewed the appeal *de novo* because the defendant alleged a statutory violation of N.C. Gen. Stat. § 15A-1232. *Id.* This Court held that the trial court committed prejudicial error because “[t]he issue of whether sexual offenses occurred and whether [the complainants] were ‘victims’ were issues of fact for the jury to decide[,]” defendant was convicted of offenses which contained the word “victim” in the jury instructions, and the pattern jury instructions did not absolve the trial court from giving correct instructions to the jury. *Id.* at ___, 747 S.E.2d at 727-28.

We acknowledge that the case at bar shares some factual similarities to *Walston*. Most importantly, however, this case is distinguishable from *Walston* because we are reviewing this issue on appeal for plain error, not under a *de novo* standard of review. On this basis, defendant’s argument fails because “it is clear from case law that the use of the term ‘victim’ in reference to prosecuting witnesses does not constitute *plain*

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error when used in instructions[.]” *State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) (emphasis added); *State v. Carrigan*, 161 N.C. App. 256, 263, 589 S.E.2d 134, 139 (2003); *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 166 (1998); *Richardson*, 112 N.C. App. at 67, 434 S.E.2d at 663. Moreover, upon review of the evidence, we cannot conclude that the use of the words “the victim” had a probable impact on the jury’s finding of guilt. Donna testified to constant sexual abuse by defendant for approximately eight years, and her testimony was corroborated by her journal and other witnesses who testified as to her prior statements to them. Additionally, the trial court instructed the jury:

The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

Thus, we hold that the trial court did not commit plain error by referring to Donna as “the victim” during jury instructions.

III. Conclusion

In sum, we hold that the trial court did not err by 1.) closing the courtroom during Donna’s testimony, 2.) answering a jury question about whether a penis could be considered an “object,” or 3.) referring to Donna as “the victim” during jury instructions. However, the trial court erred by denying defendant’s motion to dismiss the first-degree sex offense charges in 11 CRS 226769, 11 CRS 226773 and 11 CRS 226774. Thus, we vacate those sex-offense convictions and remand for a new sentencing hearing.

No error, in part, vacated and remanded, in part.

Judges CALABRIA and STEPHENS concur.

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STATE OF NORTH CAROLINA

v.

KAWANA SPRULL AND RICHARD CONOLEY CHAPMAN

No. COA14-369

Filed 18 November 2014

Gambling—operating electronic sweepstakes—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motion to dismiss charges for operating an electronic sweepstakes in violation of N.C.G.S. § 14-306.4. The jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize.

Appeal by defendants from judgments entered 18 December 2013 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David J. Adinolfi II, for the State.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for defendant-appellants.

BRYANT, Judge.

Because the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize, we affirm the trial court's denial of defendants' motion to dismiss and find no error in the judgment of the trial court.

On 23 April 2013, a magistrate in Edgecombe County issued arrest warrants for defendants Kawana Spruill and Richard Conoley Chapman on the charge of violating North Carolina General Statutes, section 14-306.4 ("Electronic machines and devices for sweepstakes prohibited"). The matter came on for trial before a jury in Edgecombe County Superior Court on 17 December 2013, the Honorable Walter H. Godwin, Jr., Judge presiding.

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The evidence presented at trial tended to show that defendant Chapman was the owner of Past Times Business Center (“Past Times”), an internet café, located at 2100 St. Andrews Street, Tabor City, and defendant Spruill was the manager. An undercover officer with the Tabor City Police Department went to Past Times to determine if the café was operating an electronic sweepstakes in violation of N.C. Gen. Stat. 14-306.4. The undercover officer testified that he went to Past Times on 11 April 2013, equipped with a surveillance camera. The surveillance video was played for the jury while the officer narrated. The officer presented the cashier with \$25.00. The cashier presented the officer with a disclaimer which states, in part:

I understand that I am purchasing computer time to be used at this location. I also realize that I can request to participate in the promotional game for free. . . .

. . .

I understand that I am not gambling. I am playing a promotional game in which the winners are predetermined. The games have no effect on the outcome of the prizes won.

The undercover officer played internet games with the names “Keno,” “Lucky’s Loot,” Lucky’s Loot bonus round named “Pot O’Gold,” “Lucky Sevens,” “Lucky Ducks,” and “Lucky Lamb.” The undercover officer testified that his understanding was “[y]ou cannot win any more money than what it says you’re already going to win before the game starts. So it’s irrelevant what you click on.” The lead investigator, Detective Sergeant Bruce Edwards, testified that Past Times’ electronic games used a pre-reveal system. The pre-reveal system showed the prize amount the patron would win prior to the patron playing a game. Once the game was completed, the prize amount revealed prior to the start of the game would be displayed again. Kevin Morse, a representative from the video game manufacturer Figure Eight, testified that the software used to make the electronic games available in Past Times was developed and controlled by Figure Eight and that Past Time paid a user licensing fee to access the games via the internet. Morse distinguished a “true sweepstakes,” where the prize is revealed after the game is completed, from the electronic games used in Past Times, where the prize is revealed before a game is played. At Past Times, the patron has the option of whether to play the game after the prize has been revealed. If the patron does not timely choose to play a game, the system prompts the next reveal opportunity.

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At the close of the evidence, the jury returned verdicts against Chapman and Spruill finding each “[g]uilty of operating or placing into operation an electronic machine or device for the purpose of conducting a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize[.]” The trial court entered judgment in accordance with the jury verdicts. Spruill was sentenced to an active term of 45 days. The sentence was suspended, and she was placed on unsupervised probation for a period of 12 months. Chapman was also sentenced to an active term of 45 days. This sentence was suspended, and he was placed on unsupervised probation for a period of 36 months. Both defendants appeal.

On appeal, defendants argue the trial court erred in denying their motion to dismiss. Defendants contend that there was not substantial evidence they conducted a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize in violation of N.C. Gen. Stat. § 14-306.4. We disagree.

“We review denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010) (citation and quotations omitted). “[T]he trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. . . . The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness’ credibility.” *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 641 (2011) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 14-306.4,

it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:

- (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.
- (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

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N.C. Gen. Stat. § 14-306.4(b) (2013). “Entertaining display” is defined as “visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play” *Id.* § 14-306.4(a)(3). An entertaining display can be “[a]ny [] video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.” *Id.* § 14-306.4(a)(3)(i). “Sweepstakes” is defined as “any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.” *Id.* § 14-306.4(a)(5).

Defendants contend that because the prize is revealed to the patron prior to any opportunity to play a game, they have not run afoul of the plain meaning of N.C.G.S. § 14-306.4. Previously, games were used to reveal the sweepstakes prize. But, according to Figure Eight representative Morse, the software accessible from Past Times was changed to incorporate the pre-reveal feature, specifically, to operate in compliance with N.C.G.S. § 14-306.4.

[N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law’s condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited[.] It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 289-90, 749 S.E.2d 429, 430-31 (2012) (citing *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915)), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___ (2013).

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It is undisputed that with the use of computers accessing the internet, defendants operated a sweepstakes wherein a prize was revealed to a patron not dependent upon the patron's skill or dexterity in playing a video game. *See* N.C.G.S. § 14-306.4(a)(3)(i). That the video game did not have to be played or played to completion is not determinative. Defendants appear to define "game" only as that interaction between patron and computer which occurs after the sweepstakes prize has been revealed and the patron presses the "game" button. We disagree.

Under the pre-reveal format, entry and participation in the sweepstakes, through the pre-reveal, is a prerequisite to playing a video game. Thus, the sweepstakes takes place during the initial stages of any game played. That the sweepstakes is conducted at the beginning of a game versus its conclusion makes no significant difference: the sweepstakes prize is not dependent upon the skill or dexterity of the patron; it is a game of chance. And, in conjunction, the electronic video game is a display which entices the patron to play.

Section 14-306.4 seeks to prevent the use of entertaining displays in the form of video games to conduct sweepstakes wherein the prize is determined by chance. *See id.* § 14-306.4(b)(1). Therefore, when viewed in the light most favorable to the State, it is clear that the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize. *See id.*; *see also Trogdon*, 216 N.C. App. at 25, 715 S.E.2d at 641. Therefore, we affirm the trial court's denial of defendants' motion to dismiss the charge and find no error in the judgment of the trial court. *Mobley*, 206 N.C. App. at 291, 696 S.E.2d at 866. Accordingly, defendant's argument is overruled.

No error.

Chief Judge McGEE and Judge STROUD concur.

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[237 N.C. App. 388 (2014)]

STATE OF NORTH CAROLINA

v.

KARSTEN EUGENE TURNER

No. COA14-318

Filed 18 November 2014

1. Drugs—possession with intent to sell or deliver—jury instruction—possession with intent to manufacture, sell, or deliver—harmless error

The trial court did not commit plain error when it instructed the jury on the charge of possession of cocaine with the intent to manufacture, sell or deliver where defendant had been indicted for possession of cocaine with intent to sell or deliver. The use of the word “manufacture” in its jury instructions was harmless error.

2. Drugs—possession with intent to sell or deliver—jury instruction—reasonable doubt—fair doubt

The trial court did not commit plain error by instructing the jury that a reasonable doubt was a “fair doubt.” Although the trial court did deviate from the pattern instruction by using the term “fair doubt” in its preliminary jury instruction to prospective jurors, the charge as a whole was correct.

3. Constitutional Law—effective assistance of counsel—failure to object to jury instruction—no prejudice

Defendant did not receive ineffective assistance of counsel in a prosecution for possession of cocaine with intent to sell or deliver by his attorney’s failure to object to the trial court’s jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Even assuming arguendo that defendant’s attorney was deficient in failing to object to the trial court’s jury instructions, defendant has failed to show how his attorney’s actions amounted to prejudicial error.

Appeal by defendant from judgment entered 21 August 2013 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth A. Fisher, for the State.

M. Alexander Charms for defendant-appellant.

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BRYANT, Judge.

Where defendant's indictment and judgment were for the same offense and a deviation in the trial court's jury instruction as to that offense was not significant, defendant cannot show plain error. The trial court did not err in describing a reasonable doubt as a "fair doubt" in its preliminary jury instruction where the entirety of the trial court's jury charge correctly stated the definition of reasonable doubt to the jury. Where defendant cannot show that his attorney's failure to object to a jury instruction would have resulted in a different outcome at trial, defendant's ineffective assistance of counsel claim will be denied.

On 23 April 2012, defendant Karsten Eugene Turner was indicted on one count each of possession with intent to sell or deliver cocaine and resisting a public officer. On the same date, defendant was separately indicted for being an habitual felon. The charges came on for trial during the 19 August 2013 session of Catawba County Superior Court, the Honorable Nathaniel J. Poovey, Judge presiding. The State's evidence presented during the trial tended to show the following.

On 11 July 2011, Investigator Wes Gardin of the Hickory Police Department conducted surveillance at 442 10th Avenue Drive in Hickory. The surveillance was set-up based on information that a gold-colored Honda Accord would arrive that day at that location for a drug transaction. Shortly after beginning his surveillance, Investigator Gardin saw a gold-colored Honda Accord arrive and park at 420 10th Avenue; Investigator Gardin recognized the driver of the car as defendant.

Investigator Gardin directed a marked unit, operated by Officer Killian and Sergeant Kerley, to pull in behind the Honda and activate its lights to conduct a narcotics investigation. Upon the marked unit activating its lights, defendant exited the car, leaving the driver's side door open, and took off running. Investigator Gardin and Officer Killian engaged in a foot pursuit of defendant; despite ordering defendant to halt, the chase did not end until defendant tripped and fell. As a passenger was observed in defendant's Honda, Sergeant Kerley remained with the car during the pursuit of defendant.

After capturing defendant, the officers returned to the Honda and saw through the open driver's side door a baggie of crack cocaine in the driver's seat. Upon searching the Honda, the officers found a marijuana joint in the center console and a second baggie of crack cocaine in the glove box. Investigator Gardin testified that the baggie found on the driver's seat contained about 5-6 rocks of cocaine, while the baggie

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found in the glove box contained over 200 rocks of cocaine. The officer also found about \$80.00 cash in the driver's seat of the Honda.

The passenger in the Honda was identified as Victor Wilfong. Defendant and Wilfong were arrested and transported to the Hickory Police Department for processing.

While being held at the Hickory Police Department, defendant voluntarily made a statement to Investigator Gardin that "it's all mine." Investigator Gardin testified that he took defendant's statement "to mean that all the controlled substances found in that vehicle belonged to [defendant]."

On 21 August 2013, a jury convicted defendant of possession with intent to sell or deliver cocaine and resisting a public officer. The trial court found defendant had a prior record level of II, and defendant stipulated to being an habitual felon. After finding that defendant had shown three mitigating factors, the trial court sentenced defendant to 50 to 69 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred (I) in holding that it had jurisdiction to enter judgment against defendant for a charge not alleged in the indictment, and (II) by instructing the jury that a reasonable doubt was a "fair doubt." Defendant further argues (III) that he received ineffective assistance of counsel.

I.

[1] Defendant argues that the trial court erred in holding that it had jurisdiction to enter judgment against him for a charge not alleged in the indictment. Specifically, defendant contends the trial court committed a jurisdictional error because it instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver, rather than the offense for which defendant was indicted, possession of cocaine with intent to sell or deliver, and that as a result, "[t]he State's indictment was fatally defective here as to manufacturing."

However, defendant failed to object to the indictment and failed to object to the jury instruction until after the jury returned its verdict. Pursuant to North Carolina Rules of Appellate Procedure, Rule 10, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict" N.C. R. App. P. 10(a)(2) (2013). As such, this Court reviews unpreserved instructional

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and evidentiary issues for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (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.

Id. at 516-17, 723 S.E.2d at 333 (citations and quotations omitted).

Defendant was indicted for one count of possession of cocaine with intent to sell or deliver. In its jury instructions, the trial court instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver:

The defendant has been charged with possessing cocaine with the intent to manufacture, sell or deliver it. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.

First, that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses cocaine when he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.

And, second, that the defendant intended to manufacture, sell or deliver the cocaine. Intent is seldom, if ever, provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.

Defendant did not object to this instruction during either the jury charge conference or when the trial court gave its instructions to the jury. In fact, the discrepancy between the indictment and the jury instructions were discovered only after the jury returned its verdict finding defendant guilty of possession of cocaine with intent to manufacture,

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sell, or deliver. After considering the arguments of counsel, the trial court held that the use of the word “manufacture” in the jury instructions was harmless error, noting that the charge required the jury to find only two elements, possession and intent, and that “[t]here wasn’t any particular evidence also regarding what constitutes manufacture, what constitutes a sale or what constitutes delivery[.]” to affect the jury’s finding as to the element of intent. The trial court then sentenced defendant in the mitigated range for the offense for which defendant was indicted: possession of cocaine with intent to sell or deliver.

We agree with the trial court that the use of the word “manufacture” in its jury instructions was harmless error. “[A]n indictment is insufficient to support a conviction if it does not conform to material elements in the jury charge required to support the conviction.” *State v. Bollinger*, 192 N.C. App. 241, 245, 665 S.E.2d 136, 139 (2008) (citation omitted). Likewise, “an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime.” *Id.* at 246, 665 S.E.2d at 139 (citation omitted). North Carolina General Statutes, section 90-95(a)(1), holds that “it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]” N.C. Gen. Stat. § 90-95(a)(1) (2013). It is well-established that there are two essential elements of this charge: possession and intent. *See State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990) (citation and quotation omitted).

Defendant was charged with possession of cocaine with intent to sell or deliver. N.C.G.S. § 90-95(a)(1) only requires the jury to find one element of intent: an intent to sell, deliver or manufacture. N.C.G.S. § 90-95(a)(1) (emphasis added). The gravamen of the offense of possession with intent to sell or deliver is possession and intent. As long as defendant possessed the cocaine with intent — whether to sell, deliver, or manufacture — he has committed the statutory offense of possession of cocaine with intent to sell or deliver. *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127 (1990) (citations omitted). Therefore, even assuming *arguendo* the trial court erred in instructing the jury as to possession of cocaine with intent to manufacture, as well as sell or deliver, this error did not rise to the level of plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” (citations

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and quotation omitted)). The record shows that the charge of possession with intent to sell or deliver was supported by the evidence, as two baggies of crack cocaine rocks and cash were found in defendant's car, with the cash and smaller baggie of crack cocaine being found in the driver's seat where defendant had been sitting. As such, defendant cannot show plain error where he received a mitigated sentence for the proper, indicted charge of possession of cocaine with intent to sell or deliver. Accordingly, defendant's first argument is overruled.

II.

[2] Defendant next argues that the trial court erred by instructing the jury that a reasonable doubt was a "fair doubt." We disagree.

As defendant failed to object to the trial court's jury instruction that a reasonable doubt was a "fair doubt," we review defendant's second issue on appeal for plain error. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

Defendant contends the trial court erred in instructing the jury that a reasonable doubt was a "fair doubt."

"[A]s a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (citation and quotation omitted).

The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it[. . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

Id. at 634, 548 S.E.2d at 505 (citations and quotations omitted). "If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." *State v. Maniego*, 163 N.C. App. 676, 685, 594 S.E.2d 242, 248 (2004) (citation omitted).

The jury instruction of which defendant complains was a preliminary instruction given by the trial court to prospective jurors prior to the commencement of jury selection, as opposed to final instructions

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given after the close of evidence at trial. The trial court, in its preliminary instruction, stated the following:

A reasonable doubt is not a vain nor fanciful doubt. For most things that relate to human affairs are open to some possible or imaginary doubt. A reasonable doubt is a fair doubt based upon reason or common sense arising out of some or all the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Thereafter, a petit jury was selected to hear the evidence in the case. After all the evidence was presented, the trial court instructed the jury as to the definition of reasonable doubt:

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Defendant's argument that the trial court erred in its jury instruction on reasonable doubt by describing it as a "fair doubt" lacks merit. It is clear from a review of the trial court's two statements of the reasonable doubt instruction that although the trial court did deviate from the pattern instruction by using the term "fair doubt" in its preliminary jury instruction to prospective jurors, the charge as a whole was correct. *See State v. James*, 342 N.C. 589, 597-98, 466 S.E.2d 710, 715-16 (1996) (the defendant was not prejudiced where the trial court gave an appropriate jury instruction at the close of evidence despite giving an allegedly erroneous preliminary instruction); *State v. Hunt*, 339 N.C. 622, 643-44, 457 S.E.2d 276, 288-89 (1994) (holding that the trial court's jury instruction, which defined a reasonable doubt as "a fair doubt," was not "constitutionally deficient" and did not impermissibly alter the context of the jury instruction); *see also State v. Flowers*,¹ No. COA01-1024, 2002 N.C. App. LEXIS 2208, at *4-6 (July 16, 2002) (the trial court did not commit plain error where it gave an erroneous preliminary jury instruction to prospective jurors but gave the proper jury instruction at the close of evidence at trial); *State v. McElvine*, No. COA01-677,

1. We note that although *Flowers* and *McElvine* are unpublished opinions of this Court, both cases are on point with the instant case.

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2002 N.C. App. LEXIS 2124, at *12 (May 21, 2002) (finding the defendant could not show plain error where, “[w]hen taking the entire instruction as a whole and in context, the trial court properly instructed the prospective jurors on the presumption of innocence and the burden of proof on the State. Thus, we find the trial court did not err in its preliminary instructions to the jury.”). Defendant’s argument is, therefore, overruled.

III.

[3] Defendant also argues that he received ineffective assistance of counsel. We disagree.

“In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted).

It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant[s] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations and quotation omitted).

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

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

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requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

In considering [ineffective assistance of counsel] claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Boozer, 210 N.C. App. 371, 382-83, 707 S.E.2d 756, 765 (2011) (citations and quotation omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012).

Defendant contends he received ineffective assistance of counsel because his attorney failed to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Because the record reveals no further investigation is required, we review defendant's ineffective assistance of counsel claim.

Defendant argues that he received ineffective assistance of counsel because, by not objecting to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver, defendant's attorney caused defendant to be convicted of an offense for which defendant was not indicted. We disagree for, as discussed in *Issue I*, the trial court's error did not amount to plain error. Further, defendant did not challenge his indictment (for possession of cocaine with intent to sell or deliver), and the trial court sentenced defendant in the mitigating range for the indicted offense. As such, defendant's ineffective assistance of counsel claim lacks merit.

Moreover, assuming *arguendo* that defendant's attorney was deficient in failing to object to the trial court's jury instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted). Here, where defendant's car was stopped by officers acting on a tip and, in addition to a bag with 5-6 rocks of crack cocaine and cash found on the driver's seat and defendant's voluntary admission that "it's all mine," over 200 rocks of

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crack cocaine were found in a baggie in defendant's glove box, there was no reasonable probability that a different result would have been reached by the jury. "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. Accordingly, defendant's argument is overruled, and his claim of ineffective assistance of counsel denied.

No error.

Chief Judge McGEE and Judge STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 NOVEMBER 2014)

BARCLAY v. MAKAROV No. 14-460	Watauga (12CVD395)	Affirmed in part, reversed in part.
BELCH v. KORTHEUER No. 14-461	N.C. Industrial Commission (X80963)	Affirmed
BYRD v. FRANKLIN CNTY. No. 13-1456	Franklin (13CVS6)	Dismissed
COFFEY v. CARLTON No. 14-395	Catawba (08CVD2474)	Affirmed in part, reversed in part.
DICKERSON v. HOWARD No. 14-509	Vance (12CVD593)	Dismissed
DILLARD v. DILLARD No. 14-304	Mecklenburg (13CVD11054)	Affirmed
E. CAROLINA UNIV. FOUND., INC. v. FIRST CITIZENS BANK & TR. CO. No. 14-465	Forsyth (13CVS6135)	Vacated and Remanded in Part, Affirmed in Part.
FAUSTIN v. N.C. BLDG. CODE COUNCIL No. 14-82	Wake (13CVS5798)	Affirmed
IN RE A.G. No. 14-588	Durham (12JT156-159)	Affirmed
IN RE A.J.R. No. 14-536	Mecklenburg (12JT271)	Affirmed
IN RE B.J.G. No. 14-669	Wake (13SP51080)	Vacated and Remanded
IN RE C.D.J. No. 14-614	New Hanover (12JT178) (12JT179)	Affirmed
IN RE C.W. No. 14-610	Orange (09JT137)	Affirmed

IN RE G.J.K. No. 14-668	Haywood (11JT101)	Affirmed
IN RE J.W. No. 13-1251	Cumberland (13JB9)	Vacated
IN RE N.S.R.C. No. 14-303	Yadkin (11JT60)	Affirmed
IN RE ROSEMEIER No. 14-389	Onslow (13SP572)	Dismissed
IN RE S.W. No. 14-432	Vance (13JA20)	Affirmed in part; reversed and remanded in part
MAROTTI v. FORTE No. 14-455	Wake (13CVS7001)	Affirmed
PARKER v. CHARLOTTE PIPE & FOUNDRY No. 14-371	N.C. Industrial Commission (049318)	Dismissed
PASUT v. ROBERTSON No. 13-1245	Pitt (12CVS2523)	Reversed and Remanded
RL REGI N. C., LLC v. LIGHTHOUSE COVE, LLC No. 12-1279-2	New Hanover (10CVS5742)	Reversed in part, No Error in part.
SCBT v. RIMES No. 14-526	Pender (12CVD1033)	Affirmed
SETZLER v. SETZLER No. 14-635	Catawba (12CVD1337)	Dismissed
SMOKY MOUNTAIN SANCTUARY PROP. OWNERS ASS'N, INC. v. SHELTON No. 14-112	Haywood (10CVS1452)	Dismissed
STATE v. BRYANT No. 14-515	Craven (11CRS54426) (13CRS752)	Affirmed
STATE v. CHISHOLM No. 14-237	Mecklenburg (12CRS224066) (12CRS224074) (12CRS42708)	No Error in Part; Judgment Arrested in Part; Remand in Part

STATE v. CLARK No. 14-188	Pitt (12CRS56543) (13CRS187)	No Error in PWISD conviction; Conspiracy to traffic cocaine by possession conviction vacated; Remanded for resentencing.
STATE v. COX No. 14-692	Henderson (12CRS51463-64)	Affirmed
STATE v. DeWALT No. 14-372	Alexander (12CRS165) (12CRS458)	No Error
STATE v. DODD No. 14-503	Haywood (13CRS51144)	No Error
STATE v. GASKINS No. 14-448	Craven (12CRS324) (12CRS50852)	No prejudicial error
STATE v. GILLIKIN No. 14-449	Carteret (09CRS54928)	No Error
STATE v. HARRIS No. 14-350	Guilford (12CRS89900-02)	No Error
STATE v. JONES No. 14-425	Mecklenburg (12CRS222317) (12CRS42714)	No Error
STATE v. LENNON No. 14-354	Durham (12CRS62652)	Judgment for Offenses 51 and 53 Vacated; Remanded. New Trial on Robbery With A Dangerous Weapon.
STATE v. LUCKADOO No. 14-604	Martin (13CRS126)	Vacated and Remanded
STATE v. MESSER No. 14-596	Buncombe (12CRS57868-72) (12CRS908)	Affirmed
STATE v. MURDOCK No. 14-534	Iredell (09CRS57228) (12CRS1086)	No error in part; dismissed in part.
STATE v. PENCE No. 14-502	Brunswick (12CRS4292-93)	No error in part; reversed and remanded in part

STATE v. PERSING No. 14-535	Moore (11CRS50844) (11CRS50845) (11CRS50850) (11CRS50865-66) (11CRS50871) (11CRS50873) (11CRS50975-76)	Affirmed
STATE v. TURNER No. 14-560	Rockingham (12CRS53123) (12CRS53125)	No Error in Part, Reversed in Part.
STATE v. WINKLER No. 14-442	Buncombe (13CRS51036)	Vacated

ADEMOVIC v. TAXI USA, LLC

[237 N.C. App. 402 (2014)]

REFIK ADEMOVIC, EMPLOYEE, PLAINTIFF

v.

TAXI USA, LLC D/B/A YELLOW CAB OF CHARLOTTE, ALLEGED EMPLOYER, RIVERPORT
INSURANCE CO., CARRIER (KEY RISK MANAGEMENT SERVICES, INC.,
SERVICING AGENT), DEFENDANTS

No. COA14-356

Filed 2 December 2014

1. Workers' Compensation—injury to taxi driver—operating certificate—finding supported by evidence

A finding of fact in a workers' compensation case involving the operating certificate under which plaintiff operated his taxi was supported by competent record evidence.

2. Workers' Compensation—findings—suspension from dispatch service—effect on municipal permit

The Industrial Commission erred in a workers' compensation case in a finding concerning the effect of a suspension from defendant's dispatching service on defendant's municipal taxi permit. Although the Commission found that plaintiff could not legally operate the taxi under suspension from defendant, the testimony indicated that suspension from defendant's dispatching service did not amount to suspension of the municipal driving permit.

3. Workers' Compensation—independent contractor—taxi driver—source and exclusivity of calls

In a workers' compensation case concerning whether plaintiff taxi driver was an independent contractor, findings concerning the number of calls plaintiff received in a day from defendant dispatch service and that plaintiff only received customers through defendant were supported by competent evidence in the record.

4. Workers' Compensation—taxi driver—right of control—independent contractor—not an employee

The Industrial Commission erred in a workers' compensation case by ultimately concluding that plaintiff taxi driver was an employee of defendant dispatch service. Plaintiff and defendant entered into an agreement stating that plaintiff was an independent contractor. Furnishing certain equipment and decals, requiring that the taxi be painted yellow, and a provision allowing termination of the contract at any time with or without notice or cause did not definitively establish that the right of control rested with defendant.

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Judge ERVIN concurring in part and concurring in the result only in part.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 21 October 2013. Heard in the Court of Appeals 8 September 2014.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for defendant-appellants.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendant-appellant Taxi USA, LLC.

McCULLOUGH, Judge.

Defendants Taxi USA, LLC d/b/a/ Yellow Cab of Charlotte and Riverport Insurance Company appeal the Opinion and Award of the Full Commission, concluding that plaintiff Refik Ademovic was an employee of defendant Taxi, USA, LLC d/b/a Yellow Cab of Charlotte on 11 August 2011. Based on the reasons stated herein, we reverse the opinion and award of the Full Commission.

I. Background

On 17 August 2011, plaintiff Refik Ademovic filed a Form 18, “Notice of Accident to Employer and Claim of Employee, Representative, or Dependent” alleging a worker’s compensation claim arising out of a shooting that occurred on 11 August 2011. Plaintiff alleged that he was shot in the face by a passenger while driving a taxi for defendant Taxi USA, LLC d/b/a/ Yellow Cab of Charlotte (“defendant Taxi”). Plaintiff also filed a Form 33 “Request that Claim be Assigned for Hearing” on 22 September 2011.

On 19 January 2012, defendants denied plaintiff’s claim by filing a Form 61 “Denial of Workers’ Compensation Claim.” Defendants asserted that plaintiff was an independent contractor and argued that no employer-employee relationship existed at the time of plaintiff’s injury.

On 30 May 2012, a hearing was held before Deputy Commissioner Chrystal Redding Stanback on the issue of whether there was an employer-employee relationship between plaintiff and defendant Taxi.

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On 21 March 2013, Deputy Commissioner Stanback filed an Opinion and Award, finding as follows:

2. Plaintiff and Defendant Taxi USA, LLC d/b/a/ Yellow Cab (hereinafter “Defendant Taxi USA”) entered into an Associate Agreement on November 19, 2010 allowing Plaintiff to drive a cab under Defendant Taxi USA’s operating certificate. Plaintiff also executed an agreement indicating that he understood that he was a self-employed business person and that he was not an employee of Defendant Taxi USA for, among other things, workers’ compensation insurance.

....

4. Defendant Taxi USA did not impose any additional rules or requirements in addition to those established by the City of Charlotte and the ordinances established by the City of Charlotte for Personal Vehicles for Hire. . . .

5. Plaintiff owned his own taxi-cab and was responsible for any maintenance needed on the vehicle. Plaintiff paid all the taxes on the vehicle, and was responsible for maintaining automobile insurance on the vehicle. Plaintiff was free to use his vehicle for any purpose he chose, so long as he was not transporting a fare at the time. Plaintiff had the opportunity, when he picked up a fare, to provide the fare with information on how to contact him directly for future services, without going through the dispatcher for Defendant Taxi USA.

6. Plaintiff kept all the fares he earned. Defendant Taxi USA did not take any social security deductions out of the fares. Additionally, Plaintiff filed tax returns indicating that he was self-employed.

7. Defendant Taxi USA did not pay Plaintiff any wages. Instead, Plaintiff paid a weekly franchise fee of \$195.00 to Defendant Taxi USA in order to maintain operation of his taxi cab under Defendant Taxi USA’s operating certificate.

8. Defendant Taxi USA did not determine the days nor the number of hours that Plaintiff worked. Plaintiff was free to take off days as he wished.

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9. Plaintiff was free to perform his taxi cab driver duties under his own control. He had the right to control both the manner and method of his duties, subject only to the guidelines established by the City of Charlotte for personal vehicles for hire.

10. Plaintiff had the choice of whether to use and accept calls from Defendant Taxi USA's dispatcher. . . .

Deputy Commissioner Stanback concluded that there was no employee-employer relationship between plaintiff and defendant Taxi. Based on the foregoing, Deputy Commissioner Stanback concluded that the Industrial Commission did not have subject matter jurisdiction over plaintiff's claim and plaintiff was not entitled to workers' compensation benefits.

Plaintiff appealed the 21 March 2013 Opinion and Award to the Full Commission. The Full Commission heard plaintiff's appeal on 15 August 2013. On 21 October 2013, the Full Commission entered an Opinion and Award reversing the 21 March 2013 Opinion and Award and finding, *inter alia*, as follows:

3. In approximately November or December of 2010, plaintiff applied for work with defendant-employer as a taxi driver. Plaintiff signed a written contract with defendant-employer; said contract was prepared by defendant-employer. The language in the contract characterizes plaintiff as an independent contractor of defendant-employer. . . .

4. Plaintiff did not own a taxi cab prior to applying to be a taxi driver with defendant-employer. Once plaintiff applied, plaintiff purchased a vehicle from defendant-employer to use as a taxi. This taxi was the only taxi that plaintiff owned or operated.

5. Plaintiff was provided equipment from defendant-employer for his work as a taxi driver. Defendant-employer provided plaintiff with a Blackberry which defendant-employer used to dispatch calls for potential customers to plaintiff. Defendant-employer also provided the top light attached to the roof of his taxi; the decals on the taxi which identified defendant-employer's business name and phone number; the taxi meter that also served as a

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backseat credit card device; and also provided a two-way radio. All the equipment provided to plaintiff by defendant-employer was necessary or required for plaintiff to drive the taxi.

6. When plaintiff picked up a customer from a dispatch call, there were two steps involved. First, plaintiff received the notification on the BlackBerry, which was termed a “bid offer. The Blackberry indicated only that a call had been dispatched to him and the amount of time plaintiff had left to accept the offered call. Plaintiff could choose to not respond to the bid offer. If plaintiff responded, he had to accept the dispatched call and pick up the customer and he would thereafter receive the customer’s name and location from defendant-employer.

7. On 11 August 2011, plaintiff received a dispatched offer from defendant-employer on the BlackBerry, which he accepted. The customer had called defendant-employer’s phone number for dispatches. Plaintiff picked up the customer and took him to the requested destination. When they arrived, the customer shot plaintiff in the face with a gun. . . .

8. As a result of the gunshot wound, plaintiff sustained a mandible fracture, a right condylar dislocation, and a large hematoma in the right masseter muscle. Plaintiff has gone through surgeries, and he still has metal bullet fragments lodged in his head. Plaintiff receives counseling for post-traumatic stress disorder, anxiety, paranoia, hypervigilance, social withdrawal, and panic attacks.

. . . .

10. Although plaintiff was under the jurisdiction of the City of Charlotte, most, if not all, of his day-to-day dealings in his work, including any fines or penalties for not complying with ordinances or defendant-employer’s rules, was with defendant-employer.

11. According to the contract with plaintiff, defendant-employer owned the company operating permit, the vehicle operating permit, and the driver’s permit under which plaintiff operated his taxi.

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12. Plaintiff paid a weekly franchise fee of \$195.00 to defendant-employer in order to maintain operation of his taxi cab under defendant-employer's operating certificate.

....

15. Under defendant-employer's contract with plaintiff, the goodwill associated with the color scheme had great value in terms of its marketability to the public, because the public knew and recognized taxis painted yellow as being affiliated with defendant-employer. For this reason, the contract provided that the goodwill associated with defendant-employer's color scheme belonged exclusively to defendant-employer.

16. Plaintiff's taxi was required to be painted yellow, which corresponded to defendant-employer's unique color scheme with the City of Charlotte. When plaintiff purchased his taxi from defendant-employer it was already painted in accordance with defendant-employer's color scheme.

17. The top light and decals provided by defendant-employer for plaintiff's taxi had defendant-employer's name and telephone number (704-444-4444) for dispatches. The top light and decals were advertisements and marketing to the public to attract potential customers to call defendant-employer's dispatch service.

18. Plaintiff's taxi had to correspond with the color scheme and décor of defendant-employer. Even though plaintiff owned and had title to the taxi, he could not continue working for defendant-employer if he painted the taxi another color or if the taxi did not have the top light and decals advertising defendant-employer.

....

22. Based upon the preponderance of the evidence in view of the entire record, defendant-employer's business as a taxi service company is not independent and distinct from plaintiff's work as a taxi driver. Plaintiff's work as a taxi driver is a necessary and integral part of defendant-employer's business.

....

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29. Defendant-employer imposed penalties on drivers for non-compliance with the City of Charlotte ordinances, which the ordinances themselves did not provide. . . .

. . . .

43. Based upon the preponderance of the evidence in view of the entire record, defendant-employer exerted sufficient control over plaintiff's activities as a taxi driver, as a result of both the City of Charlotte ordinances and the contractual agreement between the parties, to establish the relationship between the two as an employer-employee relationship, since having taxis and working as a taxi driver are necessary and integral parts of operating a taxi service company.

44. Based upon the preponderance of the evidence in view of the entire record, defendant-employer held plaintiff out as its own driver to the public through defendant-employer's marketing and advertising efforts, which also substantiates the level of control required of an employer-employee relationship.

45. Defendant-employer provided plaintiff with equipment that was necessary to drive taxis under the City of Charlotte ordinance.

Based on the foregoing, the Full Commission concluded that it had subject matter jurisdiction over plaintiff's claim. The Full Commission also concluded that at the time of his injury, plaintiff was an employee of defendant Taxi and that the parties "reserved the right to litigate the issues of disability and other benefits stemming from plaintiff's compensable injury." Because the Opinion and Award was interlocutory in nature, the Full Commission certified the "issue of the employer-employee relationship as final and ripe for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)[.]"

From this Opinion and Award, defendants appeal.

II. Standard of Review

"This Court reviews an opinion and award by the Commission to determine: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact."

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Gregory v. W.A. Brown & Sons, 212 N.C. App. 287, 294, 713 S.E.2d 68, 73 (2011). “The Commission’s conclusions of law are reviewed *de novo*.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Discussion

[1] On appeal, defendants argue that the Full Commission erred by concluding that plaintiff was an employee of defendant Taxi. Rather, defendants assert that plaintiff was an independent contractor, not subject to the jurisdiction of the Industrial Commission. We agree.

Defendants specifically challenge findings of fact numbers 35 and 37, arguing that they are not supported by competent evidence in the record. Defendants also challenge conclusion of law number 2.

Finding of fact number 35 provides as follows:

35. Although the City of Charlotte ordinances would allow plaintiff to list up to three (3) different companies with company operating certificates on his driver’s permit, plaintiff’s permit listed only one company, defendant-employer, and plaintiff only owned one taxi. Plaintiff did not have the resources or opportunity to drive for another taxi service company legally, that is by operating more than one vehicle as a taxi, each painted in the unique color scheme of the different companies. Furthermore, plaintiff’s driver’s permit identified defendant-employer as the taxi service company holding the company operating certificate under which plaintiff operated his taxi. The City of Charlotte ordinances required the driver’s permit to be posted in the back seat so that the customers could see the driver’s permit.

In their brief, defendants argue that finding of fact number 35 “confuses the suspension of the use of the Blackberry dispatching services with a suspension of a driver’s permit issued by the City of Charlotte.” Defendants contend that the evidence before the Full Commission made it clear that only dispatching services were suspended. However, after reading finding of fact number 35, we are unable to see how defendants’ arguments correspond with this finding of fact. The substance of finding of fact number 35 addresses the operating certificate under which plaintiff operated his taxi.

Nevertheless, a review of the record reveals that finding of fact number 35 is supported by competent evidence. Plaintiff testified at the

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30 May 2012 hearing that he only owned one taxi. Although the City of Charlotte allowed a taxi driver to list up to “three companies that you could be affiliated with on your driver’s permit,” plaintiff only listed defendant Taxi. John Walsh, the operations manager of defendant Taxi confirmed this portion of plaintiff’s testimony. Because plaintiff worked “eight hours or ten hours all day or all night,” he did not drive for another taxi service company. Plaintiff testified that his name, as well as defendant Taxi’s name, appeared on his driver’s permit. In order to be viewable by all passengers, the driver’s permit was posted in the back seat of plaintiff’s taxi. Based on the foregoing evidence, we reject defendants’ argument that finding of fact number 35 is not supported by competent record evidence.

[2] We note that the focus of defendants’ argument – suspension of the use of the Blackberry dispatching services versus the suspension of the driver’s permit issued by the City of Charlotte – is most closely addressed in the Full Commission’s finding of fact number 34. Although defendants do not specifically challenge finding of fact number 34, in an abundance of caution, we will address it here.

The portion of finding of fact number 34 that defendants seem to challenge provides:

34. Based upon a preponderance of the evidence in view of the entire record, under the City of Charlotte ordinances, plaintiff could not legally operate the taxi if defendant-employer has suspended him for three (3) or more hours. . . .

After careful review of the record, we are unable to find competent testimony to support this portion of finding of fact number 34. Instead, the testimony indicates that suspension from defendant Taxi’s dispatching service did not amount to suspension of a driver’s permit issued by the City of Charlotte. Plaintiff testified that if a taxi driver accepted a dispatched call, otherwise known as a “bid call,” from defendant Taxi and subsequently turned down the dispatched call or failed to pick up the passenger, defendant Taxi would suspend the taxi driver for a period of three hours. If a taxi driver turned down more than one bid call that he or she had already answered and accepted, the penalty would be suspension from the dispatch service for a whole day. John Walsh also testified that if a driver is awarded the bid call and the driver does not pick up the passenger, there is a three-hour suspension or penalty to the driver for non-service of the bid call. During the suspension, the driver would not receive any dispatched calls. Walsh explained that

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“[t]hat means that he will be taken off posting. He will not be able to post in on the Blackberry to take bid calls, but again, as discussed, he can go out and taxi other places and do other taxi[i]ng.” Walsh testified that if a taxi driver is suspended from getting dispatches for three hours, the taxi driver is still able to obtain fares through other means such as going to taxi stands, getting hailed fares, or servicing personal customers. The three-hour suspension did not revoke the taxi driver’s ability to work under defendant Taxi’s operating certificate with the City of Charlotte. Walsh also testified that the City of Charlotte’s ordinances do not penalize a driver for failing to pick up a passenger. Based on the foregoing, we find that the Full Commission erred in this finding of fact, as it was not supported by competent evidence in the record.

[3] Next, defendants argue that finding of fact number 37 is not supported by competent evidence in the record. Finding of fact number 37 provides as follows:

37. Although defendant-employer did not give plaintiff a work schedule, plaintiff worked between eight (8) and twelve (12) hours per day and did so exclusively for defendant-employer. Plaintiff received between fifteen (15) and twenty (20) dispatches a day from defendant-employer and he did not receive dispatches from any other company. Plaintiff only got customers from dispatches on the Blackberry.

Defendants argue that finding of fact number 37 “ignores that Plaintiff had control over his work activity, but chose on his own to only utilize the Blackberry dispatch service.” We reiterate that “[b]ecause the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission’s findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.” *Medlin v. Weaver Cooke Constr., LLC*, __ N.C. __, __, 760 S.E.2d 732, 738 (2014) (citation and quotation marks omitted).

Although the evidence in the record supports defendants’ contention that plaintiff had control over his work schedule and the method by which he picked up customers, defendants’ contention is not undercut by finding of fact number 37 which refers to plaintiff’s regular schedule and preferred method of obtaining customers. At the 30 May 2012 hearing before Deputy Commissioner Stanback, plaintiff testified that although defendant Taxi did not determine what days he had to work or

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what time he had he work, he worked between eight (8) to twelve (12) hours per day. Plaintiff testified that he received fifteen (15) to twenty (20) dispatches per day from defendant Taxi and did not receive dispatches from other cab companies. Furthermore, plaintiff testified that he “only used the dispatcher from the Blackberry.” Therefore, finding of fact number 37 is supported by competent evidence in the record.

[4] Nevertheless, we agree with defendants’ central argument that the Full Commission erred by ultimately concluding that plaintiff was defendants’ employee. Even assuming *arguendo* that all of the Full Commission’s findings of fact were supported by competent evidence, the Full Commission’s findings of fact do not justify its conclusions of law. Here, defendants specifically challenge the Full Commissions conclusion of law number 2, which provides as follows:

2. On 11 August 2011, plaintiff was an employee of defendant-employer under the common law tests for an employee-employer relationship established by the Supreme Court of North Carolina. N.C. Gen. Stat. § 97-2(2). *See Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). Despite its similarity to two other cases, *see, e.g., Fulcher v. Willard’s Cab Co.*, 132 N.C. App. 74, 511 S.E.2d 9 (1999); *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976), the present case involves additional facts and circumstances that are different from those two cases. In the present case, defendant-employer could terminate a driver and had supervisory control over many of plaintiff’s work activities and conduct, unlike the employer in *Alford*. Furthermore, the city ordinances at the time *Alford* was decided in 1976 apparently allowed taxi drivers to turn down potential customers on the basis of undesirable geographical locations; whereas in the present case, defendant-employer could suspend plaintiff for doing so, since defendant-employer did not give plaintiff any information about the location of the customer until plaintiff had already accepted the bid offer and failure to pick up the customer after accepting the bid offer would result in suspension. *Fulcher* is distinguishable because it was not clear in that case whether the assailant was a customer of the taxi driver, whereas here, that fact is not in dispute.

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It is well established that

[t]o be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed. The issue of whether the employer-employee relationship exists is a jurisdictional one. An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions.

Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted).

"The question of whether a relationship is one of employer-employee or independent contractor turns upon the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E.2d 187, 191 (1999). In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the North Carolina Supreme Court set out eight factors to consider in determining the degree of control exercised by the hiring party, including whether the employed:

(a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140 (citations omitted).

The presence of no particular one of these indicia is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.

Id.

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The Full Commission cited to *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 511 S.E.2d 9 (1999) in its 21 October 2013 Opinion and Award. In *Fulcher*, the plaintiff entered into a contract with the defendant cab company in which the defendant was the lessor and the plaintiff was the lessee. *Id.* at 75, 511 S.E.2d at 10. The plaintiff rented a taxicab from the defendant and paid a “per-shift” fee of \$55.00 each time he drove the taxicab. *Id.* The parties’ lease stated that the plaintiff was free from the defendant’s “control or direction” and that he was to “exercise complete discretion in the operation” of the leased taxicab. It also expressly denied any employer-employee relationship. *Id.* The plaintiff was to keep all fees and tips he collected; he was not restricted to any specific geographic area in the operation of the taxicab; and, he was free to take or refuse calls from the defendant’s dispatch. *Id.* On 1 November 1994, the plaintiff accepted a dispatch to pick up a passenger and was later found with a gunshot in the back of the head. *Id.* at 75, 511 S.E.2d at 11. The plaintiff died and his estate filed a workers’ compensation claim against the defendant. *Id.* “Sustaining the decision of the deputy commissioner, the Full Commission found that an employer-employee relationship existed and that [the plaintiff] was fatally wounded in the course and scope of his employment. It confirmed the award of benefits to the plaintiff[.]” *Id.* The plaintiff argued that because the plaintiff’s contract with defendant did not allow him to carry or possess a handgun while driving the defendant’s taxi and did not permit any other person to operate the cab, defendant exercised control over the plaintiff’s work. Our Court held that while these provisions demonstrated that the “defendant exerted some control over [the plaintiff’s] work, they are the only such evidence of an employer-employee relationship. Standing alone, they do not establish that [the plaintiff] was [the] defendant’s employee.” *Id.* at 78, 511 S.E.2d at 12. Thus, our Court held that the findings of the Full Commission did not show that the defendant had the right to exert an employer’s degree of control over the plaintiff and reversed the decision of the Full Commission. *Id.*

The Full Commission also cited to *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976) which is closely related to the facts in *Fulcher*. In *Alford*, the question before our Court was whether the plaintiff taxi driver was an employee or an independent contractor. *Id.* at 660, 228 S.E.2d at 45. Our Court affirmed the Opinion and Award of the Full Commission and held that the plaintiff was an independent contractor because the right of control did not rest in the defendant cab company based on the following findings of fact made by the Full Commission:

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[the plaintiff] rented a taxicab from [the defendant] for a twenty-four hour period for a flat fee of \$15, and [the defendant] had no supervision or control over the manner or method [the plaintiff] chose to operate that cab. [The plaintiff] had complete control over his work schedule while he used the cab. He could disregard the radio dispatcher, use the cab for his own purposes during the time it was rented, and he kept all the fares and tips he earned.

Id. at 661, 228 S.E.2d at 46.

We find our decisions in *Fulcher* and *Alford* to be controlling on the facts before us. Here, like in *Fulcher*, the Full Commission's findings indicate that plaintiff signed an associate agreement with defendant Taxi on 19 November 2010 that contained express and explicit language indicating that plaintiff was not an employee of defendant Taxi, but an independent contractor. Similar to the facts found in both *Fulcher* and *Alford*, plaintiff kept all the fares and tips he earned. Defendant Taxi did not pay plaintiff any wages, but plaintiff paid defendant Taxi a weekly flat franchise fee of \$195.00. Defendant Taxi did not determine the number of days or the number of hours plaintiff worked, instead allowing plaintiff to determine his own work schedule. In addition, plaintiff was not required to use defendant Taxi's dispatch services to pick up fares. Plaintiff was free to accept hailed fares, go to taxi stands to pick up customers, or obtain personal customers.

A distinguishing fact from *Fulcher* and *Alford* found in the case *sub judice*, further supporting the conclusion that plaintiff was an independent contractor, is that plaintiff owned his own taxi. Plaintiff paid the taxes and insurance due on the taxi and was responsible for any maintenance required on the taxi. Plaintiff was free to use his vehicle for any purpose he wanted, so long as he was not accepting a fare at the time.

In contrast, the evidence in a fairly recent case before this Court, *J.D. Mills v. Triangle Yellow Transit*, __ N.C. App. __, 751 S.E.2d 239 (2013), indicated that the plaintiff taxi driver was the defendant taxi company's employee. In *J.D. Mills*, the defendant taxi company owned, maintained, and insured the plaintiff's taxi. *Id.* at __, 751 S.E.2d at 241. The plaintiff was prohibited from using the taxi for his own personal purposes and picked the taxi up from the defendant's office each day and returned it to the same location at the end of his shift. *Id.* at __, 751 S.E.2d at 243. The plaintiff's work schedule was set by the defendant. The plaintiff did not keep all the fares and tips he earned, but rather

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the defendant “created a pay structure with each driver individually, whereby collected fares were divided equally with [the defendant].” *Id.* at ___, 751 S.E.2d at 241. Further, when the plaintiff drove the taxi, “he was required to follow service routes and pick up customers based on the commands of [the] defendant[’s] dispatcher.” *Id.* at 243. The facts of the present case are in stark contrast to those found in *J.D. Mills*.

We recognize that the Full Commission made several findings of fact which demonstrate that defendant Taxi exerted some degree of control over plaintiff. For example, defendant required plaintiff to have specific equipment, which defendant provided, in order to drive his taxi. Defendant Taxi provided a Blackberry, a top light to attach to the roof of plaintiff’s taxi, decals which identified defendant Taxi’s business name and phone number, a taxi meter that also served as a backseat credit card device, and a two-way radio. Defendant Taxi also required plaintiff’s taxi to be painted yellow. Under the terms of the contract with plaintiff, defendant Taxi could also terminate “the working relationship at any time, with or without advance notice, with or without cause, for any reason or no reason, at the end of any term.” Nonetheless, we hold that they are the only such evidence of an employer-employee relationship and do not definitively establish that the right of control rested with defendant Taxi.

Thoughtful and careful consideration of the facts of this case, in light of the cited authorities, leads us to the conclusion that the Full Commission erred by concluding that plaintiff was an employee of defendant Taxi. Because a claimant must be an employee from whom compensation is claimed in order to maintain a proceeding for workers’ compensation, we reverse the Opinion and Award of the Full Commission.

Reversed.

Judge BELL concurs.

ERVIN, Judge, concurring in part and concurring in the result only in part.

Although I concur in a considerable portion of the Court’s opinion and in my colleagues’ determination that the Commission’s order should be reversed based upon a determination that Plaintiff occupied the status of an independent contractor, rather than an employee, of Taxi USA, I am unable to concur in the Court’s treatment of the standard of review

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that should be utilized in addressing and resolving Defendants' challenge to the Commission's decision. As a result, I concur in the Court's opinion in part and concur in the result reached by my colleagues in part.

In its opinion, my colleagues state that "[t]his Court reviews an opinion and award by the Commission to determine: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact." *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 294, 713 S.E.2d 68, 73 (2011). In light of its decision to utilize this standard of review, my colleagues have conducted an extensive analysis of the sufficiency of the evidence to support certain of the Commission's findings of fact and then determined that the Commission's conclusions of law, instead of demonstrating that Plaintiff was an employee of Taxi USA, compelled the conclusion that he was an independent contractor who was not eligible to receive workers' compensation benefits. I do not believe that the Court has utilized the correct analytical framework in the course of deciding that the Commission's order should be reversed.

The approach utilized by the Court in reviewing Defendants' challenge to the Commission's order overlooks the fact that the sole issue raised by Defendants' challenge to the Commission's order was the extent to which Plaintiff had the status of an employee or an independent contractor and that this question requires us to address and resolve an issue of jurisdictional fact. *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (stating that, "[t]o maintain a proceeding for workers' compensation, the claimant must have been an employee of the party from whom compensation is claimed," so that "the existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact"). According to well-established North Carolina law, "[w]hen issues of jurisdiction arise, 'the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court,'" so that this Court is "required to make independent findings with respect to jurisdictional facts." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (quoting *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990)). Thus, the appropriate standard of review for use in reviewing Defendants' challenge to the Commission's order is *de novo* rather than the traditional workers' compensation standard of review set out and utilized in my colleagues' decision. *Capps v. Southeastern Cable*, 214 N.C. App. 225, 227, 715 S.E.2d 227, 229 (2011). As a result, in spite of the fact that Defendants have challenged several of the Commission's findings of fact as lacking in adequate evidentiary support, the proper step

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for us to take in this case is to refrain from addressing the sufficiency of the evidence to support the Commission's findings of fact and to make our own independent findings of jurisdictional fact instead.

After carefully considering the evidentiary record, which reveals the existence of remarkably few disputed factual issues, I would find as a fact that, according to the contract between Plaintiff and Taxi USA, Plaintiff acknowledged his status as an independent contractor rather than an employee and acted as such in the course of most of his dealings with Taxi USA; that Plaintiff owned the motor vehicle that he utilized to transport clients and was responsible for any and all maintenance costs associated with the operation of the vehicle; that Plaintiff was required to have his taxi painted a certain color and to display certain decals and other information on his vehicle that announced and publicized his affiliation with Taxi USA; that Taxi USA provided Plaintiff with certain equipment that he utilized in the course of obtaining fares and providing taxi service; that Plaintiff was required to comply with various provisions of the municipal ordinances in effect in the City of Charlotte governing the provision of taxi service as a prerequisite for being able to continue his relationship with Taxi USA; that Plaintiff paid the applicable taxes and the premiums required to properly insure his vehicle; that Plaintiff paid a weekly franchise fee to Taxi USA for the right to operate his vehicle under Taxi USA's operating certificate; that Plaintiff had the right to keep all of the fares and tips that he collected for customers and was not required to turn any portion of his earnings over to Taxi USA; that Plaintiff had the right to determine the number of days of the week and hours of the day that he provided taxi service; that Plaintiff was entitled to use his vehicle for any purpose of his own choosing at any time when he was not actually providing taxi service; that, while Plaintiff was offered the opportunity to provide service to certain fares made available to him by Taxi USA's dispatcher, he was not required to accept any of those fares if he did not choose to do so; that Plaintiff could be suspended from the opportunity to use Taxi USA's dispatch service for varying periods of time in the event that he accepted a fare and then failed to pick that fare up; and that, even during periods of time when his right to accept fares made available by Taxi USA's dispatcher had been suspended, Plaintiff was free to obtain fares using other means, such as waiting outside the airport and hotels or restaurants, responding to telephone calls or other messages sent directly to him by potential fares, or being hailed by customers on the side of the road. Although certain of these facts are, as Plaintiff and the Commission suggest, consistent with

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the notion that Plaintiff was an employee rather than an independent contractor,¹ I, like my colleagues, am unable to distinguish the facts of this case from those at issue in *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 78, 511 S.E.2d 9, 12 (1999), and *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 661, 228 S.E.2d 43, 46 (1976), in which this Court held that cab drivers who leased their vehicle from various entities under circumstances similar to those at issue here were independent contractors rather than employees, in any material way. In addition, like my colleagues, I agree that the degree of control exercised by the defendant in *Mills v. Triangle Yellow Transit*, __ N.C. App. __, __, 751 S.E.2d 239, 241-43 (2013), was much greater than that at issue here. According to well-established North Carolina law, these decisions are binding upon us in this case, *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that “a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court”), and define the outcome that we are required to reach. Thus, although I believe that my colleagues have failed to utilize the correct standard of review and have utilized an incorrect analytical framework in reaching their decision to overturn the Commission’s order, I am compelled to conclude that the result that they have reached on the merits is compelled by our precedent. As a result, I concur in the Court’s decision in part and concur in the result that my colleagues have reached in part.

1. For example, the fact that Taxi USA could suspend Plaintiff’s right to utilize its dispatch services for failures to pick up accepted fares does tend to suggest that Taxi USA exercised a certain degree of control over Plaintiff’s activities. On the other hand, I do not believe that the fact that the applicable municipal ordinance allowed a driver to turn down fares based on the location at which the fare was supposed to be picked up at the time of the events at issue in *Alford* or that the extent to which the assailant in *Fulcher* was or was not a customer was unclear has any bearing on the determination of whether a particular driver was an employee or an independent contractor.

IN THE COURT OF APPEALS

DUKE ENERGY CAROLINAS, LLC v. GRAY

[237 N.C. App. 420 (2014)]

DUKE ENERGY CAROLINAS, LLC, PLAINTIFF

v.

HERBERT A. GRAY, DEFENDANT/THIRD PARTY PLAINTIFF

v.

JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.,
THIRD PARTY DEFENDANTBUILDER SUPPORT SERVICES OF THE CAROLINAS, INC. F/K/A JOHN WIELAND
HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.,
FOURTH-PARTY PLAINTIFF

v.

YARBROUGH-WILLIAMS & HOULE, INC., LUCAS-FORMAN, INC., AND CARTER LAND
SURVEYORS & PLANNERS, INC., FOURTH-PARTY DEFENDANTS

No. COA14-283

Filed 2 December 2014

1. Statutes of Limitation and Repose—encroachment on power company easement—six years

The statute of limitations for an action alleging an encroachment on a power company easement was six years. N.C.G.S. § 1-50(a)(3) establishes a six-year statute of limitations for claims based upon injury to any incorporeal hereditament and the 8th edition of Black's Law Dictionary defines an incorporeal hereditament as an intangible right in land, such as an easement.

2. Statutes of Limitation and Repose—encroachment on an easement—expiration

The six-year statute of limitations had expired when plaintiff Duke Power brought an action alleging encroachment on an easement. The statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time. Furthermore, plaintiff should reasonably have known of the existence of a completed house that encroached on its easement.

3. Statutes of Limitation and Repose—encroachment on easement—limitation effective as to claim—easement not extinguished

The only effect of plaintiff's failure to file suit before expiration of the statute of limitations was to bar its lawsuit against defendant based upon this specific encroachment. The trial court did not

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terminate or extinguish plaintiff's easement and plaintiff may pursue any future claims arising from an encroachment to the easement, whether caused by this defendant or by another party.

4. Statutes of Limitation and Repose—encroachment on power company easement—not an action under seal

An action involving an easement and the statute of limitations was not subject to the ten-year statute of limitations for actions under seal. There was no dispute that plaintiff had an easement on part of defendant's property but defendant was not a principal to the original contract, defendant did not sign the agreement, defendant was not an assignee of either principal, and defendant did not obtain any rights or defenses that might have been available to the principals.

5. Appeal and Error—Supreme Court decision—binding on the Court of Appeals

The holding of *Pottle v. Link*, 187 N.C. App. 746, involving a suit between adjoining homeowners over encroachments on an easement appears to be a straightforward application of both the statute of limitations set out in N.C.G.S. § 1-50(a)(3) and the precedent applying that statute. However, even if *Pottle* was wrongly decided, the Court of Appeals would nonetheless be bound by its holding, unless it had been overturned by a higher court.

6. Appeal and Error—appealability—policy questions—legislative question

Although plaintiff offered various policy reasons against the application of a six-year statute of limitations to a claim by a utility company seeking injunctive relief for encroachment on an easement, questions regarding public policy are for legislative determination.

Appeal by plaintiff from order entered 1 November 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2014.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and John R. Buric, for plaintiff-appellee Herbert A. Gray.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, and Derek P. Adler, for plaintiff-appellee John Wieland Homes and Neighborhoods of the Carolinas, Inc.

DUKE ENERGY CAROLINAS, LLC v. GRAY

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Hamilton Stephens Steele & Martin, PLLC, by Mark R. Kutny, and Erik M. Rosenwood, for fourth-party defendant-appellee Yarbrough-Williams & Houle, Inc.

Womble Carlyle Sandridge & Rice, LLP, by Debbie W. Harden, Meredith J. McKee, and Jackson R. Price, for plaintiff-appellant Duke Energy Carolinas, LLC.

Nelson Mullins Riley & Scarborough, LLP, by Joseph W. Eason, and Phillip A. Harris, Jr., for Amici Curiae North Carolina Electric Membership Corporation and the North Carolina Association of Electric Cooperatives.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Matthew D. Rhoad, and Davis F. Roach, for Amici Curiae Public Service Company of North Carolina, Inc. d/b/a PSNC Energy; and Piedmont Natural Gas Company, Inc.

STEELMAN, Judge.

N.C. Gen. Stat. § 1-50(a)(3) provides for a six year statute of limitations for injury to an incorporeal hereditament, which includes claims for encroachment upon an easement. Because plaintiff's claim for encroachment was filed more than six years after its claim accrued, the claim was barred by the statute of limitations.

I. Factual and Procedural Background

On 18 May 1951, J. L. Wallace and his wife, Pearl D. Wallace, executed an agreement with Duke Power Company, the predecessor to Duke Energy Carolinas, LLC (plaintiff). In exchange for the sum of \$652.50, Mr. and Ms. Wallace granted a 200 foot easement over their property, allowing Duke Power to enter upon the easement for purposes associated with the transmission of electric and telephone services, and to keep the 200 foot strip of land free of structures and trees. The terms of the easement were binding on the parties and on "their successors, heirs and assigns."

In 2006 John Wieland Homes and Neighborhoods of the Carolinas, Inc., (Wieland)¹, built a house located on Lot 533 in Phase 8 of the

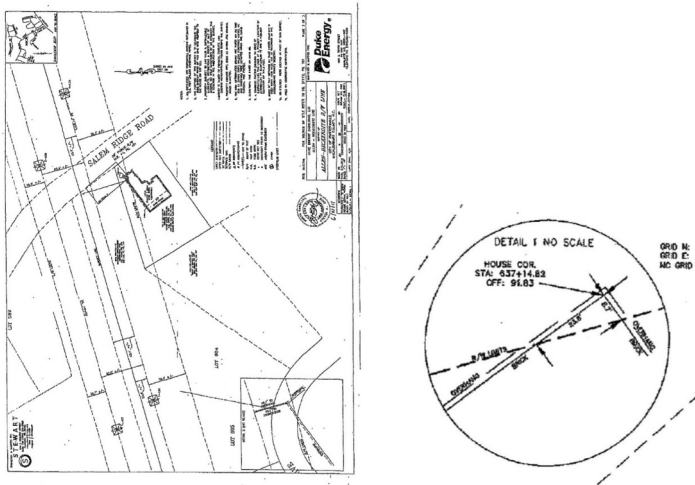
1. In November, 2012, John Wieland Homes and Neighborhoods of the Carolinas, Inc., changed its name to Builder Support Services of the Carolinas, Inc. For clarity, we refer to this party as "Wieland" throughout our opinion.

DUKE ENERGY CAROLINAS, LLC v. GRAY

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Skybrook neighborhood, in Huntersville, Mecklenburg County. The building lot included a strip of land located within plaintiff’s easement. The house was completed no later than 11 October 2006, the date that the Mecklenburg County Land Use and Environmental Services Agency issued Wieland a Certificate of Occupancy for the house.

In 2007 Herbert A. Gray (defendant) purchased the house and lot from Wieland, and a general warranty deed was filed in the Mecklenburg County Register of Deeds, stating that the conveyance was subject to easements “which may appear of record[.]” It is not disputed that plaintiff’s easement appears in the chain of title for the property. On 17 February 2010 plaintiff wrote to defendant and informed him that a portion of his house encroached on its 200-foot right of way, with the greatest encroachment being 8.7 feet on the easement, as shown below:



On 17 August 2010 defendant filed suit against Wieland. After plaintiff refused defendant’s request to intervene in the lawsuit, defendant filed a dismissal without prejudice in January 2012. On 12 December 2012 plaintiff filed suit against defendant in the instant case, seeking a mandatory injunction directing defendant to remove the encroachment from its easement. On 3 January 2013 defendant filed an answer and third-party complaint against Wieland, and on 8 March 2013 Wieland filed an answer to the third party complaint and filed fourth-party complaints against Yarbrough-Williams & Houle, Inc., Lucas-Forman, Inc., and Carter Land Surveyors & Planners, Inc., who are not involved in the present appeal.

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Wieland and defendant filed motions on 10 September 2013 and 2 October 2013 respectively, seeking entry of summary judgment against plaintiff based upon the affirmative defense that plaintiff's action was barred by the statute of limitations. They asserted that N.C. Gen. Stat. § 1-50(a)(3) established a six year statute of limitations for "injury to any incorporeal hereditament," including claims for encroachment on an easement, and that plaintiff had not filed suit within six years of the time that its cause of action accrued. On 1 November 2013 the trial court entered an order granting summary judgment for defendant and Wieland, based upon the six year statute of limitations.

Plaintiff appeals.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "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." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party.' 'We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.'" *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted), and *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

In this case, summary judgment was granted based upon the applicable statute of limitations. "Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.'" *Waddle v. Sparks*, 331 N.C. 73, 85-86, 414 S.E.2d 22, 28-29 (1992) (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). "Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate."

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Pembee, 313 N.C. at 491, 329 S.E.2d at 353 (citing *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), and *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974) (other citation omitted). “As a general proposition, ‘an order [granting summary judgment] based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant’s pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom.’” *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (quoting *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001) (internal quotation omitted).

III. Statute of Limitations

A. Applicability of N.C. Gen. Stat. § 1-50(a)(3)

[1] Plaintiff first argues that the trial court erred in ruling that the six year statute of limitation set out in N.C. Gen. Stat. § 1-50(a)(3) governs its claim against defendant. We disagree.

N.C. Gen. Stat. § 1-50(a)(3) establishes a six year statute of limitations for claims based upon “injury to any incorporeal hereditament.” “The 8th edition of Black’s Law Dictionary defines [an] ‘incorporeal hereditament’ as ‘[a]n intangible right in land, such as an easement.’ BLACK’S LAW DICTIONARY 743 (8th ed. 2004).” *Pottle v. Link*, 187 N.C. App. 746, 750, 654 S.E.2d 64, 67 (2007). Thus, “an easement is an incorporeal hereditament[, and] G.S. 1-50[(a)](3) requires that an action for injury to any incorporeal hereditament be brought within six years.” *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979) (citing *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925)). See also *Boyden v. Achenbach*, 79 N.C. 539, 543 (1878) (“If the right of way is claimed as an incorporeal hereditament, as is probable, then six years is the statute[of limitations].”). Based on the plain language of N.C. Gen. Stat. § 1-50(a)(3), and the cases of *Hawthorne* and *Pottle*, the statute of limitations for a lawsuit based upon encroachment on an easement is six years.

B. Expiration of Statute of Limitations

[2] Plaintiff next argues that there are genuine issues of material fact as to whether its claim was filed within six years of the time that the statute of limitations began to run. We conclude, based upon the relevant facts which are not in dispute, that the statute of limitations had in fact expired when plaintiff filed suit against defendant.

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“The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. ‘A cause of action generally accrues when the right to institute and maintain a suit arises.’” *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004) (quoting *Ocean Hill Joint Venture v. N.C. Dep’t of E.H.N.R.*, 333 N.C. 318, 323, 426 S.E.2d 274, 277 (1993) (internal quotation omitted). “Under the common law, a cause of action accrues at the time the injury occurs, ‘even in ever so small a degree.’ This is true even when the injured party is unaware that the injury exists.” *Pembee* at 492, 329 S.E.2d at 353 (quoting *Matthieu v. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967), and citing *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957) (other citation omitted) (emphasis added). In addition, N.C. Gen. Stat. § 1-15, “Statute runs from accrual of action,” provides that “[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.” N.C. Gen. Stat. § 1-15(a).

As noted in G.S. § 1-15, there are a number of “special cases” in which a specific claim is deemed to accrue, not when the injury occurs, but when it is discovered or reasonably should be discovered. For example, N.C. Gen. Stat. § 1-52(16) provides that in regards to claims “for personal injury or physical damage to claimant’s property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.” However, there is no such provision in N.C. Gen. Stat. § 1-50(a)(3), and no other statutory basis to delay the accrual of a claim for encroachment on an easement until the encroachment is discovered, or reasonably should be known. We hold that the statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time.

Plaintiff argues that the statute of limitations does not begin to run until the encroachment on an easement is known or should reasonably be known. In support of this position, plaintiff cites *Karner v. Roy White Flowers, Inc.*, 134 N.C. App. 645, 652, 518 S.E.2d 563, 568 (1999), *rev’d and remanded*, 351 N.C. 433, 527 S.E.2d 40 (2000), which stated that “the statute of limitations begins running as to the violation of a restrictive covenant when the plaintiff first becomes aware or should have reasonably become aware of the violation.” The holding in *Karner* is in turn based solely upon the cases of *Liptrap v. City of High Point*, 128

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N.C. App. 353, 355, 496 S.E.2d 817, 819 (1998), and *Hawthorne v. Realty*. Neither case supports *Karner's* posited exception to the general rule that the statute of limitations runs from the accrual of a claim. *Liptrap* quoted *Pembee's* statement that “[a]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run.” *Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819 (quoting *Pembee* at 492, 329 S.E.2d at 354). However, *Liptrap* was simply quoting *Pembee's* recitation of the language of N.C. Gen. Stat. § 1-52(16), which sets out a statutory exception to the general rule. *Hawthorne* did not address the point at which the statute of limitations begins to run, and did not hold that it was delayed until such time as a plaintiff reasonably should be aware of the injury. Moreover, *Karner* was reversed and remanded by the North Carolina Supreme Court, based on failure to join all necessary parties, making its precedential value questionable at best. We conclude that *Karner* does not require a holding that the statute of limitations runs from when plaintiff knew or reasonably should have known of the encroachment.

Furthermore, even if we were to apply the standard urged by plaintiff, we would nonetheless conclude that the statute of limitations had expired when plaintiff filed suit. It is undisputed that the house was completed, at the latest, by 11 October 2006, when the Mecklenburg County Land Use and Environmental Services Agency issued Wieland a Certificate of Occupancy for the house. Plaintiff should reasonably have known of the existence of a completed house that encroached on its easement, and plaintiff's claim was not filed until more than six years after this date. Therefore, the trial court did not err by ruling that its claim was barred by the relevant statute of limitations.

[3] In reaching this conclusion we have considered and rejected plaintiff's arguments to the contrary. Plaintiff's arguments are primarily based on its contention that, by ruling that plaintiff's claim against defendant was barred by the statute of limitations, the trial court “terminated” or “extinguished” plaintiff's easement, and allowed defendant to “obtain property without satisfying the required elements for adverse possession.” We are not persuaded.

Plaintiff's easement was not terminated or extinguished as a result of the summary judgment order. Plaintiff retains its easement, and may pursue any future claims arising from an encroachment to the easement, whether caused by this defendant or another party. Furthermore, in appropriate circumstances, plaintiff may exercise its power of eminent domain under N.C. Gen. Stat. § 40A-3(a)(1). In addition, defendant did

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not obtain title to any property he had not previously owned; indeed plaintiff concedes that defendant is “the owner of the underlying property[.]” Thus, the only effect of plaintiff’s failure to file suit before expiration of the statute of limitations was to bar its lawsuit against defendant based upon this specific encroachment. In this regard, plaintiff experienced the same consequences as any other plaintiff who fails to file suit in a timely manner:

“[S]tatutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff’s cause of action. They are . . . intended to require that litigation be initiated within the prescribed time or not at all. The purpose of a statute of limitations is to afford security against stale demands[.] . . . In some instances, it may operate to bar the maintenance of meritorious causes of action.”

Hackos v. Goodman, Allen & Filetti, PLLC, __ N.C. App. __, __, 745 S.E.2d 336, 342 (2013) (quoting *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (internal quotation omitted)).

Plaintiff raises several additional arguments based upon the assertion that its easement was terminated by application of the statute of limitations to its claim against defendant, including contentions that the trial court’s ruling conflicts with the law governing adverse possession and with cases addressing a defendant’s continuing trespass upon land owned in fee by a plaintiff. Plaintiff also asserts that defendant “terminated” its easement and “obtained property” to which he was not entitled. As we have concluded that plaintiff’s easement was not extinguished and that defendant did not obtain title to property he had not previously owned, we do not examine these arguments any further.

C. Instruments Under Seal

[4] Plaintiff’s next argument is that the original agreement signed by plaintiff’s predecessor and Mr. and Ms. Wallace in 1951 was an instrument “under seal” and that defendant should be considered “a principal” to this agreement, thereby making the ten year statute of limitations for claims upon a sealed instrument applicable to plaintiff’s suit. We disagree.

N.C. Gen. Stat. § 1-47(2) provides for a ten year statute of limitations for claims “[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto.” (emphasis added). In 2007, defendant purchased a house located on property

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that included part of plaintiff's easement. Under the express terms of the agreement, he took the property subject to plaintiff's easement, and there is no dispute that plaintiff has an easement on part of defendant's property.

However, defendant was not a principal to the original contract between Mr. and Ms. Wallace and plaintiff's predecessor in title. Defendant did not sign the agreement, and was not an assignee of either principal. Nor did defendant obtain any rights or defenses that might have been available to the principals. For example, if Duke Power had failed to pay the agreed-upon sum to Mr. and Ms. Wallace, this would not provide defendant with any defense against encroachment on the easement. See *Howard v. White*, 215 N.C. 130, 131, 1 S.E.2d 356, 356 (1939) ("Defenses available to [the principal] are not available to [the defendant]"). The cases cited by plaintiff are distinguishable from the instant case, as they involve parties who were clearly the assignees or successors in interest to a contract, such as the "general assign[ee] of an executory bilateral contract." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 661, 194 S.E.2d 521, 534 (1973). Because defendant was not a principal to the 1951 contract, plaintiff's claim is not governed by N.C. Gen. Stat. § 1-47(2).

D. Challenges to *Pottle* Decision

[5] Plaintiff also argues that *Pottle* was wrongly decided, and that it ignored the law on adverse possession, will lead to "absurd" results, and should not be followed. *Pottle* involved a suit between adjoining homeowners over encroachments on an easement that gave the plaintiffs access to their lots. *Pottle's* holding appears to be a straightforward application of both the statute of limitations set out in N.C. Gen. Stat. § 1-50(a)(3) and the precedent applying that statute. However, even if we agreed with plaintiff that *Pottle* was wrongly decided, we would nonetheless be bound by its holding. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we do not address plaintiff's arguments regarding the substantive merits of the *Pottle* decision.

E. Policy Arguments

[6] Plaintiff next offers various policy reasons against the application of a six year statute of limitations to a claim by a utility company seeking injunctive relief for encroachment on an easement. For example,

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plaintiff contends that if the statute of limitations is limited to “six short years” it will incur “the substantial cost of continuously patrolling [its] easements” which will “increase[] the costs of providing services[.]” We note that expiration of the statute of limitations in the present case was not the result of the unusual challenges faced by a utility company that may be charged with protecting hundreds of miles of easement. Plaintiff acknowledges that it was aware of defendant’s alleged encroachment on its easement by 2009, long before expiration of the statute of limitations. In addition, plaintiff was clearly aware of this Court’s holding in *Pottle*, given that plaintiff petitioned for leave to file an *amicus* brief when the *Pottle* plaintiffs sought discretionary review. *See Pottle v. Link*, __ N.C. __, 663 S.E.2d 317 (2008) (unpublished).

Plaintiff essentially argues that it is unreasonable to apply the same statute of limitations to utility companies as to parties such as the neighboring homeowners in *Pottle*. Plaintiff’s arguments are not without merit; however, they fall outside our purview. “It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.’ Normally, questions regarding public policy are for legislative determination.” *In re N.T.*, 214 N.C. App. 136, 144, 715 S.E.2d 183, 188 (2011) (quoting *Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 265 (2002) (internal quotation omitted). As a result, we do not express an opinion on the merits of plaintiff’s policy arguments.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant’s motion for summary judgment and that its order should be

AFFIRMED.

Judges GEER and DIETZ concur.

IN RE H.H.

[237 N.C. App. 431 (2014)]

IN THE MATTER OF H.H. AND R.H.

No. COA14-650

Filed 2 December 2014

1. Child Abuse, Dependency, and Neglect—abuse—striking child

The district court did not err when it adjudicated a child to be an abused juvenile. Allegations in an abuse petition must be viewed on a case-by-case basis considering the totality of the evidence. Here, the court's findings of fact include that Respondent-mother struck the child five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon. The court also found that the child described the discipline as "a beating."

2. Child Abuse, Dependency, and Neglect—neglect—mother overwhelmed—would have supported finding

The district court did not err when it adjudicated R.H. and H.H. neglected juveniles. By Respondent-mother's own account, she felt so overwhelmed that she could not care for the juveniles, and, rather than await assistance from law enforcement or DSS, she left the juveniles with a person she believed was a substance abuser without even interacting with him in person to assess his sobriety and current fitness to care for the juveniles. She disciplined R.H. in such an inappropriate manner that he has been adjudicated an abused juvenile and Respondent-mother herself was charged with misdemeanor child abuse. Yet, she refused virtually all assistance offered by DSS. All of this evidence would have supported a finding of fact that Respondent-mother placed the juveniles at a substantial risk of physical, mental, or emotional impairment as a consequence of her failure to provide proper care, supervision, or discipline.

3. Child Abuse, Dependency, and Neglect—dependent—living with parent able to provide care

The district court erred by adjudicating H.H. and R.H. dependent juveniles. Where, as here, all of the evidence and findings of fact indicate that the juveniles are living with a parent who is willing and able to provide for their care and supervision, the juveniles simply cannot be adjudicated dependent.

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4. Child Abuse, Dependency, and Neglect—order to maintain stable housing and employment—not supported by petitions or findings

The district court erred in a neglected and abused juvenile case by ordering Respondent-mother to maintain stable housing and employment where nothing in the findings of fact suggested that Respondent-mother's lack of employment or unstable housing contributed to the juveniles' removal from her custody. Respondent-mother's inability to properly care for the juveniles may well be due to employment, financial, and/or housing concerns, as opposed to emotional, psychological, or other issues, but the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from Respondent-mother's custody or formed the basis for their adjudications.

Appeal by Respondent-mother from order entered 25 February 2014 by Judge Mack Brittain in Polk County District Court. Heard in the Court of Appeals 27 October 2014.

Feagan Law Firm, PLLC, by Phillip R. Feagan, for Petitioner Polk County Department of Social Services.

Michael E. Casterline for Respondent-mother.

The Opoku-Mensah Law Firm, PLLC, by Gertrude Opoku-Mensah, for Guardian ad Litem.

STEPHENS, Judge.

Facts and Procedural Background

Respondent-mother, the mother of the juveniles H.H. and R.H., appeals from an order adjudicating: (1) H.H. a neglected and dependent juvenile; and (2) R.H. an abused, neglected, and dependent juvenile. After careful review, we affirm in part, reverse in part, and vacate in part.

On 3 December 2013, the Polk County Department of Social Services ("DSS") filed petitions alleging that H.H., then age 10, was a neglected and dependent juvenile, and that R.H., then age 8, was an abused, neglected, and dependent juvenile. DSS stated that it received a child protective services report on 14 November 2013 alleging that R.H. had bruising on his legs due to physical discipline imposed by Respondent-mother. Respondent-mother admitted to causing the bruises and stated

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that she intended to continue to use physical discipline on the children as she deemed necessary. Respondent-mother was charged with misdemeanor child abuse as a result of the incident.

DSS further stated that, upon information and belief, Respondent-mother had contacted 911 on the evening of 21 November 2013 and requested that someone pick up the juveniles because she was unable to provide for their care. Rather than wait for a response, Respondent-mother called the juveniles' father who agreed to take them. Respondent-mother, having told the juveniles that "she is going to jail because she abused them and that the juveniles would not see her anymore[,]” drove them to a dark parking lot and made them stand crying outside her car while she waited inside. Respondent-mother drove away once the father arrived, without waiting for him to get out of his car. Respondent-mother's behavior and statements left the juveniles "upset and scared.”

On 2 December 2013, Respondent-mother attempted to remove the juveniles from their father's care by seeking an emergency custody order. DSS claimed that the father was unable to take any legal measures, such as obtaining an emergency custody order, because he could not afford legal representation. Accordingly, DSS sought a nonsecure custody order to ensure the safety of the juveniles. The juveniles remained in their father's care. Respondent-mother was granted visitation rights but declined to exercise them.

Adjudicatory and dispositional hearings were held in Polk County District Court on 14 January 2014. By order filed 25 February 2014, the juveniles were both adjudicated neglected and dependent, and R.H. was also adjudicated abused. Custody and placement authority was granted to DSS, the court ordered that the juveniles remain placed with their father, and Respondent-mother was granted supervised visitation. Respondent-mother appeals.

Standard of Review

“The role of this Court in reviewing a trial court's adjudication of neglect and abuse [and dependency] is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.” *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, internal quotation marks, and brackets omitted), *affirmed as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). “If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.” *Id.* (citation omitted). “The trial court's

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conclusions of law are reviewable *de novo* on appeal.” *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation and internal quotation marks omitted).

*Discussion**I. Adjudication of R.H. as an abused juvenile*

[1] Respondent-mother first argues that the district court erred when it adjudicated R.H. an abused juvenile. We disagree.

Under Chapter 7B, an abused juvenile is defined, *inter alia*, as

[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; [or]

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[. . . .]

N.C. Gen. Stat. § 7B-101(1) (2013). Here, the juvenile petition filed by DSS alleged that R.H. was abused under the third prong set out above, to wit, that Respondent-mother “used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]” *See* N.C. Gen. Stat. § 7B-101(1)(c).

We begin by noting, first, that allegations in an abuse petition “must be viewed on a case-by-case basis considering the totality of the evidence[.]” *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007) (citation omitted), and observing, second, that the cases cited by Respondent-mother, DSS, and the Guardian *ad Litem* are inapposite because none concern an adjudication of abuse under subsection 7B-101(1)(c). For example, *In re Mickle*, 84 N.C. App. 559, 353 S.E.2d 232 (1987),

was decided under a statute (section 7A-517(1)) which is no longer in effect. That statute specifically required “a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ” to prove abuse of a juvenile. *See* N.C. Gen. Stat. § 7A-517(1) (Repealed by S.L. 1998-202). Given this

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statutory definition, the *Mickle* Court held that only “injuries permanent in their effect” would sustain a determination of abuse.

In re L.T.R., 181 N.C. App. at 382 n.2, 639 S.E.2d at 126 n.2. The opinions in *In re L.T.R.*, 181 N.C. App. at 380-81, 639 S.E.2d at 125, and *Scott v. Scott*, 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003), each considered whether specific instances of spanking had resulted in “serious physical injury” so as to constitute abuse under section 7B-101(1)(a). See N.C. Gen. Stat. § 7B-101(1)(a) (defining an abused juvenile as one whose parent “[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means”). As such, these cases shed no light on what constitutes abuse by the use of “cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]” See N.C. Gen. Stat. § 7B-101(1)(c).

Our review of the case law reveals only three cases, all unpublished and thus lacking precedential value, in which this Court has considered what actions constitute “cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]” See *id.*¹ Two of those cases involve much more extreme examples of supposed “discipline” of juveniles than the incident here. See *In re C.A.G.*, ___ N.C. App. ___, 754 S.E.2d 258 (2014), available at 2014 N.C. App. LEXIS 53 (findings of fact that a child’s grandmother, *inter alia*, choked him, threatened to force him to eat dog feces, and pointed a gun at him); *In re K.A.*, 217 N.C. App. 641, 720 S.E.2d 461 (2011), available at 2011 N.C. App. LEXIS 2630 (finding that a parent forced the “juvenile to stand in a ‘T-Shape,’ which entailed holding his arms straight out by his side for up to five minutes at a time; plac[ed] duct tape over his mouth; and/or [struck] him with a belt, paddle, switch, or other object”).

However, the third unpublished opinion is both persuasive and closely on point with the facts here. In that case, a juvenile was

1. This Court has never held that corporal punishment of a child constitutes abuse per se under any subsection of 7B-101(1), see, e.g., *In re C.B.*, 180 N.C. App. 221, 224, 636 S.E.2d 336, 338 (2006) affirmed *per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007), and we do not so hold in this case. Rather, each case reviewing whether a particular incident of spanking or other corporal punishment constituted abuse has turned on an analysis of the specifics of the case. Compare *id.*; *In re L.T.R.*, 181 N.C. App. at 380-81, 639 S.E.2d at 125; *Scott*, 157 N.C. App. at 387, 579 S.E.2d at 435; with *In re Rholetter*, 162 N.C. App. 653, 592 S.E.2d 237 (2004) (finding abuse where stepmother choked children, hit them with her fists and a cookie jar, and pulled out their hair); *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989) (finding abuse where child received multiple burns over a wide portion of her body, requiring prompt medical attention).

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adjudicated abused based on subsection 7B-101(1)(c) where the evidence showed that the “[juvenile]’s mother hit [her] in the face with her hand and kicked [her] in the stomach.” *In re Simone*, __ N.C. App. __, __, __ S.E.2d __, __ (2002), available at 2002 N.C. App. LEXIS 2611. When examined by a DSS employee approximately one and one-half hours later, the juvenile’s face was not red or bruised, but her stomach was red where she had been kicked. *Id.* This Court concluded that the evidence was sufficient to establish that the juvenile was abused due to her mother’s “cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]” *Id.* (quoting N.C. Gen. Stat. § 7B-101(1)(c)).

Here, the court’s findings of fact include that Respondent-mother struck R.H. five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon. The court also found that R.H. described the discipline as “a beating.” We cannot say that “a beating” which involves striking a child five times with a belt hard enough to leave multiple bruises still visible a day later is less “cruel” than a single strike to the face which left no mark and a single kick to the stomach which did leave a red mark. Accordingly, we conclude that the findings of fact made by the district court were sufficient to support its conclusion that R.H. is an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(c).

II. Adjudication of H.H. and R.H. as neglected juveniles

[2] Respondent-mother next argues that the district court erred when it adjudicated R.H. and H.H. neglected juveniles. We disagree.

“Neglected juvenile” is defined as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare; or who has been placed for care or adoption in violation of law. . . .

N.C. Gen. Stat. § 7B-101(15). Section 7B-101(15) affords a district court “some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.” *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) (citation omitted). However, in order to support an adjudication of neglect, there must be either “physical, mental, or emotional impairment

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of the juvenile[s] or a substantial risk of such impairment as a consequence of [respondent's] failure to provide proper care, supervision, or discipline. . . ." *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (citation and internal quotation marks omitted; emphasis added)).

Here, along with its findings concerning Respondent-mother's "beating" of R.H., the court's other findings of fact, as well as Respondent-mother's own testimony at the adjudication hearing, reveal the following: On 21 November 2013, Respondent-mother called 911 to report that she could not or would not care for the juveniles. Respondent-mother told the 911 operator that if someone did not pick up the juveniles, she would drop them off at a safe haven. However, before law enforcement or DSS personnel could reach her home, Respondent-mother contacted the juveniles' father and arranged for him to take them. Respondent-mother made this request despite the fact that she had repeatedly stated her belief that the father was a chronic substance abuser.² Respondent-mother told the juveniles she might go to jail for having abused them and that the juveniles would never see Respondent-mother again. The juveniles were scared, crying, and upset when their father arrived at the pickup location in the dark corner of a commercial parking lot that night.³ Respondent-mother had forced the juveniles to stand by themselves outside in the dark while waiting for their father's arrival, while Respondent-mother waited in her car. Respondent-mother drove away as soon as the father arrived in the parking lot. Respondent-mother also declined to exercise her permitted visitation rights with the juveniles in the roughly eight weeks between the time she left them with their

2. We note that the record on appeal does not support Respondent-mother's allegation that the father was a chronic substance abuser. The father cooperated with substance abuse screening offered by DSS. Immediately after the juveniles were placed with their father, he had one positive test for marijuana, but all subsequent tests were negative. At the time of the adjudication hearing, the father had also agreed to complete a substance abuse assessment which was scheduled for the following week. Finally, DSS conducted an investigation of the father's home and found it a "safe and suitable" placement for the juveniles. However, the truth of Respondent-mother's allegation is irrelevant in determining whether the juveniles were neglected as a result of Respondent-mother's actions. The decisive point is that *Respondent-mother apparently believed the father was a chronic substance abuser* when she chose to leave the juveniles in his care, rather than wait for law enforcement or DSS personnel to arrive at her home. That decision reflects Respondent-mother's extremely poor judgment which in turn placed the juveniles at substantial risk of harm if they remained in her care.

3. The record suggests that the father arrived in the parking lot to take the juveniles around 7:00 p.m. On 21 November 2013, the sun set in Columbus, the Polk County seat, at 5:20 p.m. See http://www.sunrisesunset.com/usa/north_carolina.asp (last visited 30 October 2014). Thus, it would have been well after nightfall as the juveniles stood alone and crying in the parking lot.

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father and the date of the adjudication hearing. Respondent-mother “largely refused” to attend classes and meetings recommended by DSS and refused to discuss a case plan for the juveniles.

Thus, by Respondent-mother’s own account, she felt so overwhelmed that she could not care for the juveniles, and, rather than await assistance from law enforcement or DSS, she left the juveniles with a person she believed was a substance abuser without even interacting with him in person to assess his sobriety and current fitness to care for the juveniles. She disciplined R.H. in such an inappropriate manner that he has been adjudicated an abused juvenile and Respondent-mother herself was charged with misdemeanor child abuse. Yet, despite Respondent-mother’s obvious and, in regard to the 21 November incident, self-admitted, inability to properly care for the juveniles, she has refused virtually all assistance offered by DSS. All of this evidence would have supported a finding of fact that Respondent-mother placed the juveniles at “a substantial risk of [physical, mental, or emotional] impairment as a consequence of [her] failure to provide proper care, supervision, or discipline.” *See In re E.C.*, 174 N.C. App. at 524, 621 S.E.2d at 653. Accordingly, there is no error in the district court’s failure to make such a finding. *See In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (noting that, even when “there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding”) (citation omitted).

While the district court’s findings of fact here are sufficient to support its adjudication of neglect, we take this opportunity to urge our district court judges to make detailed findings of fact on *all* competent evidence relevant to juvenile adjudications. In this matter, for example, numerous reports from DSS and the Guardian *ad Litem* were admitted without objection and incorporated by reference in the district court’s order. Those reports contained evidence about past incidents of Respondent-mother (1) failing to provide sufficient food, heating, and stable housing for the juveniles; (2) exposing the juveniles to domestic violence between Respondent-mother and the juveniles’ maternal grandmother; and (3) failing to enroll the juveniles in school. Had the district court made additional findings of fact based on this evidence, they would have provided a more complete context for its adjudication of R.H. and H.H. as neglected juveniles.

III. Adjudication of H.H. and R.H. as dependent juveniles

[3] Respondent-mother also argues that the district court erred by adjudicating H.H. and R.H. dependent juveniles. We agree.

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“Dependent juvenile” is defined as

[a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9). Where, as here, *all* of the evidence and findings of fact indicate that the juveniles are living with a parent who is willing and able to provide for their care and supervision, the juveniles simply cannot be adjudicated dependent.

The adjudication order contains findings of fact that: the juveniles have been placed with their father since 21 November 2013 (findings of fact 22 and 23), DSS has found his home a safe and suitable placement (finding of fact 26), and the juveniles have adjusted well to the placement and their new school (finding of fact 31). The district court also concluded that the juveniles’ placement with their father should be continued (conclusion of law 6). The unchallenged findings of fact, which are presumed supported by competent evidence, *see Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”) (citations omitted), as well as the court’s decision to continue placement with the father, make clear that the juveniles’ father is able to provide proper care for them. Therefore, the district court erred in adjudicating the juveniles dependent.

IV. Order to maintain stable housing and employment

[4] In her final argument, Respondent-mother contends that the district court erred in ordering her to maintain stable housing and employment. Under the circumstances present in this case, we must agree.

Section 7B-904 of our General Statutes describes a district court’s “[a]uthority over parents of juvenile[s] adjudicated as abused, neglected, or dependent[.]” N.C. Gen Stat. § 7B-904 (2013).

A trial court may not order a parent to undergo any course of conduct not provided for in N.C. Gen Stat. § 7B-904. Section 7B-904 provides that a court may order a parent to pay for certain specific treatments, counseling and classes for the child and/or parent The trial court may also order a parent to take appropriate steps to remedy

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conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent. . . . Section 7B-904 does not grant juvenile courts the authority to order a parent to obtain and maintain employment [unless this contributed to the juvenile's removal].

In re W.V., 204 N.C. App. 290, 297, 693 S.E.2d 383, 388-89 (2010) (citations, internal quotation marks, and certain brackets omitted).

Here, nothing in the findings of fact suggests that Respondent-mother's lack of employment or unstable housing contributed to the juveniles' removal from her custody. As reflected by the district court's findings of fact, the primary factors which led to the removal of the juveniles in November 2013 were Respondent-mother's inability to provide proper care and discipline for the juveniles, in that she abused R.H. and neglected both juveniles.

Respondent-mother's inability to properly care for the juveniles *may well be* due to employment, financial, and/or housing concerns, as opposed to emotional, psychological, or other issues. Indeed, as discussed *supra*, there was copious evidence before the district court in the DSS and GAL reports which suggested that Respondent-mother moved the juveniles frequently, had suffered from unstable housing situations in the past, and was financially dependent on her own mother despite an apparently conflicted relationship which resulted in domestic violence between them. However, the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from Respondent-mother's custody or formed the basis for their adjudications. Accordingly, the court lacked authority to order Respondent-mother to maintain stable housing and employment, and that portion of the order must be vacated.

Conclusion

We affirm the adjudication of R.H. as an abused juvenile and the adjudication of H.H. and R.H. as neglected juveniles. We reverse the adjudication of H.H. and R.H. as dependent juveniles. We vacate the district court's order for Respondent-mother to maintain stable housing and employment.

AFFIRMED in part; REVERSED in part; VACATED in part.

Judges GEER and McCULLOUGH concur.

IN RE POWELL

[237 N.C. App. 441 (2014)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY COURTNEY M. POWELL AKA COURTNEY POWELL (PRESENT RECORD OWNER(S): COURTNEY M. POWELL) IN THE ORIGINAL AMOUNT OF \$107,813.00 DATED NOVEMBER 12, 2008, RECORDED IN BOOK 6092, PAGE 635, DURHAM COUNTY REGISTRY SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE

No. COA14-498

Filed 2 December 2014

Deeds—deeds of trust—foreclosure—notice of hearing

The trial court did not abuse its discretion in denying appellant's motion to set aside a foreclosure order. Rule 4(j1) of the Rules of Civil Procedure is disjunctive, not conjunctive, and the record demonstrates that the trustee diligently attempted service before posting notice of the foreclosure hearing on the subject property.

Judge DILLON concurs in result by separate opinion.

Appeal by Courtney M. Powell from order entered 20 November 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 7 October 2014.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for appellant.

Hutchens Law Firm, by Hilton T. Hutchens, Jr. and Natasha M. Barone, for appellee.

HUNTER, Robert C., Judge.

Courtney M. Powell (“appellant”) appeals from the trial court's order denying her motion to set aside a foreclosure sale of her residence. Appellant contends that the trial court abused its discretion in denying her motion because Substitute Trustee Services, Inc. (“STS”) failed to exercise due diligence before attempting to serve appellant by posting notice of the hearing for foreclosure on her door. Therefore, appellant argues that she was never properly served with notice of the hearing for foreclosure, and the order entered in the foreclosure proceeding is void.

After careful review, we affirm the trial court's order.

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Background

On 12 November 2008, appellant executed a promissory note (“the Note”) and deed of trust (“Deed”) securing the note with Bank of America, N.A. for the purchase of her residence in Durham, North Carolina (“the subject property”). Bank of America then assigned all of its interest in the Note and the Deed to Nationstar Mortgage, LLC (“Nationstar”).

Appellant defaulted on the Note on or around 1 September 2012. By letter dated 5 March 2013, Nationstar sent a notice of default to appellant advising her of the amount necessary to be paid within 45 days to cure default. This notice was sent by first class mail to the subject property and was received by appellant. The notice also provided that if appellant failed to cure her default, all amounts due on the Note would be accelerated and foreclosure proceedings would be initiated. Nationstar then sent appellant notice of her right to dispute the debt owed within thirty days pursuant to N.C. Gen. Stat. § 45-21.16(c)(5a) (2013) and informed appellant that Nationstar had begun to proceed with a foreclosure action. Appellant claimed that she “may” have received this notice at the subject property. Appellant failed to cure her default, so Nationstar appointed STS as substitute trustee under the Deed. On 26 April 2013, STS filed a notice of hearing prior to foreclosure in Durham County, and the foreclosure hearing was scheduled for 5 June 2013 at 11:00 a.m.

On 29 April 2014, STS attempted to serve appellant with notice of the foreclosure hearing by sending a copy of the notice to the Durham County Sheriff’s office to be served personally on appellant at the subject property. Durham County Sheriff’s Deputy Mike Veasey (“Deputy Veasey”) went to the subject property at 2:50 p.m., but appellant was not home. Deputy Veasey posted notice of the hearing on appellant’s door. On 1 May 2013, STS then mailed a copy of the notice via certified mail to appellant at the subject property address. The certified mail was not claimed by appellant and was subsequently returned to counsel for STS on 22 May 2013. Appellant contends that she did not see the notice posted on her door by Deputy Veasey and did not receive the notice sent by certified mail.

The foreclosure hearing took place on 5 June 2013 without appellant’s presence. By order entered the same day, the clerk of court authorized Nationstar to foreclose under the power of sale contained in the Deed. The sale of the subject property was scheduled for 26 June 2013 at 10:00 a.m. Three copies of the notice of foreclosure sale were mailed to appellant at the subject property address. The sale took place as planned

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on 26 June, with Nationstar submitting the highest bid. On 15 July 2013, Nationstar sent appellant notice via UPS and regular mail to vacate the subject property.

On 9 August 2013, appellant filed a motion to set aside the foreclosure order pursuant to North Carolina Rule of Civil Procedure 60(b) (4). At the hearing on appellant's motion, appellant contended that the notice to vacate was the first time that she became aware of the foreclosure proceedings. The trial court denied appellant's motion to set aside the foreclosure order. Appellant filed timely notice of appeal.

Discussion

Appellant argues that the trial court abused its discretion by denying her motion to set aside the foreclosure order because STS did not exhaust all necessary methods of service before relying on constructive notice, or in the alternative, did not put forth a diligent effort to serve defendant before relying on constructive notice. We disagree.

Appellate review of an order denying relief under North Carolina Rule of Civil Procedure 60(b) is "limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason." *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (internal quotation marks omitted). "If there is competent evidence of record on both sides of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, and the trial court's findings supported by competent evidence are conclusive on appeal." *Id.* at 165, 574 S.E.2d at 134-35.

N.C. Gen. Stat. § 45-21.16 provides that notice of a hearing prior to a foreclosure under power of sale must be served on all parties by any manner set forth in Rule 4 of the North Carolina Rules of Civil Procedure. Section 45-21.16(a) specifies that service may be achieved by posting the notice to the subject property whenever service by publication would be permissible under Rule 4(j1). Pursuant to Rule 4(j1), "when a party cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service," the party may be served by publication. N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2013).

Appellant offers two arguments in support of her contention that service here was ineffective: (1) the use of the word "or" in Rule 4(j1) is conjunctive rather than disjunctive, and therefore a party must attempt service by personal delivery, registered/certified mail, *and* designated

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delivery service before it may rely on posting notice to the subject property; or in the alternative, (2) if the word “or” is disjunctive, STS did not exercise due diligence before relying on posting. We are not persuaded.

First, we conclude that the word “or” in Rule 4(j1) is disjunctive, not conjunctive. “A statute’s words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves.” *Grassy Creek Neighborhood Alliance, Inc. v. City of Winson-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation omitted). “[T]he word ‘or,’ as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately[.]” *Id.* (quoting 73 Am.Jur.2d, *Statutes* § 241 (1974)). Rule 4(j1) provides in relevant part that: “A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication.”

In the considerable amount of caselaw interpreting Rule 4(j1), neither this Court nor our Supreme Court has ever adopted the interpretation espoused by appellant in this case—that a party must attempt personal service, service through registered or certified mail, *and* service through a designated delivery service before resorting to publication. Rather, because our appellate courts have “refused to make a restrictive mandatory checklist for what constitutes due diligence,” *Barnes v. Wells*, 165 N.C. App. 575, 582, 599 S.E.2d 585, 590 (2004), and have instead held that a party “is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of due diligence,” *Jones v. Wallis*, 211 N.C. App. 353, 359, 712 S.E.2d 180, 185 (2011), we have consistently applied Rule 4(j1) in the disjunctive.

Specifically, in *Barnes*, this Court analyzed the version of the statute as it existed in 1979. Under the language of the rule, a party could be served with publication after “a diligent but unsuccessful attempt to serve the party under either Paragraph A [personal service] or under Paragraph B [registered or certified mail] or under Paragraphs A and B of this subsection.” *Barnes*, 165 N.C. App. at 582, 599 S.E.2d at 590. The *Barnes* Court held that attempted service via certified mail at an address the respondent later admitted was the correct mailing address, even though the notice was unclaimed for weeks at the post office, constituted due diligence sufficient for the petitioner to rely on service by publication. *Id.* Thus, the Court applied the rule in the disjunctive, holding that the party had exerted due diligence despite no attempt at serving the respondent personally under paragraph A. This interpretation was reinforced in *McCoy v. McCoy*, 29 N.C. App. 109, 111, 223 S.E.2d

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513, 515 (1976), where the Court characterized the statute as requiring “a diligent but unsuccessful attempt to serve [a party] under *one of the preceding subparagraphs* of subsection (9),” not both.

Our concurring colleague argues that Barnes is not controlling because the current language of Rule 4(j1) reflects a change in the General Assembly’s intent, as indicated by its inclusion of the word “cannot” in the statute. Utilizing the logical construct of DeMorgan’s Law, which provides that “the negation of a disjunction is the conjunction of the negatives,” the concurrence argues that the inclusion of the word “cannot” before “with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service” requires at least a showing that a party cannot be served by all three methods before it may be allowed to effect service by publication. Although we believe this interpretation is plausible on its face, we are bound by previous decisions of this Court applying the rule in the disjunctive and allowing service by publication without a showing that all other methods of service would be futile. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). For example, in *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 445 S.E.2d 604 (1994), this Court applied Rule 4(j1) containing the same “cannot . . . with due diligence” language before us. Even though the plaintiff did not make a showing that the defendant could not with due diligence be served by personal delivery, this Court affirmed the trial court’s legal conclusions that the plaintiff’s attempt to serve defendants at their known address by certified mail was a reasonable and diligent effort sufficient to allow service by posting on the subject property. *Id.* at 532-33, 445 S.E.2d at 607.

The issue then becomes whether STS’s efforts at serving appellant with notice of the hearing for foreclosure here constituted due diligence. As noted above, this Court has held that where a petitioner attempted to serve the respondent at their known mailing address via certified mail, but the mail was not claimed by the party to be served, the petitioner exercised due diligence sufficient to allow service by publication. *Barnes*, 165 N.C. App. at 582, 599 S.E.2d at 590; *McArdle Corp.*, 115 N.C. App. at 532-33, 445 S.E.2d at 607. Here, like in *Barnes* and *McArdle*, STS attempted to serve appellant by mailing notice of the foreclosure hearing to her address via certified mail, return receipt requested, but appellant claimed that she did not receive the parcel. It is immaterial that notice was posted to the subject property before and during the attempts to

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serve appellant by certified mail. *See* N.C. Gen. Stat. § 45-21.16(a) (2013) (noting that service by posting “may run concurrently with any other effort to effect service”). STS also took the additional step of attempting personal service through Deputy Veasey, but was unsuccessful. Given that this Court has held repeatedly that an unsuccessful attempt at service via certified mail constitutes due diligence, it follows that an unsuccessful attempt at service via certified mail in addition to an unsuccessful attempt at personal service through the Sheriff’s department also constitutes due diligence.

Accordingly, we conclude that STS exercised due diligence under Rule 4(j1) and section 45-21.16(a) sufficient to allow constructive notice by posting on the subject property.

Conclusion

After careful review, we conclude that Rule 4(j1) is disjunctive, not conjunctive, and the record demonstrates that STS diligently attempted service before posting notice of the foreclosure hearing on the subject property. Thus, we hold that the trial court did not abuse its discretion in denying appellant’s motion to set aside the foreclosure order.

AFFIRMED.

Judge DAVIS concurs.

Judge DILLON concurs in result by separate opinion.

DILLON, Judge, concurring in the result.

I concur in the result reached by the majority that the trial court did not err in denying Appellant’s motion to set aside the foreclosure order. However, I disagree with the majority that Rule 4(j1) of the North Carolina Rules of Civil Procedure is conjunctive, and not disjunctive.

Rule 4(j1) states that a party may be served by publication when that party “**cannot** with due diligence be served by personal delivery, registered or certified mail, **or** by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)[.]” N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2013) (emphasis added). I agree with the majority that “[a] statute’s words should be given their natural and ordinary meaning[.]” *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001). I also agree with the majority that the word “or” in a list typically requires an interpretation that the

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list is to be read in the disjunctive. *See id.* However, when the list is preceded by the word “not” or “cannot,” the context may require that the list be read in the conjunctive. For example, if a father tells his daughter that she is *not* allowed to go to the movies *or* to the football game, the parent has effectively told the child that she is not allowed to do either activity; that is, she may not go to the movies *and* she may not go to the football game. However, if the father tells his daughter that she is *not* allowed to go to the movies *and* to the football game, the parent has only stated that she may not do both activities, but that she could do one *or* the other. In the field of logic, the “not . . . or” construct is governed by a principle known as DeMorgan’s Law, which provides, in part, that the negation of a disjunction is the conjunction of the negatives; that is, “not (A or B)” is the same as “not A *and* not B.” Accordingly, applying DeMorgan’s Law, I believe the plain language of Rule 4(j1) requires a showing that a party may only be served by publication where it is shown that the party cannot with due diligence be served by any of the listed methods, not just one of them. *See State v. Martin*, ___ N.C. App. ___, 762 S.E.2d 1, 2014 N.C. App. LEXIS 591, *12-13 (2014) (unpublished decision) (applying DeMorgan’s Law in construing the former version of N.C. Gen. Stat. § 14-112.2).

I believe that *Barnes v. Wells*, cited by the majority, is not controlling. In *Barnes*, we were construing a prior version of Rule 4 which was not written in the “not . . . or” construct, but rather used the word “or” by itself, providing that a party may be served by publication where “there has been a diligent but unsuccessful attempt to serve the party under either Paragraph A [personal service] or Paragraph B [registered or certified mail] or under Paragraphs A and B of this subsection.” 165 N.C. App. 575, 582, 599 S.E.2d 585, 590 (2004) (construing N.C. Gen. Stat. § 1A-1, Rule 4(j)(9)(1979)). Accordingly, I believe that under the current version of Rule 4, a party may be served by publication where the party cannot with due diligence be served by any of the following: (1) personal delivery, (2) registered or certified mail, (3) a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).

Even though I believe the word “or” in Rule 4(j1) is to be read in the conjunctive, I do not believe the Rule requires that a party must actually attempt to serve the opposing party in all three ways before utilizing service by publication. Rather, the Rule only requires that a party must show that the opposing party “cannot with due diligence be served” by any of the three methods. In the present case, the substitute trustee attempted to serve Appellant by personal service at her home through the Sheriff’s office and by certified mail. Based on the foregoing, where

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the appellant has refused to claim a certified letter, I believe that it is proper to conclude that the appellant could not with due diligence have been served by UPS or FedEx or another method authorized pursuant to 26 U.S.C. § 7502(f)(2). In a case cited by the majority, we have held that a party “is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of ‘due diligence.’ This is particularly true when there is no indication in the record that any of the steps would have been fruitful.” *Jones v. Wallis*, 211 N.C. App. 353, 359, 712 S.E.2d 180, 185 (2011). Accordingly, I agree with the majority that the trial court did not err in denying Appellant’s motion to set aside the foreclosure order.

PHILIP J. MOHR, AS ADMINISTRATOR OF THE ESTATE OF SAM MONROE MATTHEWS, PLAINTIFF
v.
JOHN C. MATTHEWS, GLORIA MATTHEWS, AND JOBY MATTHEWS, DEFENDANTS

No. COA14-271

Filed 2 December 2014

1. Negligence—social host liability—contributory negligence—driving while voluntarily intoxicated

The trial court did not err by granting defendants’ motion to dismiss plaintiff’s action for negligence under a common law theory of social host liability. Plaintiff’s claim was barred by decedent’s contributory negligence of driving while voluntarily intoxicated.

2. Negligence—social host liability—special relationship—parent and child—decedent no longer a minor

The trial court did not err by granting defendants’ motion to dismiss plaintiff’s action for negligence under a common law theory of social host liability even though plaintiff alleged a special relationship of parent and child. Because decedent was over 18 years old at the time of the accident, he was not a minor and, therefore, was not under the legal control of his parents.

Appeal by plaintiff from order entered 12 November 2013 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 27 August 2014.

Wall Esleeck Babcock, LLP, by Andrew L. Fitzgerald, Hannah K. Albertson, and Margaret S. Shipley, for plaintiff-appellant.

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Davis and Hamrick, L.L.P., by James G. Welsh, Jr., for defendant-appellee John C. Matthews.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Deborah J. Bowers, for defendants-appellees Gloria Matthews and Joby Matthews.

DAVIS, Judge.

Philip J. Mohr (“Plaintiff”), administrator of the Estate of Sam Monroe Matthews, appeals from the trial court’s order granting the motion to dismiss of Defendants John C. Matthews (“John”), Gloria Matthews (“Gloria”), and Joby Matthews (“Joby”) (collectively “Defendants”) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, Plaintiff contends that his complaint stated a valid claim for negligence regarding the death of Sam Monroe Matthews (“Sam”). Specifically, Plaintiff contends that Defendants negligently allowed Sam to consume an excessive amount of alcohol despite their knowledge of his intent to operate a motor vehicle. After careful review, we affirm.

Factual Background

We have summarized the pertinent facts below using Plaintiff’s own statements from his complaint, which we treat as true in reviewing the trial court’s order dismissing his 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.”).

On 1 April 2011, Sam, who at the time was 19 years old, attended a cookout at the home of his paternal grandparents, Joby and Gloria, in Davie County, North Carolina. Sam’s father, John, and his stepmother, Lisa Matthews, were also at the cookout. Sam arrived at around 7:00 p.m. and began drinking beer and liquor provided to him by Defendants. During the course of the evening, Sam continued to consume alcoholic beverages and became visibly intoxicated. Defendants continued to provide Sam with additional alcoholic drinks and encouraged him to continue drinking despite his noticeably increasing level of intoxication.

Prior to 1 April 2011, Defendants had on a number of occasions provided Sam with alcohol and permitted him to consume alcohol at their homes despite the fact that he was under the legal drinking age. Defendants had actively encouraged Sam to drink alcoholic beverages on these occasions and had hosted parties where alcohol was provided

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to other individuals below the legal drinking age who were in attendance. Defendants were aware that following his consumption of alcoholic beverages at such gatherings, Sam would often drive — especially when he was agitated or angry.

At the cookout on the evening of 1 April 2011, Sam and John had a disagreement concerning whether John would provide money for Sam to attend college. Earlier that evening, one or more of Defendants had talked with Sam about him taking Gloria's car back to Winston-Salem the following day to clean and detail it. Sam had previously performed this task after other gatherings at his grandparents' house. At no time during the evening did Defendants instruct Sam not to drive that night nor did they take any measures to prevent Sam from obtaining the keys to Gloria's car. In fact, one or more of the Defendants informed Sam that evening that the keys to Gloria's car were in the ignition.

At approximately 1:30 a.m., Defendants decided to go to bed. When asked if he was also coming up to bed, Sam replied that he was going to have one more drink. Defendants then went upstairs. Approximately 20 minutes later, while still intoxicated and agitated from his disagreement with John, Sam got into Gloria's car and began driving toward Winston-Salem.

Before he got out of his grandparents' subdivision, the vehicle crashed into a tree and caught fire. Sam died at the scene of the wreck. An autopsy report revealed that the primary causes of his death were smoke and fume inhalation and blunt force trauma to his head. The autopsy report also revealed that at the time of the accident Sam's blood alcohol level was 0.17.

On 1 April 2013, Plaintiff filed an action against Defendants in Forsyth County Superior Court alleging that their negligence proximately caused Sam's death. On 3 May 2013, Joby and Gloria filed a joint answer containing a motion to dismiss pursuant to Rule 12(b)(6). On 21 June 2013, John filed an answer also containing a motion to dismiss based on Rule 12(b)(6).

On 12 November 2013, the motion to dismiss was heard by the Honorable David L. Hall in Forsyth County Superior Court. On that same date, Judge Hall entered an order granting Defendants' motion to dismiss with prejudice. Plaintiff filed a timely notice of appeal.

Analysis

On appeal, Plaintiff contends that the trial court erred in granting Defendants' motion to dismiss.

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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. 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.

Gilmore v. Gilmore, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (internal citations, quotation marks, and brackets omitted).

A. Contributory Negligence

[1] Plaintiff contends that he pled a proper cause of action for negligence under a common law theory of social host liability. Our Supreme Court has held that “an individual may be held liable on a theory of common-law negligence if he (1) served alcohol to a person (2) when he knew or should have known the person was intoxicated and (3) when he knew the person would be driving afterwards.” *Camalier v. Jeffries*, 340 N.C. 699, 711, 460 S.E.2d 133, 138 (1995). In his complaint, Plaintiff alleged that Defendants served alcohol to Sam despite being aware that he was already intoxicated and that they knew or should have known that he had a propensity to drive when simultaneously agitated and inebriated. We believe the trial court's dismissal of Plaintiff's complaint was proper based on the doctrine of contributory negligence.

It is well established that “[c]ontributory 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.” *Cone v. Watson*, __ N.C. App. __, __, 736 S.E.2d 210, 213 (2012) (citation, quotation marks, and brackets omitted). In order to establish contributory negligence, it must be shown “(1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury.” *Thorpe v. TJM Ocean Isle Partners LLC*, __ N.C. App. __, __, 733 S.E.2d 185, 190 (2012), *disc. review denied*, 366 N.C. 586, 739 S.E.2d 846 (2013). In addition, a court may dismiss a complaint based on contributory negligence pursuant to Rule 12(b)(6) “when the allegations of the complaint taken as true show negligence on the plaintiff's part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom.” *Sharp v. CSX Transp., Inc.*, 160 N.C. App. 241, 244-45, 584 S.E.2d 888, 890 (2003) (citation, quotation marks, and brackets omitted).

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Our analysis in the present case is governed by our Supreme Court's decision in *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992). In *Sorrells*, the decedent and his friend were highly intoxicated at a bar and showed visible signs of impairment. *Id.* at 646-47, 423 S.E.2d at 73. Their waitress asked the decedent's other friends who was driving and they responded that the decedent intended to drive and that he should not be served any additional alcoholic beverages. *Id.* Upon the waitress' refusal to serve him any additional drinks, the decedent and his friend went to the bar and attempted to order drinks directly from the bartender. *Id.* at 647, 423 S.E.2d at 73. The waitress informed the manager of the situation and expressed her belief that the decedent should not be served any more alcoholic beverages. The manager, however, told the bartender to continue serving the decedent. *Id.* The decedent ultimately drove away, lost control of his vehicle, and was killed when he crashed into a bridge abutment. *Id.*

The decedent's estate brought a wrongful death action alleging a violation of North Carolina's Dram Shop Act and also that the negligence of the bar's employees in continuing to serve the decedent alcoholic beverages proximately resulted in his death. The trial court granted the defendant's motion to dismiss under Rule 12(b)(6). This Court reversed the trial court's order but our Supreme Court reinstated the order of dismissal, ruling that the plaintiff's claim was barred by the decedent's contributory negligence.

Plaintiff bases this action on the premise that defendant was negligent in two ways: first, by violating N.C.G.S. 18B and second, by serving alcohol to an intoxicated consumer with knowledge that the consumer would thereafter drive and cause injuries that were reasonably foreseeable. We have recognized that both of these bases may support a recovery for injuries to third parties. However, we conclude that defendant's motion to dismiss was properly granted since plaintiff's complaint discloses an unconditional affirmative defense which defeats the claim asserted and pleads facts which deny the right to any relief on the alleged claim.

In this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence. The Superior Court and the Court of Appeals both found that the allegation that decedent drove his vehicle while impaired established contributory

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negligence as a matter of law. Thus, plaintiff's claim would be barred if defendant was merely negligent.

However, plaintiff argues and the Court of Appeals held that defendant's acts of serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him were sufficient to constitute willful and wanton negligence, such that the decedent's contributory negligence would not act as a bar to recovery. While we recognize the validity of the rule upon which the Court of Appeals relied, we do not find it applicable in this case. Instead, we hold that plaintiff's claim is barred as a result of decedent's own actions, as alleged in the complaint, which rise to the same level of negligence as that of defendant.

It is admitted in this case that decedent, a willing consumer of alcohol, drove his vehicle while highly intoxicated. He did so in violation of N.C.G.S. § 20-138.1. That statute provides that one who drives on a highway while under the influence of an impairing substance commits the misdemeanor offense of impaired driving. This Court has held that a willful violation of this statute constitutes culpable negligence. Proof of both a willful violation of the statute and a causal connection between the violation and a death is all that is needed to support a successful prosecution for manslaughter. Plaintiff cannot dispute either of these elements under the facts as alleged in the complaint. In fact, to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent. Thus, we conclude that plaintiff cannot prevail.

Id. at 647-49, 423 S.E.2d at 73-74 (internal citations, quotation marks, and brackets omitted).

Plaintiff attempts to distinguish *Sorrells* by asserting that the Court relied solely upon the Dram Shop Act in reaching its conclusion as opposed to basing its decision on common law social host liability. The Supreme Court's decision, however, expressly analyzed the plaintiff's claims under common law negligence principles as well as under the Dram Shop Act. *Id.* at 647-48, 423 S.E.2d at 73. Moreover, *Sorrells* has been cited in subsequent cases involving claims based on

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common law negligence where decedents voluntarily consumed alcohol and were found to be contributorily negligent in causing their own deaths. *See Canady v. McLeod*, 116 N.C. App. 82, 87, 446 S.E.2d 879, 882 (“[D]efendant[’s] . . . actions, in furnishing alcohol to the deceased while he was re-roofing a house on a cold and windy December day, may have risen to a level constituting willful and wanton behavior. Despite this, however, we are constrained to hold that the deceased’s own negligence in consuming the alcohol while working on a roof rose to the same level of negligence as that of defendant . . . and thus bars plaintiff’s claim.”), *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994); *see also Meachum v. Faw*, 112 N.C. App. 489, 495, 436 S.E.2d 141, 145 (1993) (“We believe that, as in *Sorrells*, the decedent’s own negligence in driving while voluntarily intoxicated rose to the level of the defendant’s negligence in entrusting the automobile to her. Therefore, we find that, as a matter of law, the plaintiffs’ claim is barred by decedent’s contributory negligence as alleged in the complaint. Hence, plaintiffs’ complaint failed to state a claim upon which relief might be granted, and the trial court properly dismissed the action.”).

B. Special Relationship

[2] Plaintiff also argues that Defendant should be held liable on the theory that a special relationship existed between Sam and Defendants. Specifically, Plaintiff contends that because of Defendants’ blood relationship to Sam, they owed him a special duty to prevent him from harming himself. Based on the facts of this case, we disagree.

It is true that a parent-child relationship is recognized under the law as a special relationship. *Scadden v. Holt*, __ N.C. App. __, __ 733 S.E.2d 90, 92, *disc. review denied*, 366 N.C. 416, 736 S.E.2d 177 (2012). However, the special relationship doctrine is inapplicable here because Sam was past the age of majority at the time of the accident. *See* N.C. Gen. Stat. § 48A-2 (2013) (“A minor is any person who has not reached the age of 18 years.”); *Scadden*, __ N.C. App. at __, 733 S.E.2d at 93 (“A finding that a special relationship exists and imposes a duty to control is justified where (1) the defendant knows or should know of the third person’s violent propensities *and* (2) the defendant has the ability and opportunity to control the third person at the time of the third person’s criminal acts. The ability and opportunity to control must be more than mere physical ability to control. Rather, it must rise to the level of custody, or legal right to control.” (internal citations and quotation marks omitted)).

Because Sam was over 18 years old at the time of the accident, he was not a minor and, therefore, was not under the legal control of

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his parents. *See Bridges v. Parrish*, 366 N.C. 539, 542, 742 S.E.2d 794, 797 (2013) (under the special relationship doctrine, “the parent of an *unemancipated child* may be held liable in damages for failing to exercise reasonable control over the child’s behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control.” (citation and quotation marks omitted and emphasis added)). Therefore, Plaintiff’s argument on this issue is overruled.

Conclusion

For the reasons stated above, the order of the trial court granting Defendants’ motion to dismiss is affirmed.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.

CHRISTIE LYNN MOORE, PLAINTIFF

v.

HAROLD GAIL MOORE, JR., DEFENDANT

No. COA14-374

Filed 2 December 2014

1. Appeal and Error—appealability—wrong order

Although defendant father contended in a child support case that the trial court abused its discretion when it required him to pay 100% of the private school tuition for the parties’ minor children, this issue was not properly before the Court of Appeals. Defendant did not appeal from the 2007 order, but instead appealed from the 2013 order modifying custody and reapportioning uninsured medical expenses.

2. Child Custody and Support—support—uninsured medical expenses—trial court without authority to modify without request

The trial court abused its discretion in a child support case by ordering defendant to pay 100% of the uninsured medical expenses for the parties’ minor children. Because neither party requested a modification of the existing uninsured medical expense obligation, the trial court was without authority to modify the previously

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agreed upon provision on its own motion. Therefore, this portion of the trial court's order was reversed and remanded for reinstatement of the previous provisions.

Judge ERVIN concurring in part and concurring in the result in part by separate opinion.

Appeal by defendant from order entered 30 September 2013 by Judge Beth S. Dixon in Rowan County District Court. Heard in the Court of Appeals 8 September 2014.

No Brief, for Plaintiff.

Homesley & Wingo Law Group PLLC, by Andrew J. Wingo, for Defendant.

BELL, Judge.

Defendant Harold Gail Moore, Jr. appeals from an order modifying a previous consent order addressing child support, alimony equitable distribution, court costs and counsel fees. The order from which Defendant appeals maintained the prior custody arrangements between the parties with respect to their minor daughter, awarded sole custody of the parties' minor son to Defendant, maintained the existing child support payment amounts, mandated that Defendant pay all uninsured medical expenses, and held Defendant in contempt for unlawfully withholding child support payments. On appeal, Defendant contends that the trial court abused its discretion by requiring him to pay 100% of the educational expenses for the parties' minor children, requiring the retroactive payment of medical and extraordinary expenses, and in requiring him to pay 100% of the uninsured medical expenses. After a careful consideration of the parties' arguments in light of the record and applicable law, we conclude that the trial court's order should be reversed in part and remanded to the Rowan County District Court for the entry of a new order not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant married on 11 March 1996. Over the course of their marriage, the couple had two children: one son and one daughter, the son being the older of the two. The parties separated in 2006 and divorced on 5 June 2007. In a consent order dated 30 August 2007, the trial court ordered, among other things, that Defendant pay \$1,000

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per month in child support, that Defendant continue to pay for the children's educational expenses, and that the parties equally share uninsured medical and dental expenses. Custody of their minor children was to be shared equally.

Despite this order, the parties' son began living with Defendant exclusively in March of 2012 after a physical altercation with Plaintiff. Additionally, from 2010 through 2012, Defendant unilaterally deducted amounts from his monthly child support payment on the grounds that Plaintiff had not paid her half of the uninsured medical expenses. Although Defendant deducted over \$7,000 for various expenses, the evidence demonstrated that Plaintiff's unpaid share of the children's uninsured medical expenses was \$3,166.83. Furthermore, Defendant unilaterally enrolled the parties' daughter in numerous extracurricular activities, even when the activities were scheduled during Plaintiff's custodial time, and then deducted the associated costs from his child support payments.

The parties' daughter attended Davidson Day for the 2011-2012 school year, at a cost of \$15,000. Defendant unilaterally removed the parties' daughter from Davidson Day and enrolled her in Southlake Christian Academy, a school with a cost of attendance of \$8,900 annually, for the 2012-13 school year. Defendant enrolled the parties' son in Davidson Day in 2011 but moved him to Mooresville High School in 2012.

Plaintiff worked part-time at Home Depot in October of 2012, earning \$9 per hour. Although Plaintiff initially was able to arrange her work schedule around her custodial time with the parties' daughter, she eventually chose to quit her job because she was no longer able to schedule her job obligations in a way that did not interfere with her parenting time. Plaintiff had no income other than alimony payments made by Defendant, the last of which was made in February of 2013.

Defendant, on the other hand was the sole shareholder and owner of a corporation from which he received pass through income. Defendant was paid a weekly compensation of \$1,750, however his last available tax return indicated that he had received \$405,969 from his business. At the time of the hearing in 2013, the trial court determined that Plaintiff's gross monthly income for the purposes of child support was \$780, stemming from her prior work at Home Depot, and Defendant's monthly gross income was \$41,413.

Based on this evidence, the trial court determined that it was in the best interest of the parties' son that he be primarily placed with Defendant and granted Defendant sole custody. The court further ordered that the

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custody of the parties' daughter would remain the same, that child support would remain unchanged at \$1,000 per month, and that Defendant would be responsible for 100% of the unreimbursed medical expenses. The trial court further found Defendant in civil contempt of court for failing to comply fully with the previous child support order. Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Apportionment of Education Expenses

[1] Defendant argues on appeal that the trial court abused its discretion when it required him to pay 100% of the private school tuition for the parties' minor children. According to Defendant, at the time the 2007 consent order was entered into, the parties' children were in preschool and public school and "the parties had not contemplated private primary school at that time." Furthermore, Defendant contends that the 2007 order was ambiguous because it required him to "continue" to pay educational expenses. According to Defendant, the term "educational expenses" was not defined and the term "continue" could be construed to mean that Defendant was only required to pay whatever education expenses were in existence in 2007, which were minimal compared to the expenses currently being incurred. Defendant reasons that because the language in the 2007 order is ambiguous, the trial court erred in requiring Defendant to continue paying for all educational expenses, including private school tuition, in the order appealed from because it required him to pay an increased, unanticipated amount and apportioned a new extraordinary expense to be paid solely by Defendant. This issue, however, is not properly before this Court.

According to N.C.R. App. P. 3(a) and 3(c), a party may appeal from a particular order or judgment by filing a notice of appeal within thirty days after entry of the judgment or order. A properly filed notice of appeal, which gives jurisdiction to this Court, *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994), must "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C.R. App. P. 3(d). Therefore, "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.* Here, Defendant did not appeal from the 2007 order; he specifically appealed from the 2013 order modifying custody and reapportioning uninsured medical expenses. The 2013 order appealed from by Defendant made no conclusion of law concerning private school tuition or ongoing education expenses and did not order Defendant to pay any percentage of private school tuition or ongoing education expenses. Put simply, the

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order was silent with respect to the parties' obligations concerning the private school tuition or ongoing education expenses of their children.

The trial court did address educational expenses, other than tuition, indirectly in two ways. First, it found Defendant in contempt for withholding amounts from his monthly child support payments to Plaintiff. While some of these amounts were for school-related expenses such as application fees, yearbooks, uniforms, supplies, registration fees and bus route payments, none were for tuition. The trial court found that "[t]he Defendant [was] in willful violation of the prior Order of this Court by failing to pay Plaintiff child support as ordered by the court." Second, the trial court concluded that Defendant "had at all times, and continues to have, the means and ability to comply with the prior Orders of this Court," without interpreting that order's mandate with regard to education expenses or private school tuition. While the testimony at trial addressed the purported intent of the parties regarding the payment of education expenses, the trial court, in its order, did not adopt either parties' interpretation. As such, the issues raised by Defendant regarding education expenses and private school tuition are not before this Court.

B. Uninsured Medical Expense Determination

[2] Defendant next contends that the trial court erred in ordering him to pay 100% of the uninsured medical expenses for the parties' minor children. According to Defendant, the trial court failed to make sufficient findings of fact to support an order requiring him to pay for all expenses, considering the fact that he now has full custody of one of the minor children, and the court additionally erred in reapportioning uninsured medical expenses because the issue was not before the trial court.

"Our review of a child support order is limited to determining whether the trial court abused its discretion." *Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 327, 674 S.E.2d 448, 452 (2009). Generally, "an order of a court of this State for support 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." N.C. Gen. Stat. § 50-13.7(a). Therefore, a "trial court may not, on its own, modify an existing child support order"; its jurisdiction is "limited to the specific issues properly raised by a party or interested person." *Henderson v. Henderson*, 165 N.C. App. 477, 479, 598 S.E.2d 433, 434 (2004) (quoting *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999)).

Both parties made motions before the trial court prior to the entry of the 2013 order. Defendant made a motion to (1) modify the child custody agreement, (2) recalculate child support, and (3) order Plaintiff to

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pay her half of the past out-of-pocket medical expenses. Plaintiff filed a motion to hold Defendant in contempt for failing to make necessary child support payments. Neither party requested that the court reevaluate the apportionment of the uninsured medical expenses. Moreover, uninsured medical expenses were not subsumed in the child support payments pursuant to the 2007 order; the trial court provided for separate payment of the uninsured medical expenses. The facts before us now are strikingly similar to those addressed in a previous unpublished decision rendered by this Court.

In the case of *Parrott v. Kriss*, No. COA09-593, slip op. at 8 (N.C. Ct. App. May 18, 2010), this Court noted that certain education expenses were not included in the prior child support obligation and that the defendant did not seek a modification of those obligations in his motion for a modification of his child support payments. This Court found that “the only issue properly before the [trial] court was the issue of the amount of [defendant’s] child support” because the defendant’s “motion to modify requested a reduction in his monthly child support obligation” and not “to modify other provisions regarding expenses for private school tuition and extracurricular expenses.” *Id.* at 10. Likewise, despite the fact that Defendant sought reimbursement for out-of-pocket medical expenses not paid for by Plaintiff, Defendant never sought in his motion to modify the percentages paid with respect to this issue. Because neither party requested a modification of the existing uninsured medical expense obligation, the trial court was without authority to act as it did in making a modification to the previously agreed upon provision on its own motion. Therefore, we reverse this portion of the trial court’s order and remand this case for reinstatement of the previous provisions regarding uninsured medical expenses.

III. Conclusion

For the reasons set forth above, we conclude that the trial court’s order should be reversed and remanded for entry of a new order not inconsistent with this opinion. All portions of the order unchanged by this opinion shall remain as currently provided; the portion of the trial court’s order requiring Defendant to pay all uninsured medical expenses should be stricken and replaced by the terms of the previous order, which requires an equal sharing of the responsibility.¹

1. Defendant also argued on appeal that the trial court abused its discretion in ordering him to pay the modified medical expense amount and education expenses retroactively. We will not address this issue, however, due to the fact that our holding renders Defendant’s argument moot.

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REVERSED and REMANDED.

Judge McCULLOUGH concurs.

ERVIN, Judge, concurring in part and concurring in the result in part.

Although I concur in the result that my colleagues have reached in this case and in much of the reasoning upon which they have based their decision, I am unable to join their discussion of Defendant's challenge to the trial court's decision with respect to the education expense issue. As a result, I concur in the Court's opinion in part and concur in the result reached by the Court in part.

In his brief, Defendant argues that the trial court erred by requiring him to pay all of the educational expenses incurred on behalf of the parties' minor children, with this argument being predicated on the assertion that the provisions of the 2007 consent judgment governing the payment of the children's educational expenses were ambiguous and that the reference to Defendant's obligation to "continue" to pay the children's educational expenses should be limited to the amount that was being incurred for that purpose at the time that the parties entered into the 2007 consent judgment. Instead of directly addressing the argument advanced in Defendant's brief, however, the Court declines to consider Defendant's contention on the grounds that the trial court's "order was silent with respect to the parties' obligation concerning the private school tuition or ongoing education expenses of their children." As a result, my colleagues conclude that, in the absence of a decision by the trial court in any way relating to the educational expense issue, the Court need not address Defendant's contention with respect to this subject on the merits.

A careful reading of the trial court's 2013 order has convinced me that the trial court did, contrary to my colleagues' apparent conclusion, address Defendant's contention that his exposure to education-related costs should be limited to the level that he was incurring for that purpose in 2007 and hold him in contempt for violating the relevant provision of the 2007 consent order. Admittedly, the trial court's order does not clearly delineate the specific acts which led to the decision that Defendant should be held in contempt. However, as I read its order, the trial court concluded as a matter of law that Defendant was under a continuing obligation to pay for all of the children's educational expenses and held Defendant in contempt for unilaterally reducing the

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child support payments that he made to Plaintiff in an amount equal to a sum consisting, in part, of one-half of certain private school-related expenses.

In its order, the trial court stated in Finding of Fact No. 63 “[t]hat[,] pursuant to a prior consent Order . . . [,] Defendant is to pay the children’s educational expenses[.]” Although the quoted language is denominated as a finding of fact in the trial court’s order, this “finding” is more properly understood as a legal conclusion given that it explains the legal basis upon which Defendant’s liability for the disputed educational expense is predicated. *See Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980) (construing the trial court’s finding that “plaintiff is in need of financial assistance for the support of the minor children and that defendant is capable of providing such assistance” as a conclusion of law). As a result, the trial court did, contrary to my colleagues’ determination, conclude that Defendant was obligated to pay all of the children’s educational expenses.

In addition, the trial court went on to hold that Defendant had violated the 2007 consent order by unilaterally withholding from the child support payments that he made to Plaintiff amounts relating to the children’s school uniforms, school application fees, school supply expenses, bus route payments, and academic registration fees. As should be obvious, these expenses appear to be unique to the private school setting and were not being incurred at the time that the parties entered into the 2007 consent order. Thus, the trial court did, in fact, hold Defendant in contempt for withholding from the monthly child support payments that he made to Plaintiff an amount that Defendant contended that he was not required to pay under his interpretation of the 2007 consent order.¹ For that reason, I am unable to join my colleagues’ apparent decision that the trial court did not make any decision in the order that is currently before us for review relating to the educational expense issue that was adverse to Defendant.

I do not, however, believe that the challenge to the trial court’s decision with respect to the educational expense issue that Defendant

1. Although the argument that Defendant has advanced in his brief with respect to this issue focuses on tuition payments rather than other educational expenses, I do not believe that that fact should have any bearing on the ultimate outcome that we reach with respect to this issue given that the logic of Defendant’s argument would be equally applicable to all education-related expenses rather than being solely applicable to tuition payments.

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has attempted to assert on appeal has merit. As Defendant notes, “[a] consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties.” *Allison v. Allison*, 51 N.C. App. 622, 626-27, 277 S.E.2d 551, 554 (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457 (1975)), *disc. review denied*, 303 N.C. 543, 281 S.E.2d 660 (1981). The primary purpose sought to be effectuated in the contract construction process is determining the intent of the parties “at the moment of its execution.” *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). “It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.” *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (internal citation and quotation omitted). As a result, “[i]f the plain language of a contract is clear, the intention of the parties is [to be] inferred from the words of the contract.” *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996); *see also Corbin v. Langdon*, 23 N.C. App. 21, 25, 208 S.E.2d 251, 254 (1974) (stating that, “[w]here the language is clear and unambiguous, the court is obliged to interpret the contract as written, and cannot, under the guise of construction, reject what parties inserted or insert what parties elected to omit”) (citation and quotation omitted). “An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.” *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004).

After carefully reviewing the relevant contractual language, I am unable to agree with Defendant’s contention that the provisions of the 2007 consent order dealing with responsibility for the children’s educational expenses can be read to limit his liability for the children’s educational expenses to the level being incurred at the time that the parties entered into the 2007 consent order. According to the 2007 consent order, “Defendant will continue to pay for the minor children’s education expenses,” with the children “currently attend[ing]” two specified educational institutions. According to ordinary English usage, the word “continue” means to “persist in an activity or process.” *New Oxford American Dictionary* 376 (3rd ed. 2010). Although Defendant contends that the use of the word “continue,” coupled with the reference to the educational institutions that the children were attending in 2007, sufficed to render the educational expense provisions of the 2007 consent order ambiguous on the theory that the presence of this verbiage suggested that his obligation to pay to educate the children should be commensurate with the level of expense that he was incurring for that purpose in

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2007, I am not persuaded by Defendant's argument. Instead, when read in light of the language that the parties actually used and the complete absence of any language suggesting that Defendant's obligation to pay for the education of his children was subject to any explicit or implicit dollar limit, the relevant provision seems to me to unambiguously mean that Defendant would continue, as he had in the past, to pay whatever level of expense had been reasonably incurred for the children's education. Thus, given the fact that the language contained in the 2007 consent judgment with respect to the manner in which the parties were to pay for the children's education was clear and unambiguous and given the absence of any indication that the level of expense being incurred to educate the children was exorbitant or unreasonably high, the trial court did not err by determining that Defendant was obligated to pay all of the children's educational expenses.

As a result, although I disagree with the Court's decision to refrain from reaching the merits of Defendant's challenge to the educational expense provision, I do not believe that Defendant is entitled to relief from the trial court's order on the basis of his educational expense claim. For that reason, I concur in the result that the Court has reached with respect to this issue without joining the relevant portion of its decision. I do, however, concur in the remainder of the Court's opinion.

STATE OF NORTH CAROLINA

v.

BONRICK LEE BARKSDALE, DEFENDANT

No. COA14-595

Filed 2 December 2014

1. Constitutional Law—effective assistance of counsel—reason for not taking plea—revealed to judge

Defendant was not denied effective assistance of counsel in a prosecution for first-degree burglary, first-degree kidnapping, sexual offenses, and other crimes when his attorney revealed defendant's desire to go to trial because he might get lucky. This occurred before the jury was empaneled, could not have affected the finding of guilt, and did not affect the judge's sentencing decision, given the incredibly heinous crimes that defendant committed.

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2. Constitutional Law—effective assistance of counsel—reason for not taking plea revealed—possible conflict of interest—not prejudicial

Defendant's ineffective assistance of counsel claim was rejected in a prosecution for first-degree burglary, first-degree kidnapping, sexual offenses, and other crimes where defendant argued that his counsel had a conflict of interest in revealing defendant's thoughts about standing trial rather than taking a plea. Even if there was a conflict of interest, it was not per se prejudicial.

3. Sentencing—defendant's refusal of plea bargain—judge's statement

The trial court did not impermissibly punish the defendant for his decision to reject a plea bargain and go to trial in a prosecution for burglary, kidnapping, sexual offenses, and other crimes. In context, the trial court's statement concerning the effect of defendant's crimes on people was a reflection on how terrible the crimes were, not on defendant's choice to go to trial.

4. Constitutional Law—double jeopardy—sentencing—kidnaping—underlying sexual offense

The trial court violated double jeopardy by sentencing defendant for both first-degree kidnapping and two of the underlying sexual assault offenses where the victim was not seriously injured or left in an unsafe place. One of the two sex offense charges must serve as the basis for first-degree kidnapping and the trial court's sentencing order was reversed and remanded.

Appeal by Defendant from judgments entered 16 January 2014 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

DIETZ, Judge.

Defendant Bonrick Lee Barksdale appeals from a lengthy series of felony convictions stemming from a violent attack and sexual assault on two women. Barksdale broke into the victims' home intending to steal laptops visible through a window. But after discovering the couple and

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their young child in the home, Barksdale forced the two women to kiss and touch each other. He then sexually assaulted and attempted to rape one of the victims and later shot the other when she tried to fight him off, nearly killing her.

On appeal, Barksdale argues that his appointed counsel improperly disclosed to the court (outside the presence of the jury) that Barksdale knew how strong the case against him was, but wanted a trial to “take the chance that maybe lightning strikes, or I get lucky, or something.” He also argues that the trial court improperly considered his decision to go to trial in determining the severity of his sentence. Finally, Barksdale argues that his sentences for first degree kidnapping based on sexual assault and for the underlying sexual assault itself violate the double jeopardy clause—an error that the State concedes on appeal.

For the reasons set forth below, we hold that Barksdale did not receive ineffective assistance because his trial counsel’s remarks, even if improper, did not prejudice Barksdale. We likewise hold that the trial court did not improperly increase Barksdale’s sentence based on his decision to go to trial. Because the State concedes error in Barksdale’s sentence—and we agree—we vacate his sentence and remand for resentencing consistent with this opinion.

Facts and Procedural History

In the early morning hours of 25 August 2011, Barksdale broke into an apartment occupied by Jane Doe, Jill Smith, and Smith’s young child, whom the couple raised together.¹ Barksdale had seen two laptops through the window and entered the apartment with the intention of taking them. Ms. Doe, Ms. Smith, and their child were asleep in the bedroom when Ms. Doe woke up and noticed a light was on in the kitchen. Ms. Doe got up to turn off the light and discovered Barksdale standing in her kitchen. She confronted Barksdale and he pulled out his gun. Ms. Doe ran back to the bedroom, yelling for Ms. Smith to take the child and escape out the window.

Ms. Smith took her child and hid in the bathroom. Ms. Doe attempted to hold the bedroom door closed and block Barksdale from entering, but Barksdale threatened to shoot through the door if she didn’t let him in. Barksdale entered the bedroom and asked who else was there. Ms. Doe told him that her girlfriend was in the bathroom. Barksdale then made

1. This opinion uses pseudonyms in place of the victims’ names to protect their privacy.

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Ms. Smith and the child come out of the bathroom and sit on the bed with Ms. Doe.

Barksdale asked them if they had any money and they responded that they didn't. He then told them to "touch each other." Barksdale stood at the foot of the bed, holding his gun, and watched while Ms. Doe and Ms. Smith touched and kissed. After about two minutes, Barksdale instructed them to stop kissing and to go into the other bedroom.

As they were walking through the hallway to the other bedroom, Barksdale pulled Ms. Smith away from Ms. Doe and began "dry humping" her back and touching her breasts. Barksdale, gun still in hand, asked if they had any condoms. When they informed him that they did not, he asked if they had any sandwich bags. Ms. Doe told him where they were in the kitchen, and Barksdale went to get them, returning approximately thirty seconds later. Barksdale told Ms. Smith to get down on the floor, where he removed her clothes and attempted to rape her. Barksdale was unable to rape Ms. Smith with the sandwich bag around his penis, and instead instructed Ms. Smith at gunpoint to get on her knees and "suck my dick." Ms. Smith did as she was instructed because she wanted her family to "make it out alive." Barksdale inserted his penis, with the sandwich bag on it, into Ms. Smith's mouth against her will.

At that point, Ms. Doe grabbed Barksdale and began choking him. Ms. Smith then grabbed and twisted Barksdale's penis. During the struggle, Barksdale fired three or four shots at Ms. Doe. Two of the shots hit her, one in the abdomen and one in the leg. Barksdale also punched Ms. Doe several times, leaving her with a black eye and chipped tooth. Ms. Doe eventually managed to drag Barksdale out to the living room where she yelled for Ms. Smith to "open the door so I can get him out." Ms. Smith opened the door and Ms. Doe pushed Barksdale out of the apartment. Ms. Doe shut and locked the door while Ms. Smith called 9-1-1.

When the ambulance arrived, Ms. Doe was taken away to the hospital. The responding police found a pry mark on one of the apartment's sliding glass doors as well as gunshot damage on furniture inside the apartment. Police also found Barksdale's Maryland driver's license, his hat, his glasses, his cell phone, and a plastic sandwich bag with his DNA on the inside. Barksdale was arrested in Maryland on 26 August 2011 and later extradited to North Carolina.

The State charged Barksdale with possession of a firearm by a felon, two counts of first degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, first degree sexual offense,

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attempted first degree rape, two counts of attempted robbery with a dangerous weapon, and first degree burglary.

Barksdale declined the plea agreement offered by the State and his case went to trial on 13 January 2014. Barksdale's appointed counsel informed the court, on the record but before the jury was impaneled, that he had advised Barksdale of the strength of the State's case. He also explained that he advised Barksdale to accept the State's plea agreement (which carried a maximum 30-year prison sentence), but that Barksdale was unwilling to accept the agreement and wanted to "take the chance that maybe lightning strikes, or I get lucky, or something."

Before counsel disclosed this information, Barksdale consented to the disclosure:

COUNSEL: What he told me -- and I think it's appropriate to tell the Court this. What he told me was --

THE COURT: As long as it's okay with him.

COUNSEL: Is it?

BARKSDALE: Yes.

After disclosing the information, Barksdale's counsel explained that "the big reason why I want to put all this on the record is to let the record reflect that we have done everything in our power to try to convince—try and resolve this case short of trial."

On Barksdale's motion at the close of the State's evidence, the court dismissed the charge of possession of a firearm by a felon. The jury convicted Barksdale on the remaining charges, except that it convicted him of the lesser-included offense of assault with a deadly weapon inflicting serious injury instead of the indicted charge of assault with a deadly weapon with intent to kill inflicting serious injury. The court sentenced Barksdale to consecutive sentences on each conviction, totaling a minimum of 83 years and a maximum of 106 years in prison. After announcing the sentence, the trial judge commented that Barksdale had "affected two lives entirely" and "affected 13 other people's lives, not to mention everyone else that heard anything about this case." Barksdale's counsel timely appealed.

Analysis**I. Ineffective Assistance of Counsel**

[1] Barksdale first argues that he was denied effective assistance of counsel. Barksdale contends that his trial counsel improperly revealed

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attorney-client communications about Barksdale's desire to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something."

We note that Barksdale expressly consented to the disclosure of this attorney-client communication, which seems to undermine his claim that the disclosure was improper. But we need not address whether counsel's conduct was constitutionally deficient because, as explained below, Barksdale failed to show that this purportedly deficient conduct prejudiced him.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that "his counsel's performance was deficient" and that "counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). To prove prejudice, "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotation marks omitted). "[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [the court] need not determine whether counsel's performance was deficient." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (quotation marks omitted).

Here, Barksdale has not shown that, but for counsel's disclosure of the confidential information, the result of his trial would have been different. First, counsel revealed the information outside of the presence of the jury, before a jury had even been impaneled. Thus, counsel's conduct could not have affected the jury's finding of guilt.

Second, Barksdale has not shown that his counsel's comments affected the trial court's decision at sentencing. Barksdale argues that counsel's statements "could have led the judge to regard the defendant in a negative light." But this argument ignores the incredibly heinous crimes that Barksdale committed. He broke into the victims' home in the middle of the night to rob them. He forced the victims to kiss and fondle each other at gunpoint for his own pleasure. He attempted to rape one victim and then forced her to perform oral sex on him. When the women found the courage to fight back, he fired four shots at one of them, hitting her twice and nearly killing her.

Simply put, the trial court would have viewed Barksdale in a "negative light" even without the purportedly deficient conduct of his counsel. Given the monstrous nature of Barksdale's crimes, he has not shown that, but for his counsel's comments concerning rejection of the plea deal, he would have received a more lenient sentence. *See Strickland*

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v. Washington, 466 U.S. 668, 699-700 (1984) (holding that, considering the totality of the evidence, there was no reasonable probability that a lesser sentence would have been imposed but for counsel's alleged error); *State v. Braswell*, 312 N.C. 553, 563-64, 324 S.E.2d 241, 249 (1985) (holding that there was no reasonable probability that the outcome would have been different in the absence of counsel's alleged errors because the evidence against defendant was overwhelming).

[2] Barksdale also argues that he need not show prejudice because his counsel's purportedly deficient conduct resulted from a conflict of interest. The conflict, according to Barksdale, arose from his counsel's desire to protect himself from a future claim of ineffective assistance by disclosing Barksdale's reasons for going to trial. Barksdale argues that this conflict of interest is *per se* prejudicial. We reject this argument because, even if counsel's comments stemmed from a conflict of interest (and we are not persuaded that they did), it is not the type of conflict that is *per se* prejudicial.

In *Cuyler v. Sullivan*, the U.S. Supreme Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. 335, 349-50 (1980). But as our Supreme Court has explained, "[t]he applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court." *Phillips*, 365 N.C. at 121, 711 S.E.2d at 137. It applies in cases involving "an attorney's multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters." *Id.* at 118, 711 S.E.2d at 135.

In *Phillips*, our Supreme Court declined to extend *Sullivan* to a case involving an attorney who continued to represent the defendant after learning that he may need to testify as a fact witness. *Id.* at 121-22, 711 S.E.2d at 137. Similarly, this Court recently declined to apply *Sullivan* where the defendant's attorney had contact with the alleged victim. *State v. Smith*, ___ N.C. App. ___, ___, 749 S.E.2d 507, 509 (2013). In *Smith*, we emphasized that the *Sullivan* exception applies only to "alleged conflicts of interest arising from defense counsel's representation of multiple adverse parties." *Id.*; see also *Mickens v. Taylor*, 535 U.S. 162, 175 (2002) (rejecting lower federal courts' expansive readings of *Sullivan* because "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application").

Barksdale asks this Court to do what our appellate courts were unwilling to do in *Phillips* and *Smith*: extend *Sullivan* beyond cases involving representation of adverse parties. Barksdale urges this Court

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to follow the Colorado Court of Appeals, which applied *Sullivan* in a case where trial counsel breached client confidentiality and “reveal[ed] matters to the court and prosecutors, while keeping the same matters secret from their client.” *Colorado v. Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009).

We decline Barksdale’s invitation to expand the scope of *Sullivan*. The rationale for the *Sullivan* rule is the difficulty in proving prejudice in cases where a lawyer represented multiple adverse parties. See *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137. In that circumstance, it is difficult—if not impossible—to show which decisions by counsel were made because of the purported conflict, as opposed to other reasons. But here, as in *Phillips* and *Smith*, “the facts do not make it impractical to determine whether the defendant suffered prejudice.” *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137. We can review the sentencing proceedings to determine whether the result would have been different but for counsel’s disclosure of the confidential attorney-client communications to the court. As explained above, after reviewing the court’s sentencing pronouncement, and taking into account the heinous nature of Barksdale’s crimes, we conclude that the result would not have been different. We therefore reject Barksdale’s ineffective assistance of counsel claim.

II. Improper Sentencing Considerations

[3] Barksdale next argues that the trial court improperly based its sentencing determination in part on Barksdale’s decision to reject the offered plea agreement and go to trial. After announcing the sentences, the trial judge made the following comment:

THE COURT: These are long sentences and it may seem that they are more than your life time, but what I heard today, yesterday, and the day before, this sentence should be a statement for more than just one life time. You’ve affected two lives entirely, and you’ve affected 13 other people’s lives, not to mention everyone that heard anything about this case.

Barksdale contends that the reference to affecting “13 other people’s lives” shows that the trial court sentenced him because he chose to present his case to a jury. For the reasons that follow, we find no error in the trial court’s sentencing.

It is reversible error for a trial court during sentencing to take into account the defendant’s decision to reject a plea offer and insist on

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a jury trial. *See State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). In determining whether the severity of the defendant's sentence was based on this improper factor, we look at the "totality of the trial judge's remarks" in context. *State v. Tice*, 191 N.C. App. 506, 515, 664 S.E.2d 368, 374 (2008).

This Court addressed a similar issue in *State v. Gantt*, 161 N.C. App. 265, 272, 588 S.E.2d 893, 898 (2003). There, the trial court announced the defendant's sentence with the following comment:

At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Correction[].

Id. We held that "[a]lthough we disapprove of the trial court's reference to defendant's failure to enter a plea agreement, we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because he exercised his constitutional right to trial by jury." *Id.* (quotation marks omitted).

Similarly, in *Tice*, the trial court remarked at sentencing that "[y]ou've had ample opportunities to dispose of this case. The State has given you ample opportunity to dispose of it in a more favorable fashion and you chose not to do so." 191 N.C. App. at 513, 664 S.E.2d at 373. The court then discussed its belief that the defendant had presented false testimony at trial. *Id.* This Court affirmed, holding that, in context, the trial court was simply acknowledging "that defendant made a bad choice, but justified the sentence he imposed on his belief that defendant's evidence was fabricated." *Id.* at 515, 664 S.E.2d at 374-75.

As in *Gantt* and *Tice*, we conclude here that the trial court did not impermissibly punish the defendant for his decision to go to trial. In context, the trial court's statement that "[y]ou've affected two lives entirely, and you've affected 13 other people's lives, not to mention everyone that heard anything about this case" is a reference to the heinousness of Barksdale's crimes. Indeed, the court's mention of not just the jurors but also "everyone that heard anything about this case" demonstrates that the court's concern was how terrible Barksdale's crimes were, not the fact that Barksdale chose to be tried by a jury. Accordingly, as in *Gantt* and *Tice*, we conclude that the trial court's remarks "do not rise to the level of the statements our Courts have held to be improper

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considerations of a defendant's exercise of his right to a jury trial." *Gantt*, 161 N.C. App. at 272, 588 S.E.2d at 898.

Although we reject Barksdale's argument, we take this opportunity to repeat our admonition to trial courts in *Tice* that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." *Tice*, 191 N.C. App. at 516, 664 S.E.2d at 375.

III. Double Jeopardy Violation

[4] Finally, Barksdale argues that sentencing him for both first degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge violates the protections against double jeopardy contained in the United States and North Carolina constitutions. The State concedes this error and we agree.

When a defendant is tried under two different statutes for the same conduct, "the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of our State Constitution is determined by the intent of the legislature." *State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986). A defendant cannot be sentenced under both statutes unless the legislature has authorized cumulative punishment. *Id.* at 21-22, 340 S.E.2d at 39-40.

The offense of first degree kidnapping requires that "the person kidnapped . . . [1] was not released by the defendant in a safe place or [2] had been seriously injured or [3] sexually assaulted." N.C. Gen. Stat. § 14-39(b) (2013). Our Supreme Court has held that in first degree kidnapping cases based on the sexual assault element, "the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *Freeland*, 316 N.C. at 23, 340 S.E.2d at 40-41. Therefore, it is a double jeopardy violation to convict and sentence a defendant for both first degree kidnapping and the sexual offense that constituted the sexual assault element of the first degree kidnapping charge. *Id.* at 21, 340 S.E.2d at 39.

In *Freeland*, the defendant was convicted and sentenced on charges of first degree rape, first degree sexual offense, and first degree kidnapping. 316 N.C. at 14, 340 S.E.2d at 36. But because the only basis for first degree kidnapping in *Freeland* was the sexual assault element of the statute, "the jury must have relied on the rape or sexual offense to satisfy the sexual assault element." *Id.* at 21, 340 S.E.2d at 39. Therefore, our Supreme Court held that the defendant was "unconstitutionally

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subjected to double punishment under statutes proscribing the same conduct.” *Id.* The Court remanded the case for resentencing, stating that “[t]he trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the sexual assault convictions.” *Id.* at 24, 340 S.E.2d at 41.

The present case is indistinguishable from *Freeland*. Barksdale was convicted of first degree kidnapping, first degree sexual assault, and attempted first degree rape of Ms. Smith. In order for the jury to convict him on the charge of first degree kidnapping of Ms. Smith, who was not seriously injured or left in an unsafe place, it was necessary for the jury to find that Barksdale sexually assaulted her. Therefore, one of the two sex offense charges must be the basis for that count of first degree kidnapping. As a result, sentencing Barksdale for all three offenses violated the constitutional protections against double jeopardy.

Accordingly, we reverse the trial court’s sentencing order and remand for resentencing with respect to the convictions for first degree sexual offense, attempted first degree rape, and the count of first degree kidnapping pertaining to Ms. Smith. At the resentencing hearing, the trial court may either resentence Barksdale for second degree kidnapping or it may arrest judgment on one of the two sexual offense convictions.

Conclusion

For the reasons stated above, we find no error in Barksdale’s conviction but we vacate the trial court’s sentencing order in part and remand for resentencing consistent with this opinion.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEPHENS concur.

STATE v. CHAVEZ

[237 N.C. App. 475 (2014)]

STATE OF NORTH CAROLINA

v.

MARGARITO CHAVEZ

No. COA14-255

Filed 2 December 2014

1. Appeal and Error—preservation of issues—written order rendered—driving while impaired

Defendant preserved for appellate review his argument that the trial court erred by denying his motion to suppress evidence in a driving while impaired case. There was no material conflict in the evidence presented, the trial judge clearly rendered the order by stating the rationale for his rulings at the conclusion of the hearing, and the order was ministerially entered by the filing of a written order.

2. Motor Vehicles—driving while impaired—blood draw—pursuant to search warrant—no right to have a witness present

The trial court properly denied defendant's motion to suppress evidence from a blood draw and to dismiss an impaired driving charge. Defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, and defendant did not have a right under N.C.G.S. § 20-16.2 to have a witness present. Furthermore, defendant was not prejudiced by the denial of the opportunity to have a witness observe his condition.

Appeal by defendant from judgment entered on or about 11 October 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 26 August 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Angel E. Gray, for the State.

Katy Strait Chavez, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment for impaired driving arguing his motion to suppress evidence from his blood draw should have been allowed. For the following reasons, we find no error.

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[237 N.C. App. 475 (2014)]

I. Background

The facts of this case are not in dispute: On 5 December 2010, defendant was involved in a two car automobile accident and was cited for “failing to yield the right of way in obedience to a duly erected flashing red light” and driving “[w]hile subject to an impairing substance.” Defendant called his wife, an attorney, at 2:46 a.m.; she was in Florida at the time. Officer A. D. Johnson arrived at the accident scene and after conducting an investigation arrested defendant. At 3:10 a.m., the passenger in defendant’s vehicle called defendant’s wife to let her know he had been arrested. Defendant’s wife began calling various people in Wake County, seeking a witness for defendant. At 3:20 a.m., defendant was informed of his rights and refused to take a breathalyzer test; he asked to call his wife and attorney. Defendant called his wife at 3:20 a.m. At 4:02 a.m., defendant’s wife spoke with Ms. Rebecca Moriello, also an attorney, and asked her to observe “the blow and the -- everything.” At 4:03 and 4:04 a.m., defendant refused to submit to a breathalyzer test. At 4:14 a.m., a warrant was issued for defendant’s blood to be drawn. Ms. Moriello arrived at the jail around 4:20 a.m., and she was informed that she was too late to witness the breathalyzer test. By 4:22 a.m., Ms. Moriello had called defendant’s wife to inform her that she was too late to witness the testing procedures. Defendant’s blood was drawn at 4:34 a.m. Defendant was ultimately released at 6:19 a.m.

On or about 28 June 2012, defendant filed various motions ultimately requesting that the trial court “dismiss the charge against him [or] . . . [i]n the alternative, . . . that any and all evidence beyond the arrest of the Defendant be suppressed[.]” Defendant’s motions were based upon (1) violation of defendant’s Sixth Amendment right because Ms. “Moriello was not allowed to see the Defendant while he was confined in the Wake County Jail[.]” (2) a *Ferguson* violation because Ms. “Moriello was not allowed to view the testing procedures under N.C.G.S. § 20-16.2[.]” (3) a *Knoll* violation because “his release from detention was unreasonably delayed[.]” and (4) lack of “probable cause to believe that a crime had been committed and that he had committed it.”

The Honorable Judge Howard Manning heard the defendant’s motions during the 24 April 2013 session of Criminal Court, and in open court announced his rulings, which were ultimately typed onto AOC-CR-305, Rev. 7/95, “JUDGMENT/ORDER OR OTHER DISPOSITION” as:

MOTION TO SUPPRESS PROBABLE CAUSE DENIED

MOTION TO SUPPRESS THE FERGUSON ISSUE IS
DENIED

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KNOLL MOTION TO DISMISS IS DENIED

6TH AMENDMENT PARTIALLY ALLOWED AS TO ANY
STATEMENTS MADE BY THE DEFENDANT AFTER THE
BLOOD DRAW

ADA MARK STEVENS WILL PREPARE THE ORDER

COURT REPORTER: GINA MACCHIO

On or about 11 October 2013, defendant pled guilty, by an Alford plea, to impaired driving but reserved the right to appeal the trial court's denial of his motions. Defendant appeals.

II. Preservation of Appeal

[1] The State argues that “[d]efendant [f]ailed to [p]reserve an [a]rgument [t]hat [h]e is [e]ntitled to [r]elief [b]ecause [n]o [o]rder [e]xists in the [r]ecord on [a]ppel.” While the “JUDGMENT/ORDER OR OTHER DISPOSITION” does note that “ADA MARK STEVENS WILL PREPARE THE ORDER[,]” which apparently did not occur, the document in our record still substantively rules on defendant’s multiple motions and was signed by the presiding judge; this document constituted “entry” of the order. *See State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (“*Entering* a judgment or an order is a ministerial act which consists in spreading it upon the record. (quotation marks and citation omitted) (emphasis in original)). In addition to *entering* the “JUDGMENT/ORDER OR OTHER DISPOSITION[,]” Judge Manning *rendered* judgment by announcing the rationale for each of his rulings in open court at the conclusion of the hearing on the motions. *Id.* (“*Rendering* a judgment or an order means to pronounce, state, declare, or announce the judgment or order, and is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy.” (citations, quotation marks, and brackets omitted) (emphasis in original)). As we noted in *State v. Barrett*,

N.C. Gen. Stat. § 15A-977(f) (2011), requires that the judge must set forth in the record his findings of facts and conclusions of law. However, N.C. Gen. Stat. § 15A-977(f), has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing. If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress.

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A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.

___ N.C. App. ___, ___, 752 S.E.2d 237, 239 (2013) (citations, quotation marks, and brackets omitted).

There is no material conflict in the evidence presented, the trial judge clearly rendered the order by stating the rationale for his rulings at the conclusion of the hearing, and the order was ministerially entered by the filing of the “JUDGMENT/ORDER OR OTHER DISPOSITION” which addresses each of defendant’s multiple issues raised in his motion at trial, including the ones made on appeal. *See id*; *Oates*, 366 N.C. at 266, 732 S.E.2d at 573. Thus, defendant has preserved this issue for appeal.

III. Defendant’s Rights

[2] Despite the multiple grounds for defendant’s pretrial motions, on appeal, defendant raises only two issues. First, defendant contends that he “had his rights violated when his attorney witness was not allowed to observe the blood draw and his condition even though she arrived before the blood draw had occurred.” (Original in all caps.) Essentially, defendant argues that the trial court should have allowed his *Ferguson* motion to dismiss based upon a constitutional violation of his rights, and, without citation of any authority, defendant asks that we apply the rights to have a witness present for blood alcohol testing performed under North Carolina General Statute § 20-16.2 to blood draws taken pursuant to a search warrant. In addition, defendant contends that a failure to do so is a violation of his constitutional rights. The defendant’s statutory and constitutional arguments are conflated but whether we review for a constitutional or a statutory violation, the standard of review is still *de novo*. *See State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (“Alleged statutory errors are questions of law, and as such, are reviewed *de novo*.” (citation omitted)); *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), (“The standard of review for alleged violations of constitutional rights is *de novo*.”), *disc. review denied*, 363 N.C. 857, ___ S.E.2d ___, *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

Here, the facts, including the timing of when defendant was informed of his rights, defendant’s refusal of the breathalyzer, the issuance of the search warrant, and the blood draw, are not in dispute. Defendant states,

The Trial Court implied that part of the reasoning behind its denial of the motion to suppress or dismiss

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was that the blood draw was made pursuant to a warrant issued by the magistrate. An example offered by the Court was that a search warrant could not be delayed until an attorney arrived. However the reasoning in this argument is flawed. The testing in this case did not have to be delayed at all to accommodate the witness.

Actually, the trial court did not just imply that the reasoning behind the denial of the motions was that the blood draw was made pursuant to a warrant — that is actually what the trial court ruled, and properly so. Defendant had no constitutional right to have a witness present for the execution of the search warrant, which in this situation was performing a blood test, and the timing of Ms. Moriello's arrival is irrelevant to the issue defendant has presented on appeal.¹

Defendant directs our attention to North Carolina General Statute § 20-16.2(a) regarding his right to have an attorney and/or witness present for his chemical analysis. *See* N.C. Gen. Stat. § 20-16.2 (2009). Defendant then cites case law, and his arguments regarding each case are contingent upon the applicability of North Carolina General Statute § 20-16.2 to his blood test. However, North Carolina General Statute § 20-16.2 is not applicable to this case because defendant's blood was drawn pursuant to a search warrant.

Our Supreme Court determined in *State v. Drdak*,

The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests. This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1.

1. Under North Carolina General Statute § 20-16.2(a), there is a 30 minute waiting period allowed for a witness "to view the testing procedures" performed under that statute, N.C. Gen. Stat. § 20-16.2(a)(6) (2009), usually an breathalyzer test. The undisputed evidence showed that Ms. Moriello arrived after the 30 minute period had expired; also, defendant has abandoned his *Ferguson* argument on appeal.

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. . . .

Basically, the defendant's constitutional arguments must fail because of defendant's flawed contention that the State is limited to evidence of blood alcohol concentration which was procured in accordance with the procedures of N.C.G.S. § 20-16.2. This defective argument results from the failure of the defendant to recognize the other competent evidence clause provided in N.C.G.S. § 20-139.1(a). We hold that none of the constitutional rights of the defendant have been violated.

330 N.C. 587, 592-94, 411 S.E.2d 604, 607-08 (1992) (quotation marks omitted). In *State v. Davis*, this Court relied on *Drdak*, and noted, "We hold that testing pursuant to a search warrant is a type of other competent evidence referred to in N.C.G.S. § 20-139.1." 142 N.C. App. 81, 85-86, 542 S.E.2d 236, 239 (quotation marks omitted), *disc. review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001). While *Davis* went on to conclude that the officers ultimately had complied with North Carolina General Statute § 20-16.2, *id.* at 84-87, 542 S.E.2d at 238-40, under *Drdak* and *Davis*, if there is "other competent evidence[,]" we need not consider issues as to compliance with North Carolina General Statute § 20-16.2. *Davis*, 142 N.C. App. at 85-86, 542 S.E.2d at 239; *Drdak*, 330 N.C. at 592-94, 411 S.E.2d at 607-08. Furthermore, *Davis* plainly states that "a search warrant is a type of other competent evidence[.]" 142 N.C. App. at 86, 542 S.E.2d at 239.

The relevant portion of North Carolina General Statute § 20-139.1 provides,

In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. *This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.*

N.C. Gen. Stat. § 20-139.1(a) (2009) (emphasis added). As defendant's blood draw was performed pursuant to a valid search warrant, we conclude that the trial court properly denied defendant's motion to suppress the blood evidence and to dismiss the impaired driving charge. *See State v. Shepley*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Nov. 4, 2014)

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(No. COA14-390) (“We hold that, because defendant’s blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, [defendant] did not have a right under N.C. Gen. Stat. § 20-16.2 to have a witness present.”). This argument is overruled.

Secondly, we have thoroughly reviewed defendant’s argument based upon *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), that defendant “was denied the opportunity to have a witness observe [his] condition and that lost opportunity cause[d] prejudice[.]” We conclude that defendant fails to show prejudice on the facts in this case. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
ANDREW GRADY DAVIS

No. COA14-443

Filed 2 December 2014

1. Evidence—first-degree rape—irrelevant—unduly prejudicial

The trial court did not err in an assault with a deadly weapon, first-degree burglary, and first-degree rape case by preventing defendant from presenting evidence regarding the conditions of the police department’s evidence room refrigerators. The evidence was irrelevant under Rule 401 of the North Carolina Rules of Evidence and its probative value was substantially outweighed by the risk of unfair prejudice pursuant to Rule 403.

2. Evidence—first-degree rape—improperly excluded under Rule 412—not prejudicial

The trial court did not commit prejudicial error in an assault with a deadly weapon, first-degree burglary, and first-degree rape case. Although the trial court improperly excluded relevant evidence

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[237 N.C. App. 481 (2014)]

under N.C.G.S. § Rule 412(b)(2) by preventing defendant from presenting evidence that the victim had had a consensual sexual encounter with defendant's roommate within 72 hours of the rape, defendant failed to show prejudice.

3. Satellite-Based Monitoring—aggravated offense—date of offense—prior to enactment of statute

The trial court erred in a first-degree rape case by submitting defendant to lifetime sex offender registration and satellite-based monitoring. Because the date of the offense in this case was 22 September 2001, it could not be considered an “aggravated offense” for the purposes of N.C.G.S. § 14-208.6(1a).

Appeal by defendant from judgment entered 10 June 2013 by Judge C. Phillip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 23 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General K. D. Sturgis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

HUNTER, Robert C., Judge.

Andrew Grady Davis (“defendant”) appeals from judgment entered after a jury convicted him of assault with a deadly weapon, first degree burglary, and first degree rape. On appeal, defendant argues that the trial court erred by preventing him from presenting evidence as to: (1) the conditions of the Asheville Police Department (“APD”) evidence refrigerator; (2) prior sexual behavior of the complaining witness; and (3) the investigators’ failure to comply with sexual assault evidence collection protocols. Additionally, defendant contends that the trial court erred by ordering him to register as a sex offender and enroll in satellite-based monitoring (“SBM”) for the remainder of his life.

After careful review, we conclude that the trial court did not err in excluding evidence pertaining to the conditions of the APD refrigerator, did not commit prejudicial error by excluding evidence of the victim’s prior sexual behavior, but did err by enrolling defendant in SBM under an inapplicable statute. Accordingly, we remand the case for resentencing.

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[237 N.C. App. 481 (2014)]

Background

The following evidence was presented at trial: On the night of 22 September 2001, C.W.¹ was dropped off at her townhouse apartment in Asheville, North Carolina. After putting on her pajamas and watching television, she fell asleep on the downstairs couch; her roommate was asleep upstairs. C.W. awoke to the sound of someone coming through the unlocked sliding glass patio door. An individual shoved C.W.'s face onto the couch, put a knife to her neck, and threatened to kill her if she screamed. The assailant put a cloth or sock into C.W.'s mouth, pulled off her shorts, and vaginally raped her with his penis. The assailant ran the knife over C.W.'s body, leaving scratches on her buttocks and arm. The attacker then stopped abruptly and covered C.W. with a blanket. C.W. testified that because it was dark and she was facing toward the couch, she could not see the assailant's face, but could tell from seeing his arm that he was Caucasian. After she was sure that the assailant had gone, C.W. ran to her neighbor Keith Bartell's ("Bartell's") house and called the police.

C.W. was taken to the hospital, where nurses treated her wounds and performed a sexual assault examination. Medical personnel collected clothing samples, oral swabs, pubic hair combings, and vaginal smears using the sexual assault kit. C.W. told the medical staff that she wasn't sure whether her attacker ejaculated or used a condom. However, she did say that Bartell was not the man who raped her.

During the time period leading up to the attack, Bartell was preparing to move to California and drive there with defendant, who had become Bartell's friend after working in a restaurant together. Three or four days after the rape occurred, defendant and Bartell drove to California, playing golf at various courses along the way. Defendant stayed with Bartell for a few days in California then flew back to Asheville.

Frances Morris ("Morris") of the APD took custody of the sexual assault kit performed on C.W. and stored it in the APD evidence room. On 16 February 2005, the sexual assault kit was submitted to the North Carolina Crime Laboratory at the State Bureau of Investigation ("SBI"). On 28 April 2005, ReliaGene Technologies ("ReliaGene"), a private DNA testing company located in New Orleans, Louisiana, received the sexual assault kit from the SBI. For several weeks after Hurricane Katrina

1. A pseudonym will be used to protect the privacy of the alleged victim.

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made landfall in the area, ReliaGene's building had intermittent power. Some of the refrigerators and freezers were moved to a temporary satellite facility in Baton Rouge. After testing the sexual assault kit ("the 2005 lab test"), ReliaGene identified a single profile of cells matching a known sample from C.W. as well as a profile of a single sperm donor. At the time, there was no known sample from defendant to compare to the sperm cell in the assault kit. An SBI employee took custody of the sexual assault kit and the DNA extracts produced by ReliaGene on 16 February 2007.

In March 2010, defendant was charged with offenses relating to the 2001 attack on C.W. Morris, the APD evidence technician, took two oral swabs from defendant and submitted them to the SBI for analysis ("the 2010 lab test"). The SBI Crime Laboratory conducted an additional analysis of the oral and vaginal swabs contained in C.W.'s sexual assault kit. Like ReliaGene, the SBI developed a profile of a single sperm donor in the vaginal swabs. After comparing the sperm profile with the known sample from defendant's oral swab, the SBI found that the sperm matched defendant's DNA. On 15 October 2010, the vaginal and oral swabs in the sexual assault kit, the oral swabs taken from defendant, the DNA extracts generated by ReliaGene, and the DNA extracts generated by the SBI were all mailed back to the APD in one envelope.

On 14 March 2012, APD investigators met to examine the physical evidence collected in the case. The oral swabs taken from defendant were readily located but the swabs from C.W. in the sexual assault kit and the DNA extracts produced by ReliaGene and the SBI could not be found. On 21 March 2012, the APD located the DNA extracts created by ReliaGene and the SBI in a sealed envelope in the APD refrigerator, and on 18 April 2012, the APD located the vaginal and oral swabs in the sexual assault kit in an envelope on a shelf in the property room.

In October 2012, Cellmark Forensics ("Cellmark"), another private DNA testing facility, received the sexual assault kit and the swabs taken from defendant to conduct additional testing ("the 2012 lab test"). They did not conduct their analysis using the DNA extracts produced by ReliaGene or the SBI, which were found in the APD refrigerator. Once again, the sperm cell fraction from the vaginal swabs in the sexual assault kit was found to match defendant's DNA. Additionally, two socks found at the scene of the crime produced partial DNA results of at least two people, including at least one male, with profiles that could not exclude C.W. and defendant as contributors.

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Defendant was tried during the 3 June 2013 criminal session in Buncombe County Superior Court. The jury convicted defendant of first degree rape, first degree burglary, and assault with a deadly weapon, but acquitted him of first degree kidnapping. Defendant was sentenced to consecutive terms of 285 to 351 months and 75 to 99 months imprisonment and was ordered into lifetime enrollment in SBM. Defendant filed timely written notice of appeal.

Discussion**I. Evidentiary Rulings on APD Evidence Room Conditions**

[1] Defendant first argues that the trial court erred by preventing him from presenting evidence regarding the conditions of the APD evidence room refrigerators, namely, that the refrigerators were moldy and that evidence was kept in a disorganized and non-sterile environment. The trial court excluded this evidence as irrelevant under Rule 401 of the North Carolina Rules of Evidence and because its probative value was substantially outweighed by the risk of unfair prejudice pursuant to Rule 403. After careful review, we find no error in the trial court's rulings.

Standard of Review

"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). "A trial court's ruling on relevant evidence is not discretionary and therefore is not reviewed under the abuse of discretion standard." *State v. Moctezuma*, 141 N.C. App. 90, 94, 539 S.E.2d 52, 55 (2000).

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

State v. Blackney, __ N.C. App. __, __, 756 S.E.2d 844, 847 (2014) (citation omitted).

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[237 N.C. App. 481 (2014)]

A. Rule 401

Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2013); *Moctezuma*, 141 N.C. App. at 93, 539 S.E.2d at 55. Generally, any evidence that is relevant is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2013).

Here, defendant sought to introduce evidence regarding an investigation into the APD evidence room in April 2011 after narcotics stored for drug trafficking cases had gone missing. Specifically, defendant proffered photographs taken during that investigation depicting the conditions of the evidence room refrigerators. Based on our *in camera* review of the sealed documents, we agree with defendant that the photographs show substandard conditions. The photographs reveal what appears to be a mold-like substance growing in one of the refrigerators. A caption included on one of the photographs contained the notation that “[t]he refrigerated storage was not inventoried to date.” Multiple envelopes and bags containing DNA evidence were kept in various cardboard liquor bottle boxes with no discernable organization. Defendant argues that because the DNA testing linking him to the semen found inside C.W.’s vagina was crucial to his conviction, the evidence pertaining to the conditions of the APD evidence refrigerators was relevant and crucial to his defense. Although we find the conditions of the APD evidence room refrigerator disturbing, we disagree with defendant’s contention.

Independent lab tests on the swabs included in the sexual assault kit were conducted on three separate occasions – in 2005, 2010, and 2012. It is undisputed that the sexual assault kit was either at ReliaGene or the SBI from April 2005 to June 2010, when the first two tests were conducted. Therefore, the conditions of the APD evidence room refrigerator have no bearing on the chain of custody or reliability of those tests. Accordingly, this evidence is clearly irrelevant to the extent that it pertains to the 2005 and 2010 tests, the latter being the first to conclude that defendant’s DNA matched the sperm profile taken from C.W.’s vagina.

Additionally, the only pieces of physical evidence found in an APD evidence room refrigerator were the physical DNA extracts produced by ReliaGene and the SBI during the 2005 and 2010 tests. The 2012 lab test was done “from scratch,” meaning that the original swabs in the sexual assault kit and swabs taken from defendant’s mouth were used to conduct the analysis. Defendant concedes that this evidence was located on 18 April 2012 on a shelf in the APD’s evidence room, not in a refrigerator.

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[237 N.C. App. 481 (2014)]

Although defendant argues that the trial court's refusal to admit the proffered evidence regarding the APD evidence room "denied [defendant] a meaningful opportunity to present a complete defense," he fails to adequately demonstrate the connection between his defense and the APD evidence room refrigerator conditions in 2011. It is undisputed that no pieces of physical evidence were in APD custody from 2005 to 2010, when two tests were conducted confirming the presence of one semen profile in C.W.'s vagina, with the latter test matching defendant's DNA to that profile. Further, there is no indication that any pieces of physical evidence used to conduct further DNA analysis were stored in the APD refrigerators. Given that the conditions of the APD refrigerators had no 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," *Moctezuma*, 141 N.C. App. at 93, 539 S.E.2d at 55, and keeping in mind the "great deference" we give to a trial court's rulings in this context, *Blakney*, __ N.C. App. at __, 756 S.E.2d at 847, we find no error in the trial court's ruling that evidence pertaining to the condition of the APD refrigerator in 2011 was irrelevant under Rule 401.

B. Rule 403

Although the State does not offer argument in support of the trial court's conclusion that this evidence was also inadmissible under Rule 403, we also find no error in that determination. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). As noted above, because defendant's proffered evidence regarding the state of the APD refrigerator is irrelevant to any issue in this case, its probative value is necessarily minimal. In contrast, the photographs of the APD refrigerators may have confused the issues and misled the jury into discounting the quality or reliability of the DNA analyses linking defendant to the crime, despite there being no connection among them. Therefore, we find no abuse of discretion in the trial court's 403 ruling. See *McCray*, 342 N.C. at 131, 463 S.E.2d at 181.

II. Rule 412 Evidence

[2] Defendant next argues that the trial court erred by preventing him from presenting evidence that C.W. had a consensual sexual encounter with Bartell within 72 hours of the rape and the investigators failed to follow their protocol for collecting physical evidence. We find no prejudicial error.

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Rule 412 of the North Carolina Rules of Evidence is also known as the “rape shield law.” See *State v. Edmonds*, 212 N.C. App. 575, 578, 713 S.E.2d 111, 114 (2011). In relevant part, Rule 412 provides that the sexual behavior of a complainant is irrelevant and therefore inadmissible unless such behavior “[i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]” N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (2013). “We review the trial court’s rulings as to relevance with great deference. . . . We believe that the same deferential standard of review should apply to the trial court’s determination of admissibility under Rule 412.” *State v. Khouri*, 214 N.C. App. 389, 406, 716 S.E.2d 1, 12-13 (2011).

Here, defendant sought to offer evidence tending to show that C.W. and her neighbor, Bartell, had a consensual sexual encounter the day before the rape occurred. Defendant also sought to admit into evidence a form containing the applicable protocol for collecting physical evidence. It provided in relevant part that “[i]n sexual assault cases, known blood must also be submitted from any consensual sexual partners of the victim within seventy-two hours of the assault, if DNA typing is requested.” It is undisputed that no biological sample was taken from Bartell or anyone else besides C.W. and defendant. Therefore, defendant argues that the investigators’ failure to obtain a DNA sample from Bartell meant that “he was never excluded as the source of the semen” found in C.W.’s vagina during the sexual assault examination.

We agree with defendant that evidence pertaining to C.W.’s prior sexual encounter with Bartell was relevant under Rule 412 and was improperly excluded. In *State v. Fortney*, 301 N.C. 31, 41, 269 S.E.2d 110, 115 (1980), our Supreme Court held that evidence of specific instances of sexual conduct “offered for the purpose of showing that the act or acts charged were not committed by the defendant” was “clearly intended, inter alia, to allow evidence showing the source of sperm, injuries or pregnancy to be someone or something other than the defendant.” The Court included a footnote observing that the original draft of the rape shield law expressly provided for evidencing showing “an origin of semen other than the alleged defendant.” *Id.* at 41, n.2, 269 S.E.2d at 116, n.2. As indicated by the protocol with which the investigators failed to comply, evidence of C.W.’s prior sexual encounter with Bartell the day before the rape was relevant insofar as it may have provided an alternative explanation for the existence of semen in C.W.’s vagina. Therefore, because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error.

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However, we review errors committed by the trial court in excluding relevant evidence under Rule 412 for prejudice. *See State v. Ollis*, 318 N.C. 370, 377, 348 S.E.2d 777, 782 (1986) (citing N.C. Gen. Stat. § 15A-1443 in support of its conclusion that a defendant was prejudiced by the exclusion of evidence under Rule 412(b)(2)). In order to establish prejudice, defendant bears the burden of showing 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) (2013). Defendant has failed to carry that burden here. Although Bartell was not specifically excluded as the source of the sperm in C.W.’s vagina, there is no reasonable possibility that a different result would have been reached at trial had defendant been able to admit evidence of C.W.’s prior sexual encounter with Bartell. First, C.W. told the hospital staff during her sexual assault evaluation that Bartell used a condom during their consensual sexual encounter the day before the rape, and she was certain that her attacker was not Bartell. Second, multiple independent tests showed that defendant’s DNA matched the sperm found in C.W.’s vagina. An expert in DNA analysis testified that “the probability of randomly selecting an unrelated individual with a DNA profile that matches [the sample found in C.W.’s vagina] is one in greater than one trillion, which is more than the Caucasian, Black, Lumbee Indian and Hispanic populations.” Thus, Bartell was effectively excluded as a source for the semen in C.W.’s vagina, despite the fact that his DNA was not specifically analyzed.

Because defendant has failed to demonstrate a reasonable possibility that the verdict would have been different had the evidence of C.W.’s sexual encounter with Bartell been admitted, the trial court did not commit prejudicial error.

III. SBM and Sentencing

[3] In his final argument on appeal, defendant contends that the trial court erred by submitting him to lifetime sex offender registration and SBM. The State concedes that the trial court erred and that this matter should be remanded for resentencing. We agree. The trial court imposed SBM based on its determination that defendant’s conviction for first degree rape constituted an “aggravated offense” as defined by N.C. Gen. Stat. § 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. *See* 2001 N.C. Sess. Law 373, Sec. 12. Because the date of the offense in this case was 22 September 2001, it cannot be considered an “aggravated offense” for the purposes of section 14-208.6(1a). Thus, we conclude

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that the trial court erred by utilizing an inapplicable statutory provision in its determination. Accordingly, we remand for resentencing.

Conclusion

For the foregoing reasons, we conclude that the trial court did not err in its evidentiary ruling regarding the photographs of the APD refrigerator, and it did not commit prejudicial error in excluding evidence under Rule 412. However, because the trial court erroneously ordered defendant into SBM enrollment under an inapplicable statute, we remand for resentencing.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART;
REMANDED FOR RESENTENCING.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA

v.

WILLIAM FRIEND, III

No. COA14-336

Filed 2 December 2014

1. Police Officers—resisting, delaying, or obstructing public officer—seatbelt citation—failure to provide identity

The trial court did not err by denying defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Defendant's failure to provide an officer with the information necessary to issue him a seatbelt citation did constitute resistance, delay, or obstruction. Further, defendant did not make any showing that he was justified in refusing to provide his identity.

2. Assault—physical injury on law enforcement officer—discharging duty of office

The trial court did not err by denying defendant's motion to dismiss the charge of assault causing physical injury on a law enforcement officer even though defendant contended that there was insufficient evidence that Captain Sumner was discharging a duty of his office at the time defendant assaulted him. By remaining at the jail to ensure the safety of other officers, Captain Sumner was discharging the duties of his office.

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3. Appeal and Error—appealability—mootness—fruit of poisonous tree—attack on police officers

Although defendant contended the evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his underlying arrest for resisting, delaying, or obstructing was unlawful, this argument was moot in light of the Court of Appeals' conclusion that defendant's arrest was lawful. Further, the fruit of the poisonous tree doctrine does not operate to exclude evidence of attacks on police officers even where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights.

Appeal by Defendant from judgments entered 6 September 2013 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 23 September 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marc X. Sneed, for the State.

Anne Bleyman, for the Defendant.

DILLON, Judge.

William Friend, III (“Defendant”) appeals from judgments entered upon a jury verdict finding him guilty of injury to personal property; assault on a government officer; resisting, delaying, or obstructing a public officer; and assault causing physical injury on a law enforcement officer.

I. Background

On the evening of 2 August 2012, Captain Sumner and Officer Benton were patrolling a parking lot during their town's annual Watermelon Festival. The officers observed Defendant and his brother enter a pickup truck with Defendant seated in the passenger side.

After Defendant's brother started the truck and put it in reverse, Captain Sumner noticed that Defendant was not wearing his seatbelt and asked him to put it on. However, Defendant did not put on his seatbelt, and he began to back the truck up. Captain Sumner asked Defendant a few more times to put his seatbelt on. However, as the truck backed into the street and began to move forward, Defendant still had not put his seatbelt on. Captain Sumner activated his blue lights and conducted a traffic stop.

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During the traffic stop, Officer Benton approached the passenger side of the truck and asked Defendant for his identification. Defendant told Officer Benton that he did not have identification and refused to provide the information the officer needed to write him a seatbelt citation. Officer Benton advised Defendant that his refusal to cooperate could result in an additional charge. In response, Defendant exited the truck and turned and grabbed onto the truck bed, “bowing up” his chest and telling Officer Benton to arrest him if he thought he could. Officer Benton then placed Defendant under arrest for resisting, delaying, or obstructing a public officer.

It took several officers to put Defendant into handcuffs. During processing at the magistrate’s office, Defendant lowered his shoulder and charged into Officer Benton, though Officer Benton was able to sidestep the charge and avoid injury.

Defendant was then transported by Captain Sumner and another officer to the Hertford County Jail. Captain Sumner escorted Defendant to a holding cell at the jail, removed the handcuffs, and closed the door to the holding cell, believing it would lock behind him automatically. However, the door remained unlocked, and Defendant was able to open it. When Captain Sumner noticed Defendant standing in the holding cell doorway with the door open, he instructed Defendant to get back inside the cell. Instead, Defendant tackled Captain Sumner, knocking him unconscious and damaging his glasses. Captain Sumner suffered a concussion and scratches on the bridge of his nose and was hospitalized.

On 7 January 2013, a grand jury indicted Defendant for resisting, obstructing, or delaying a public officer (refusing to provide his identity for the seatbelt citation); assault on a government officer (charging into Officer Benton); assault causing physical injury on a law enforcement officer (tackling Captain Sumner, giving him a concussion); and injury to personal property (damaging Captain Sumner’s glasses).

Defendant was tried by a jury, who convicted him of all the charges. The trial court entered three judgments: sentencing Defendant to prison (1) for three to thirteen months for the assault on a law enforcement officer causing physical injury conviction; (2) for 150 days for the assault on a government officer conviction; and (3) for sixty days on a judgment consolidating the injury to personal property and resisting, delaying, or obstructing an officer convictions. Defendant gave notice of appeal in open court.

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II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Resisting, Delaying, or Obstructing

[1] In his first argument, Defendant contends that the trial court erred in denying his motion to dismiss the charge of resisting, delaying, or obstructing a public officer because his failure to provide Officer Benton with the information necessary to issue him a seatbelt citation did not constitute resistance, delay, or obstruction. We disagree.

The offense of resisting, delaying, or obstructing a public officer is codified in N.C. Gen. Stat. § 14-223 (2012), which makes it a misdemeanor to “willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[.]”

We hold that the failure to provide information about one’s identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14-223. Although no reported North Carolina case has specifically addressed this issue, we find our opinion in *Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760, *disc. review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997), instructive. In *Roberts*, in response to one of the State’s arguments, we held that the failure to provide one’s social security number during a stop was *not* sufficient to establish probable cause to arrest based on a violation of N.C. Gen. Stat. § 14-223. *Id.* at 724, 487 S.E.2d at 768. However, we stated as a basis of our holding that the refusal to provide the social security number “did not hinder or prevent [the police officers] from completing the arrest and citation[.]” *Id.* Unlike *Roberts*, in the present case, Defendant’s refusal to provide identifying information *did* hinder Officer Benton from completing the seatbelt citation. We note that our holding is in line with decisions from other jurisdictions. *See Bailey v. State*, 190 Ga. App. 683, 684, 379 S.E.2d 816, 817 (1989) (refusing to identify oneself after being stopped for a traffic violation constitutes obstruction); *Burkes v. State*, 719 So.2d 29, 30 (1998) (same), *review denied*, 727 So.2d 903 (1999), *cert. denied sub nom, Burkes v. Florida*, 528 U.S. 829, 120 S. Ct. 82, 145 L. Ed.2d 69 (1999); *East Brunswick Tp. V. Malfitano*, 108 N.J. Super. 244, 246-47, 260 A.2d 862, 863 (1970) (same).

There are, of course, circumstances where one would be excused from providing his or her identity to an officer, and, therefore, not subject to prosecution under N.C. Gen. Stat. § 14-223. For instance, the Fifth Amendment’s protection against compelled self-incrimination

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might justify a refusal to provide such information; however, as the United States Supreme Court has observed, “[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.” *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed.2d 292, 306 (2004). In the present case, Defendant has not made any showing that he was justified in refusing to provide his identity to Officer Benton.

Defendant cites *In re D.B.*, 214 N.C. App. 489, 714 S.E.2d 522 (2011), in support of his argument. However, we find *In re D.B.* easily distinguishable. In *In re D.B.*, an officer stopped a juvenile and conducted a *Terry* frisk. *Id.* at 493-94, 714 S.E.2d at 525-26. After the juvenile failed to provide his name, the officer retrieved what he thought was the juvenile’s identification card from one of his pockets. *Id.* at 494, 714 S.E.2d at 526. Instead of an identification card, the officer recovered a stolen credit card. *Id.* at 491, 714 S.E.2d at 524. We reversed the trial court’s denial of the juvenile’s motion to suppress the credit card as evidence, holding that the officer exceeded the reasonable scope of a *Terry* frisk in violation of the juvenile’s Fourth Amendment rights since the stolen credit card was not a weapon or immediately identifiable contraband. *Id.* at 496, 714 S.E.2d at 527. However, in *In re D.B.*, we did not address whether the juvenile’s failure to provide his identity constituted a violation of N.C. Gen. Stat. § 14-223. Accordingly, Defendant’s argument is overruled.

B. Assault Causing Physical Injury on an Officer

[2] Defendant next asserts that the trial court erred in denying his motion to dismiss the charge of assault causing physical injury on a law enforcement officer because there was insufficient evidence that Captain Sumner was discharging a duty of his office at the time Defendant assaulted him. We disagree.

N.C. Gen. Stat. § 14-34.7(c) (2012) proscribes assaulting and physically injuring a law enforcement officer while the officer is discharging or attempting to discharge the duties of his or her office. While unpublished and non-controlling, N.C. R. App. P. 30(e)(3), we find our decision in *State v. Hinson*, 173 N.C. App. 234, 617 S.E.2d 724, 2005 N.C. App. LEXIS 1883 (2005), instructive, and hereby adopt its reasoning. In *Hinson*, the defendant argued that he was not guilty of assaulting an officer because at the time of the assault he was engaging in lawful resistance to illegal police conduct and the officer, therefore, was not discharging his official duties within the meaning of the statute. *Id.* at

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234, 617 S.E.2d at 724, 2005 N.C. App. LEXIS 1883, *5-6. We chronicled the statute's legislative history, reasoning that the intent of the General Assembly in consistently amending the statute to make the offense a more serious crime was to allow a charge for violation of the statute regardless of whether "the officer is assaulted in a location he [has] a legal right to be," and concluded that the requirement that the officer be discharging or attempting to discharge an official duty was still met even where his conduct appeared to violate the Fourth Amendment. *Id.* at 234, 617 S.E.2d at 724, 2005 N.C. App. LEXIS 1883, *10-11. Thus, unlike the offense of resisting, delaying, or obstructing an officer, *see supra*, criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties.

Defendant contends that the trial court erred in denying his motion to dismiss the charge because Captain Sumner was not discharging or attempting to discharge a duty of his office at the time of the assault. His basis for this contention is the testimony of several officers to the effect that Defendant was no longer in Captain Sumner's custody and was instead in the custody of the Hertford County Jail where Captain Sumner happened to be "hanging around" at the time of the assault. This contention lacks merit. On the day in question, Defendant had proven himself extremely uncooperative. Any concerns Captain Sumner may have had about officer safety would thus have been well-founded. By remaining at the jail to ensure the safety of other officers, Captain Sumner was discharging the duties of his office. Accordingly, this argument is overruled.

C. Motion to Suppress

[3] Lastly, Defendant argues that the evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his arrest for resisting, delaying, or obstructing was unlawful. We disagree. In light of our conclusion that Defendant's arrest for resisting, delaying, or obstructing was lawful, this argument is moot. Moreover, Defendant's entire premise is incorrect.

The doctrine of the fruit of the poisonous tree is a specific application of the exclusionary rule. *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). The doctrine provides that evidence obtained as a result of illegal police conduct should be suppressed, as should "all evidence that is the 'fruit' of that unlawful conduct[.]" *Id.* However, the doctrine does not operate to exclude evidence of attacks on police officers where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights.

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State v. Miller, 282 N.C. 633, 640-41, 194 S.E.2d 353, 357-58 (1973). As our Supreme Court has observed, “[a]pplication of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved[.]” *Id.* at 641, 194 S.E.2d at 358. Thus, even assuming, *arguendo*, that the initial stop of Defendant or his subsequent arrest were in violation of his Fourth Amendment rights, the evidence of his crimes against the officers would not be considered excludable ‘fruits’ pursuant to the doctrine. *See id.* Accordingly, this final argument is overruled.

III. Conclusion

For the reasons stated above, we uphold the challenged convictions.

NO ERROR.

Judge HUNTER, Robert C. and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
DERRICK GARDNER

No. COA14-646

Filed 2 December 2014

1. Constitutional Law—right to confrontation—GPS tracking reports

The trial court did not the violate defendant’s right to confrontation by admitting GPS tracking reports. The GPS tracking evidence was properly admitted as a business record since it constituted data compilation.

2. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although defendant argued on appeal that the data obtained from a GPS device violated his constitutional rights because the trial court had previously ordered that the device be removed, he did not present this constitutional issue at trial and it was not preserved for appeal.

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[237 N.C. App. 496 (2014)]

Appeal by defendant from judgments entered 12 January 2014 by Judge Ronald E. Spivey in Rowan County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Leslie Rawls for defendant.

ELMORE, Judge.

On 1 July 2013, defendant was indicted for failure to register as a sex offender (N.C. Gen. Stat. § 14-208.11) and for sex offender residential restriction violation based upon his alleged decision to reside within 1,000 feet of a child care center (N.C. Gen. Stat. § 14-208.16). On 23 September 2013, defendant was also indicted for habitual felon status. Prior to trial, defendant filed a motion *in limine* to exclude GPS data obtained from defendant's satellite-based monitoring system. On 16 January 2014, defendant was found guilty of both charges. He subsequently admitted his habitual felon status. Defendant was sentenced as a prior record level IV offender with 12 prior record level points in the presumptive range to a minimum of 88 months and maximum of 118 months imprisonment.

On appeal, defendant contends that he was denied his right to confront and cross-examine the witnesses against him and denied his right to be free from unreasonable searches and seizures. After careful consideration, we conclude that defendant received a trial free from error.

I. Background

The facts of this case are undisputed: On 21 March 2012, defendant was released from the North Carolina Department of Corrections into the custody of probation officer Josh Barrier (Barrier). Barrier provided defendant with a copy of the post-release conditions. As required, defendant registered his post-release address with the sheriff's department at 930 N. Church Street in Salisbury, his mother's residence. Defendant was assigned a curfew of 6:00 p.m. to 6:00 a.m. as part of his supervision. Barrier informed defendant he was confined to his residence during those hours.

Barrier conducted visual curfew checks of defendant two to three times per week to insure defendant's compliance. Defendant was arrested three times for curfew violations, and he was sent to prison for

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thirty to sixty days on each occasion. As a result of multiple curfew violations, defendant was placed on electronic monitoring on 25 September 2012. The monitoring device tracked defendant's whereabouts and monitored whether he abided by the curfew restrictions and whether he stayed out of exclusion zones.

At trial, the State called Barrier to testify concerning the operation of the electronic monitoring device worn by defendant and the data produced by that device. Barrier explained that the ankle bracelet used GPS and cell phone towers to pinpoint the location of an offender in real time. He stated that the system is monitored twenty-four hours a day and employs the same GPS satellite technology used in phones and cars for navigation. The system logs information including the specific time an offender enters an inclusion zone, which is generally his home address, or when he enters an exclusion zone, which is a prohibited area. Barrier testified that the information transmitted by the bracelet is stored in a secure database and constitutes an accurate and reliable source of information.

On 28 December 2012, defendant asked Barrier if he could move to his girlfriend's residence in Salisbury. Barrier informed defendant that moving to that location would violate the sex offender registry laws as her home was located a block from the Rowan Medical Child Development Center. As an alternative residence, Barrier located a church-run program in Spencer where defendant was permitted to live for free provided he attend church services. Defendant agreed. Defendant registered the church's address with the sheriff's department in early 2013. However, defendant resided at the church for only a month before he was asked to leave due to his continued rule violations. He changed his address back to 930 North Church Street.

On 6 June 2013, Barrier was notified by the electronic monitoring system that defendant had failed to enter his inclusion zone the night before. Barrier reviewed the electronic records and determined that between 15 May 2013 and 6 June 2013, defendant had spent each night at his girlfriend's residence, 900 Holmes Street in Salisbury. Barrier compiled a report based on the electronic data which was admitted into evidence to illustrate defendant's whereabouts during the requisite time periods.

The defense presented the following evidence at trial: Dorothy Gardner, defendant's mother, testified that defendant lived with her from 15 May to 6 June 2013. Cynthia Houston, defendant's girlfriend, testified

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that defendant did not reside with her during the requisite time period. Defendant now appeals from his conviction.

II. Analysis**A. Confrontation Clause**

[1] Defendant first argues the admission of the GPS tracking reports violated his rights under the Sixth Amendment's Confrontation Clause in light of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). We disagree and hold that the GPS tracking evidence was properly admitted as a business record.

We review defendant's Confrontation Clause challenge *de novo*. *State v. Ortiz-Zape*, ___ N.C. App. ___, ___, 743 S.E.2d 156, 162 (2013) *cert. denied*, ___ U.S. ___, ___, 189 L. Ed. 2d 208 (2014). The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187.

This Court has previously held that GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule. *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 55 (2013). "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) (2013). 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 (2013). N.C. Gen. Stat. § 8C-1, Rule 803(6) establishes an exception to the general exclusion of hearsay evidence as applied to 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,

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profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2013). When a business record is stored electronically, it is still 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, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637(2011) (quoting *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973)), *rev. denied*, 365 N.C. 553, 722 S.E.2d 607 (2012). The electronic business records need not be authenticated by the person who made them. *Id.* at 516, 719 S.E.2d at 637-38.

Defendant argues that the facts of this case are distinguishable from the Eighth Circuit decision *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013). We disagree with defendant. Instead, we find *Brooks* both on point and persuasive. In *Brooks*, the Eighth Circuit determined that a business record under Rule 803(6), while generally non-testimonial in nature, may occasionally be testimonial and “run afoul” of the Confrontation Clause if the business record was created for the purpose of establishing or proving some fact at trial. *Brooks*, 715 F.3d at 1079. Put another way, a business record is testimonial “when the circumstances objectively indicate that . . . the primary purpose of [an] interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). On appeal, defendant contends that the GPS data and report offered into evidence at trial was generated solely “for the purposes of criminal prosecution.” Therefore, he argues that the GPS evidence was testimonial in nature and subject to the Confrontation Clause.

As in *Brooks*, the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant’s compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant’s Confrontation Clause rights. *See id.*

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To clarify, the tracking data from the electronic monitoring device worn by defendant constitutes a data compilation. The State's exhibit 1, which consisted of Barrier's report compiling the data gathered from defendant's electronic monitoring device, is "merely an extraction of that data produced for trial." *Jackson*, ___ N.C. App. at ___, 748 S.E.2d at 55. It is well established that "[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). On appeal, defendant does not dispute the trustworthiness of exhibit 1, meaning he does not dispute that the report was made or recorded in the regular course of business at or near the time of the incident. We hold that the tracking data at issue, which was gathered for the purpose of monitoring defendant's compliance with his post-release supervision, constitutes a reliable source of information. Barrier's testimony further established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record. *See Jackson*, *supra*. Accordingly, we overrule defendant's argument.

B. Unreasonable Search and Seizure

[2] Defendant argues that the data obtained from the GPS device violated his constitutional rights because the trial court previously ordered that the device be removed. We disagree.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). It is well settled that constitutional issues not raised and passed upon at trial will not ordinarily be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Because there is no evidence in the record that defendant raised this issue at trial and because there is no evidence in the record that the trial court did, in fact, order defendant's tracking device removed, we decline to address this issue.

In sum, we hold that the trial court did not err in admitting the GPS tracking evidence because such evidence was non-testimonial in nature and fell within the business records exception to the hearsay rule. Accordingly, we hold that defendant received a trial free from error.

No error.

Judges BRYANT and ERVIN concur.

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[237 N.C. App. 502 (2014)]

STATE OF NORTH CAROLINA

v.

NESTA LOUISE GERBERDING

No. COA14-482

Filed 2 December 2014

1. Animals—felonious cruelty to animals—jury instruction—without justification or excuse

The trial court did not err in its instructions to the jury in a felonious cruelty to animals and conspiracy to commit felonious cruelty to animals case by incorrectly defining the term “without justification or excuse” in response to a question posed by the jury. The trial court’s use of “self-defense” and “accident” as examples did not confuse the jury or lead the jury to believe that there were no justifiable excuses available to defendant in the instant case.

2. Animals—felonious cruelty to animals—jury instruction—implied malice

The trial court did not commit plain error in its instruction to the jury in a felonious cruelty to animals and conspiracy to commit felonious cruelty to animals case. The definition of implied malice used in homicide cases could also apply to the crime of felonious cruelty to animals when malice is an element of that offense.

Judge ERVIN concurs in part and concurs in result in part by separate opinion.

Appeal by defendant from judgments entered 17 September 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney Elizabeth Leonard McKay, for the State.

Mary McCullers Reece for defendant.

ELMORE, Judge.

Nesta Louise Gerberding (defendant) was indicted on 1 April 2013 for felonious cruelty to animals and conspiracy to commit felonious

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cruelty to animals in violation of N.C. Gen. Stat. § 14-360(b). She was tried and found guilty of both counts before a jury in Durham County Superior Court on 17 September 2013. The trial court sentenced defendant to a term of 5 to 15 months for the felonious cruelty to animal conviction and 4 to 14 months for the conspiracy conviction with both sentences suspended for a term of 18 months probation. Defendant appeals on the basis that the trial court erred in its instructions to the jury. After careful consideration, we hold that defendant received a fair trial that was free from error.

I. Background

The facts of this case are largely undisputed. On the evening of 29 December 2012, defendant arrived home at 2:00 a.m. with her boyfriend, Jason Kidd (Jack), and her brother, Kevin Gerberding (Kevin). The three placed several fast food bags on the kitchen table before heading to the living room. Tank, a male pit bull that had been left at the house when Kevin's ex-girlfriend moved to the west coast, began rummaging through the food bags and eating a hamburger. When Jack returned to the kitchen, he yelled "[w]hat in the world . . . the dog's got into the food." Defendant reached her hand into Tank's mouth in an attempt to retrieve the food and wrapper. Tank bit her, nearly severing the top of her finger. Defendant testified that she was surprised Tank bit her because Tank had no history of being aggressive: "[Y]ou wouldn't expect [him] to bite."

Jack dragged Tank by his collar to the backyard. Kevin secured Tank by putting a lead on him. Jack returned to the house. Defendant grabbed a knife and went outside because she "had to defend [her]self." Defendant told Kevin, "I'm going to kill this dog." Kevin pinned the dog down, one knee on his chest, one knee on his head, while defendant admittedly stabbed and sliced the dog to death. Defendant stated, "[i]n my world, when a dog bites, you kill it; that's what happens." Jack and Kevin buried Tank in the backyard.

At approximately 6:00 a.m., defendant went to the hospital to seek treatment for the bite. X-rays showed that defendant's finger was broken. The wound required six stitches and bandaging. Later that day, an animal control officer went to defendant's home to deliver a "bite packet." When the officer inquired as to whether Tank might be infected with rabies, defendant explained that she had killed Tank because he was aggressive. Defendant now appeals her convictions for felonious cruelty to animals and conspiracy to commit felonious cruelty to animals.

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II. Analysis**A. Trial court's response to jury question**

[1] On appeal, defendant argues that the trial court erred and prejudiced her by incorrectly defining the term “without justification or excuse” in response to a question posed by the jury. We disagree.

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). “The trial court is best positioned to decide whether ‘additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court’s instructions.’” *State v. Russell*, ___ N.C. App. ___, ___, 758 S.E.2d 902, ___ (2014) (quoting *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986)).

During deliberations, the jury posed the following question to the trial court:

The definition of felonious cruelty has three points. The second and third elements contain “without justification or excuse.” In the third point these words are used to define malice, and in the second point they’re used to define intent. Please clarify the distinction.

Outside the presence of the jury, the trial court discussed its possible response to the foregoing question with counsel. The trial court determined that by providing examples of a legal justification or legal excuse, such as “self-defense” or “accident,” the jury would be aided in understanding the phrase “without justification or excuse.” Defense counsel objected, reasoning that by providing examples that did not arise on the evidence in the instant case, the jury would “feel like they don’t have the opportunity of applying justifiable excuse[s].” The trial court informed defense counsel, “I think I can make it very clear that it is up to the jury to determine whether there was a justification or excuse, as those words are commonly understood. . . . I can’t give an exhaustive list of every justification or excuse that the jury might consider.”

The trial court then answered the jury’s question as follows:

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A justification or excuse is a circumstance, that if it exists, excuses the defendant's actions and the defendant. Even if he or she did the act charged, it would be not guilty because there was a reason for committing the act that the law recognizes as an excuse or valid justification.

As your jury instructions state, if excuse or justification exists, then the defendant would not have had an intent or malice to commit the act alleged and would therefore be not guilty of either felonious or non-felonious cruelty to animals. It is the State's burden to prove beyond a reasonable doubt that no such justification or excuse existed.

By way of example, and not applicable to the evidence in this case but simply by way of example to help you understand this concept: self-defense is considered a justification with the killing of a person if a person reasonably believes that his or her acts are necessary in order to keep a person from killing him or her or doing him or her great bodily harm. Another example, and not applicable to the evidence in this case, would be an accident, which is an excuse where injury or death occurs during the course of a long time [] that does not involve culpable negligence.

If you find the defendant committed the act alleged in the first moment of the offense of felonious cruelty to animals or non-felonious cruelty to animals, it is for you, the jury, to determine whether, according to the evidence, the instructions on the law that I've provided you, and the ordinary and common meaning of those words used, whether a justification of excuse exists.

On appeal, defendant raises the same argument advanced by defense counsel at trial—that “[b]y giving two examples of defenses that did not apply [‘self-defense’ and ‘accident’] and no explanation of how justification or excuse might apply to [defendant’s] facts, the trial court sent the message that finding justification or excuse was difficult or even impossible.” Defendant contends that “[t]he judge should have instructed the jury that if they believed [defendant’s] undisputed testimony that the dog was dangerous and that she therefore killed the dog to protect people and other animals, they should find that [defendant’s] act was legally justified.”

We disagree and note that defendant cites no relevant case law to support his position. Further, his argument ignores the rule of law that

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the trial judge is “not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel[.]” *State v. Bailey*, 254 N.C. 380, 386, 119 S.E.2d 165, 170 (1961) (quotation and citation omitted). There is no legal requirement that the trial court respond to the jury’s question as defense counsel instructs. On review, we conclude that the trial court’s response to the jury’s question was adequate and proper. The trial court’s instruction both addressed the jury’s concerns and constituted a correct statement of law. Defendant has failed to convince us that the trial court’s use of “self-defense” and “accident” as examples somehow confused the jury or led the jury to believe that there were no justifiable excuses available to defendant in the instant case. Defendant’s argument is without merit and we overrule it.

B. Instruction on lesser-included offense

[2] Defendant contends that the trial court erred in instructing the jury that she could be found guilty of felonious cruelty to animals if the jury found that defendant had acted with implied malice. More specifically, defendant argues that the definition of implied malice is “not suitable as a stand-alone definition of malice in felony animal cruelty because it define[s] malice in terms equivalent to causing injury ‘without justification and excuse.’” Defendant asserts, “[i]n the context of the animal cruelty statute, malice must mean something more than acting without just cause, excuse, or justification. Otherwise, there would be no difference between misdemeanor and felony animal cruelty.” We disagree.

We note at the outset that defendant did not object to the trial court’s jury instructions at trial and therefore this issue has not been preserved for appellate review. We 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 should be applied only when the defendant proves that, “after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotations omitted) (alteration in original). An appellate court “must be convinced” by the defendant that “absent the error the jury probably would have reached a different verdict.” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

In order to prove the offense of felony cruelty to animals, the State must present substantial evidence that a defendant did “maliciously

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torture, mutilate, maim, cruelly beat, disfigure, poison, or kill” an animal. N.C. Gen. Stat. § 14-360(b). The crime of misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals. In order to prove the offense of misdemeanor cruelty to animals, the State is required to present substantial evidence that a defendant did “intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal[.]” N.C. Gen. Stat. § 14-360(a) (2013). As such, in order to be guilty of felonious cruelty to animals, a defendant must have acted both “maliciously” and “intentionally.” In the alternative, there is no element of “malice” required for a defendant to be found guilty of misdemeanor cruelty to animals.

The actual jury instruction read by the trial court to the jury is as follows:

For you to find the Defendant guilty of [felony animal abuse], the State must prove three things beyond a reasonable doubt.

First, that the Defendant killed the dog.

Second, that the Defendant acted intentionally; that is, knowingly and without justification and excuse.

And third, that the Defendant acted with malice. Malice means not only hated, ill will or spite, as it is ordinarily understood – to be sure, that is malice – but it also means the condition of mind which prompts a person to intentionally inflict serious bodily harm which proximately results in injury to an animal without just cause, excuse or justification.

. . .

Non-felonious cruelty to animals differs from felonious cruelty to animals in that the State is not required to prove the Defendant acted with malice. Thus, if you find . . . Defendant intentionally – that is, knowingly and without justification or excuse – killed a dog, it would be your duty to return a verdict of non-felonious cruelty to animals.

To clarify, we note that the first portion of the “malice” instruction above (“malice means not only hatred, ill will, or spite as it is ordinarily understood; again, to be sure, that is malice. . . .”) refers to express

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malice. *State v. Sexton*, 357 N.C. 235, 237, 581 S.E.2d 57, 58 (2003). The second portion of the instruction (“but it also means that condition of mind that prompts a person to intentionally inflict damage without just cause, excuse, or justification”) refers to implied malice. *Id.* “[M]alice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred.” *Id.* at 238, 581 S.E.2d at 58.

The jury instructions given in the present case for both felonious and non-felonious cruelty to animals were taken almost verbatim from the North Carolina pattern jury instructions. *See* N.C.P.I. Crim. 247.10 and 247.10A (2012). The definition of malice used here is the same definition of malice used in homicide cases. *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). This Court is unpersuaded by defendant that the definition of implied malice used in homicide cases cannot also apply to the crime of felonious cruelty to animals when malice is an element of that offense. The mere fact that the lesser-included offense of misdemeanor cruelty to animals defines the element of “intent” as “knowingly and without justification or excuse” (terms also used in the implied malice definition) does not render the jury instruction concerning implied malice invalid. The jury was free to convict defendant of either the felony or the misdemeanor offense. Accordingly, we conclude that the trial court’s instruction was proper.

Assuming *arguendo* that the trial court erred, any such error by the trial court would not constitute plain error. The evidence taken in the light most favorable to the State shows that defendant acted intentionally and with *express* malice when she attacked Tank with a knife, admittedly stabbing to death a dog that had no history of violent behavior. Again, the trial court did not err.

III. Conclusion

In sum, the trial court properly instructed the jury according to the North Carolina pattern jury instructions. Further, it responded appropriately to the question posed by the jury regarding the jury instructions. Accordingly, we hold that defendant received a trial free from error.

No error.

Judge BRYANT concurs.

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ERVIN, Judge, concurring in part and concurring in the result in part.

Although I agree with my colleagues that the trial court did not err in the course of responding to the jury's question concerning the circumstances under which Defendant's conduct might be justified or excused, I am unable to agree with the Court's determination that the trial court did not err by instructing the jury that a finding that Defendant acted with implied malice would suffice to establish the existence of the malice element of the offense of felonious cruelty to animals. However, I also conclude, like my colleagues, that the trial court's erroneous malice instruction did not rise to the level of plain error sufficient to necessitate an award of appellate relief from Defendant's conviction. As a result, I concur in the Court's opinion in part and concur in the result reached by my colleagues in part.

N.C. Gen. Stat. § 14-360(a) provides that, "[i]f any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor," with a prohibited act having been committed "intentionally" in the event that it was "committed knowingly and without justifiable excuse." N.C. Gen. Stat. § 14-360(c). On the other hand, N.C. Gen. Stat. § 14-360(b) provides that, "[i]f any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill . . . any animal, every such offender shall for every such offense be guilty of a Class H felony," with a "malicious" act being defined as one "committed intentionally and with malice or bad motive." N.C. Gen. Stat. § 14-360(c). As a result, in order to be guilty of felonious cruelty to animals, the defendant must have acted both "intentionally" and "maliciously."

At the conclusion of Defendant's trial, the trial court instructed the jury that it could find the existence of the "malice" necessary for a finding that Defendant was guilty of felonious cruelty to animals in the event that she acted with "the condition of mind which prompts a person to intentionally inflict serious bodily harm which proximately results in injury to an animal without just cause, excuse or justification." In other words, the trial court allowed the jury to find that Defendant killed Tank maliciously in the event that she acted in a manner consistent with the statutory definition of "intentional" rather than requiring the jury to also find that Defendant acted "intentionally and with malice or bad motive."

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In concluding that the trial court did not err by instructing the jury in this manner, my colleagues equate the “malice” that must be established in order to support a conviction for felonious cruelty to animals with the malice that must be shown in order to support a determination that a defendant was guilty of murder rather than manslaughter. In reaching this conclusion, my colleagues have referenced the decision in *State v. Sexton*, 357 N.C. 235, 237-38, 581 S.E.2d 57, 58-59 (2003), in which the Supreme Court held that proof of the implied malice that is deemed to exist based upon intentional conduct engaged in without just cause or excuse sufficed to support a finding that the defendant was guilty of willful and malicious damage to real property through the use of an incendiary device in violation of N.C. Gen. Stat. § 14-49.1 (stating that “[w]e see no reason why the definition of malice used in homicide and arson cases should not also apply to the crime of malicious damage to an occupied real property by use of an incendiary device”). However, the logic enunciated in *Sexton* cannot be deemed to apply in this case given that the legal principles at issue here are defined in the specific statutory language contained in N.C. Gen. Stat. § 14-360(c) rather than in otherwise-applicable common law principles.

Unlike the statutory provisions under consideration in this case, the legislative language at issue in *Sexton* did not contain any definition of “maliciously.” In the absence of a specific definition of a particular term, the common law definition of language used in a statutory provision is deemed applicable. See *State v. Vickers*, 306 N.C. 90, 99, 291 S.E.2d 599, 606 (1982) (utilizing the common law definition of “arson” where the term in question was not statutorily defined), *overruled on other grounds by State v. Barnes*, 333 N.C. 666, 678, 430 S.E.2d 223, 229, *cert. denied*, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993); *State v. Murphy*, 280 N.C. 1, 5, 184 S.E.2d 845, 847 (1971) (utilizing the common law definition of “kidnapping” given that the term in question was not statutorily defined). In this case, however, the General Assembly has provided a statutory definition of “maliciously,” so this definition must be deemed controlling. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 130-31, 177 S.E.2d 273, 280 (1970) (stating that, “[w]here the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition”). As a result, the extent to which a defendant can be convicted of felonious cruelty to animals based on a finding of implied, as compared to express, malice, hinges upon the manner in which the General Assembly defined “malice” in N.C. Gen. Stat. § 14-360(c) rather than the manner in which that term is used in other contexts.

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A careful examination of the relevant statutory language establishes that guilt of both misdemeanor and felonious cruelty to animals requires proof that the defendant acted “intentionally,” which means that the defendant acted “knowingly and without justifiable excuse.” See N.C. Gen. Stat. § 14-360(c). In other words, the statutory definition of “intentional” conduct closely tracks the definition of malice contained in the trial court’s instructions. In order to support a conviction for felonious cruelty to animals, however, a showing of “malice or bad motive” in addition to a showing of “intentional” conduct is required. As should be obvious, the statutory requirement that there be proof of “malice or bad motive” in addition to proof of intentional conduct in order to support a conviction for felonious cruelty to animals is rendered superfluous in the event that implied malice of the type deemed sufficient in the trial court’s instructions suffices to establish the malice necessary to raise the defendant’s conduct from a misdemeanor to a felony. As a result of the fact that, according to well-established North Carolina law, “an individual section of a statute will not be interpreted in such a manner that renders another provision of the same statute meaningless,” *Williams v. Holsclaw*, 128 N.C. App. 205, 212, 495 S.E.2d 166, 170, *aff’d per curiam*, 349 N.C. 225, 504 S.E.2d 784 (1998), the “malicious” conduct necessary to establish the defendant’s guilt of felonious cruelty to animals must consist of something more than “knowing” conduct engaged in “without justifiable excuse.” Allowing a defendant to be convicted of both misdemeanor and felonious cruelty to animals on the basis of the same conduct would raise serious constitutional issues by “allow[ing] a prosecutor arbitrarily to elect to pursue a felony conviction for an offense, defined by the substantive statute as a *misdemeanor*, which requires proof of the very elements by which it may be ‘elevated’ to felony status.” *State v. Glidden*, 317 N.C. 557, 566, 346 S.E.2d 470, 475 (1986) (Meyer, J., concurring in result) (emphasis in original). As a result of the fact that the trial court’s malice instruction runs afoul of both of these fundamental principles, I believe that the trial court erred by allowing the jury to find the existence of the “malice” element of felonious cruelty to animals based on a determination that Defendant acted with implied, rather than express, malice, and am unable to concur in my colleagues’ determination to the contrary.¹

1. As my colleagues note, the trial court’s jury instruction was taken almost verbatim from the relevant pattern jury instruction. See N.C.P.I. Crim. 247.10 and 247.10A (2012). Although the fact that the challenged language appears in the applicable pattern jury instruction is certainly relevant to our analysis, the pattern jury instructions do not have the force of law. *State v. Warren*, 348 N.C. 80, 120, 499 S.E.2d 431, 453, *cert. denied*, 525 U.S. 915, 119 S. Ct. 263, 142 L. Ed. 2d 216 (1998). As a result, the fact that the

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I do, however, concur with my colleagues' conclusion that Defendant is not entitled to relief from her conviction for felonious cruelty to animals based upon the trial court's erroneous malice instruction. As the Court notes, the undisputed evidence reflects that Defendant intentionally killed Tank after he had been taken outside and restrained despite the complete absence of any indication that Tank had any history of violent behavior. In her trial testimony, Defendant admitted that she, in essence, executed Tank after he bit her and that, in the milieu in which she lived, such conduct should be deemed to be nothing out of the ordinary. In my opinion, the evidence contained in the present record is more than sufficient to establish that Defendant killed Tank with "hatred, ill will or spite" and precludes any finding that the outcome at Defendant's trial would have probably been different in the event that the trial court had not delivered an erroneous malice instruction. Thus, I have no hesitation in concluding that Defendant simply cannot show that, "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). As a result, although I am unable to join in my colleagues' conclusion that the trial court did not err by allowing the jury to find Defendant guilty of felonious cruelty to animals on the basis of implied, rather than express, malice, I am in complete agreement with their determination that Defendant is not entitled to relief from her conviction on the basis of this erroneous malice instruction and, for that reason, concur in the result that the Court has reached with respect to this aspect of Defendant's challenge to her conviction. I do, however, concur in the remainder of the Court's opinion.

challenged definition of malice appears in the relevant pattern jury instruction does not suffice to support a determination that the trial court's malice instruction correctly stated the applicable law.

STATE v. JOINER

[237 N.C. App. 513 (2014)]

STATE OF NORTH CAROLINA
v.
RAYMOND DAKIM-HARRIS JOINER

No. COA14-645

Filed 2 December 2014

1. Constitutional Law—right to counsel—competency for self-representation—malingering—judge’s determination supported by evidence

The trial court did not err by concluding that defendant was competent to represent himself at trial. Although defendant included in his brief examples of disruptive and aberrant behavior, he did not argue specifically how this was sufficient to demonstrate incompetence when mental health professionals had determined him to be competent. Defendant did not argue on appeal that the mental health professionals were incorrect or that the trial judge erred in finding that defendant was malingering, and did not contend that he was not competent to stand trial. Even so, the trial court’s determination that defendant was competent was supported by the evidence and was conclusive on appeal.

2. Criminal Law—defendant proceeding pro se—inquiry by judge

Although defendant argued that the trial court failed to make the proper inquiry when he indicated his desire to proceed pro se, defendant forfeited his constitutional right to counsel by his own disruptive conduct, and the trial court did not commit prejudicial error by failing to conduct a N.C.G.S. § 15A-1242 inquiry under these circumstances.

3. Constitutional Law—right to counsel—pro se representation—disruptive defendant—invited error

The trial court did not erroneously deny defendant the right to continue representing himself at trial where the trial court ruled that defendant’s actions were for the purpose of disrupting the trial and that any prejudice was invited error. There was plenary evidence to support these rulings.

4. Criminal Law—motion for a mistrial—defendant’s disruptive conduct

The trial court did not abuse its discretion in refusing defendant’s motions for mistrial where the trial court ruled that defendant’s

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actions were for the purpose of disrupting the trial, and that any prejudice was invited error. There was plenary evidence to support those rulings.

Appeal by Defendant from judgments entered 28 June 2013 by Judge R. Stuart Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 3 November 2014.

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

Kimberly P. Hoppin for Defendant.

McGEE, Chief Judge.

Raymond Dakim-Harris Joiner (“Defendant”) was charged with two counts of malicious conduct by a prisoner and having attained habitual felon status on 28 January 2013. Two Forsyth County Sheriff’s deputies were attempting to remove Defendant from his holding cell and take him to court on 30 November 2012, when Defendant resisted them and spat in both of their faces. The incident was captured on video.

One month earlier, on 30 October 2012, Defendant had been evaluated by Dr. Charles Vance (“Dr. Vance”), a forensic psychiatrist at Central Regional Hospital in Butner, in order for Dr. Vance to determine Defendant’s competence to participate in a separate criminal proceeding. Dr. Vance later averred in a 27 June 2013 affidavit:

The prison records, all from 2011, consistently reflected a sole mental health diagnosis of Antisocial Personality Disorder. The jail records, from 2012, describe his engaging in extreme behavior, such as smearing feces and flooding his cell. Consideration was given to his having a psychotic disorder, but it was ultimately felt that he was fabricating symptoms or being purposefully manipulative. [Defendant’s] reviewed Sick Call Requests likewise did not reflect disordered or psychotic thinking.

Dr. Vance determined that Defendant was competent to stand trial in that separate matter.

In the present case, R. Andrew Keever (“Keever”) from the Public Defender’s Office was appointed to represent Defendant. However, in late 2012, Defendant informed Keever that he wished to represent

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himself. A hearing was conducted on 22 February 2013, in which Keever informed the trial court that Defendant had asked him to withdraw as his attorney so that Defendant could represent himself. Keever presented the trial court with a psychological evaluation of Defendant, presumably done by Dr. Vance, and the trial court asked Defendant if he wanted to represent himself. Defendant failed to answer many of the trial court's questions in a straightforward manner, but stated multiple times that he did want to represent himself without Keever's assistance. The trial court noted that Defendant's evasive and often bizarre answers to questions appeared "to be some type of malingering like they said in the report." The trial court found that Defendant "understands the courts and the proceedings and the nature of the charges against him," and Defendant was allowed to represent himself. Keever was appointed as Defendant's standby counsel. The trial court explained to Defendant:

Mr. Joiner, the reason I am allowing you to represent yourself is because it appears from the psychological evaluation that you don't suffer from any serious mental illness, although you do have an antisocial personality disorder, and you seem to be of average intelligence and not mentally deficient in any way.

Before the start of trial on 24 June 2013, the trial court revisited Defendant's desire to represent himself. During that hearing, Defendant refused to answer questions and declared that the trial court had no authority to conduct the trial. The trial court repeatedly asked Defendant if he wanted to represent himself, if he understood the charges against him, and if he understood the maximum prison sentence he was facing. Defendant responded to these questions by saying, "no," answering in contradictory ways, or refusing to answer at all. Defendant also yelled obscenities at the trial court and was otherwise extremely disruptive. During the pre-trial hearing, the trial court made eight different findings that Defendant was intentionally attempting to delay the proceedings.

Following this extended colloquy with Defendant, the trial court again ruled that Defendant could represent himself, with Keever as his standby counsel. The trial court made this decision based upon its findings that Defendant understood the nature of the proceedings, could appropriately answer the questions posed to him, but refused to engage appropriately simply as a means of delaying the proceedings. The trial court repeatedly advised Defendant that he could change out of his prison clothes, but Defendant refused to do so. The trial court ordered Defendant's shackles removed, but Defendant resisted, and stated that he was going to punch the judge in the "f***ing face." The trial court then

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determined that Defendant would remain shackled. Later, the trial court again offered to unshackle Defendant and provide civilian clothes, but Defendant declined.

Defendant refused to leave his cell on the second day of trial and had to be forced out. Defendant threatened to stab an officer, and while Defendant was in a holding cell at the courthouse, he defecated and smeared his feces on the cell walls. The proceedings were delayed approximately one hour and, when Defendant entered the courtroom, he was extremely disruptive and belligerent, including directing obscenities toward the judge. The trial court warned Defendant that if he did not desist in his behavior, he would be gagged. The trial court stated:

The defendant, by my unofficial count, he talked, uninterrupted, continuously for at least 10 minutes. I gave him a warning that he would be gagged if he continued to be so disruptive. Again, he was so loud, in fact yelling, that there was basically nothing the Court could say without creating a muddled record. The Court does intend to gag the defendant if he continues to act like this.

I'm going to ask the sheriff to get the appropriate measures to gag him. Make sure his nostrils are clear so he can breathe.

The trial court took a recess to give Defendant another chance to conduct himself appropriately.

THE COURT: Let the record reflect that we're back in session. We went in – we took a recess after the defendant's last tirade at approximately 10:57 a.m. It is now approximately 11:43, so I've given the defendant plenty of time to calm down. We'll see how it goes.

He's not in the courtroom yet. We'll bring him here in a minute.

His outstanding standby counsel Mr. Keever has been here the entire time.

Mr. Keever, just so you know, I intend to proceed. If he continues to act as he has been acting, he will be gagged. I will find, I'm going to find that he's waived his right to proceed pro se. You will be representing him. Do you understand?

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MR. KEEVER: I understand. I would need to make the appropriate objections at the appropriate time if that happens.

THE COURT: Sure. You object. But the Court is concerned. I want to insure a fair trial. And if he refuses to cooperate, I want someone to be able to work as best he can under the circumstances for the defendant on his behalf. To do otherwise would be to allow every single defendant who wants a mistrial simply to act up and we'd never have a trial. So I'm going to give him another opportunity.

Again, court opened at nine-thirty, just shortly after nine-thirty. It's now almost 11:45, so he has certainly succeeded in delaying this trial for quite a while. The Court has exercised as much forbearance, restraint, and patience as it can. I'm going to proceed. We are going to have a hearing about the restraint in the absence of the jury. But if he continues to act disruptive, I do intend to find that he's waived his right to proceed pro se.

Defendant was brought back into the courtroom in a restraint chair with a mesh bag over his head. When asked by the trial court if he intended to spit on anyone if the bag were removed, Defendant answered: "Yes." Defendant also responded in the affirmative when asked if he intended to hurt anyone if his restraints were removed. The trial court then informed Defendant of its intent to conduct a hearing concerning the use of restraints, and Defendant expressed his interest in having another mental evaluation:

At this time, in the presence of the defendant, in the absence of the jury, I want to conduct a hearing about the defendant's restraints. Let me have –

THE DEFENDANT: And my mental capacity too.

THE COURT: I understand. Sergeant – you've already been evaluated for forensic evaluation.

THE DEFENDANT: I have a right to get evaluated twice too.

THE COURT: You've already been evaluated. At this point, sir, you're just delaying the Court, as I found yesterday. You've succeeded. I mean it's almost twelve o'clock.

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The trial court called a female officer involved in the morning incidents for Defendant to question. When the officer was told to place her hand on the Bible to take the oath, Defendant stated: "It won't . . . matter if she took the oath. She a harlot." The trial court responded: "I understand[,]" and Defendant then said: "In other words whore." After Defendant continued to interrupt in a belligerent fashion, the trial court stated:

THE COURT: Wait a minute. Now, Mr. Joiner, if you keep interrupting, I am going to gag you. That is the next step. I don't want to do that. I don't intend to do that unless you keep interrupting. I have reached my limit. So, you are warned if you keep interrupting. You called this witness, I believe you just called her a whore. That is absolutely contemptible. I am exercising as much forbearance and restraint as I can. You're warned. Any more interruptions could result in you being gagged. If you continue to interrupt, I want you to be warned that I'm also going to find that you're waiving your right to proceed pro se and I will activate Mr. Keever to be your attorney.

THE DEFENDANT: Can you do that right now then?

THE COURT: Do you want me to do that?

THE DEFENDANT: Yes, sir.

THE COURT: You want Mr. Keever to represent you?

THE DEFENDANT: No. I want you to go ahead and do what you said you were going to do.

THE COURT: Well, I've told you what's going to happen. If you keep interrupting, you're going to be gagged.

THE DEFENDANT: Waive my pro se.

THE COURT: Pardon me?

THE DEFENDANT: Waive my pro se.

THE COURT: You want Mr. Keever to represent you?

THE DEFENDANT: I am myself.

THE COURT: Do you want to represent yourself not or not?

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Defendant did not answer. The trial court continued to give Defendant opportunities to ask questions concerning his restraints, but Defendant would only ask irrelevant questions. The trial court ruled that Defendant needed to remain restrained, and gave Defendant one further chance to represent himself, stating: “Mr. Joiner, when I bring the jury in, if you act disruptive, you are going to be gagged and Mr. Keever will represent you, okay?” Jury *voir dire* resumed, and when the State had finished asking questions of the first potential juror interviewed that day, the trial court asked if Defendant had any questions for the juror. Defendant responded: “I’m not going to ask nobody nothing, man. This is racism, man.” The trial court sent the potential jurors out of the courtroom, and again asked Defendant if he wanted to represent himself. When Defendant failed to answer, the trial court found Defendant’s silence to be a negative response, and appointed Mr. Keever to take over representation of Defendant, ruling

that someone needs to act in the defendant’s best interest, and if the defendant is not going to ask any relevant questions, all he is doing is making spontaneous statements, the Court is going to find he’s waived his right to proceed pro se, and I’m going to activate Mr. Keever to represent [Defendant].

Even following this ruling, the trial court once again offered Defendant the opportunity to continue representing himself. Defendant again expressed his unwillingness to participate in the proceeding, and stated that if the trial court wanted “to hire [Mr. Keever] on [its] behalf, then go ahead, and I’ll file my federal lawsuits, and you’ll have to answer to the international courts.” The trial court once again instructed Mr. Keever to step in and represent Defendant.

Mr. Keever then moved for a mistrial “[b]ased on what’s been going on in court,” arguing that Defendant had been prejudiced. The trial court denied the motion

based on the finding that the defendant, any error has been invited error on his part. It’s all his own doing. The [c]ourt hasn’t incited the defendant to do anything negative. If I were to allow a mistrial in this case, a hundred percent of criminal cases will always result in a mistrial. All the defendant has to do is come in and act disorderly, willfully obstruct and delay court. Based on your motion, nevertheless, the [c]ourt finds any actions in front of the

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jury by the defendant have been done by the defendant willfully and voluntary.

The [c]ourt, in fact, finds that the defendant has willfully obstructed and delayed the trial court proceedings by refusing to cooperate, by refusing to answer simple questions asked by the [c]ourt, by being disruptive in the courtroom, by refusing to participate in his defense in any way, by making gratuitous statements that have no relevance to any of the court proceedings, by threatening various court personnel, by stating his intention to spit on people in court if his spit sock was removed, by stating that he would act out in court and possibly hurt people in court if his restraints were removed. The [c]ourt finds all that to be invited error, all by the defendant's own doing. Motion for mistrial is denied.

Defendant then personally requested that the trial court include on the record "that I'm on mental health medication too for depression[.]" Following jury selection, Defendant was again given the chance to represent himself but, because Defendant did not respond to questions related to waiver of counsel, the trial court ruled that Mr. Keever would continue representing Defendant.

On the third day of trial, Mr. Keever questioned Defendant's capacity to proceed and the trial court ordered Defendant to again be evaluated to determine his capacity to proceed at trial. Edward Paul Flores ("Mr. Flores"), a licensed clinical social worker and certified forensic screener, evaluated Defendant. Mr. Flores testified that he had difficulty making a determination concerning Defendant because Defendant did not answer his questions in an appropriate manner. Mr. Flores recommended that Defendant be sent for a full forensic evaluation. Mr. Flores testified that he would ask Defendant a question "and the [Defendant had his] own agenda of the answers that [he] wanted to tell me. So that's why I thought there was some malingering." When asked directly by the trial court if he agreed with an earlier finding that Defendant "appears to be malingering for secondary gain, possibly for transfer, release or absolution of legal charges[.]" Mr. Flores answered: "Yes."

The trial court ordered that Defendant be sent for further evaluation. Defendant was evaluated by Dr. Vance. Dr. Vance testified that, during the evaluation, Defendant "refused to engage in interview with me yesterday. He was brought to Central Regional Hospital for evaluation. He would not talk to me, though, would not even acknowledge my

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presence or make eye contact with me.” Although Defendant’s refusal to participate hampered Dr. Vance’s ability to conduct his evaluation, Dr. Vance was of the opinion — based upon his earlier evaluation of Defendant as well as more recent information — that Defendant was competent to proceed to trial, that he understood the proceedings, and that he was able to assist in his defense. Dr. Vance believed Defendant’s behavior, including spreading feces on his cell wall, was manipulative behavior. Following this hearing, the trial court entered findings of fact stating that Defendant was purposefully disruptive and had successfully managed to delay the proceedings on multiple occasions. The trial court concluded that Defendant was competent to stand trial, and Defendant’s motion to find Defendant incompetent to stand trial was denied.

The trial continued, and Defendant immediately began to disrupt the proceedings. The jury was sent out of the courtroom again, and the trial court found Defendant in contempt of court based upon the following:

[I]n open court, the [c]ourt finds beyond a reasonable doubt that during the course of [Defendant’s] criminal trial in 12CRS61993 and 61994 on Monday, 24 June 2013, and on Tuesday, 25 June 2013, [Defendant] continuously and willfully obstructed and delayed his trial by refusing to answer simple, straightforward questions asked by the [c]ourt, by yelling and cussing at the [c]ourt, by threatening court personnel with bodily harm, and by otherwise failing to cooperate.

. . . .

In addition . . . [D]efendant smeared his feces on his cell wall in an effort not to come to court.

During the contempt hearing, Defendant continued to disrupt the trial court, including calling the judge a “m*****f*****” several times, and stating that the judge should have his head cut off. After continuation of Defendant’s disruptions and multiple warnings by the trial court, the trial court had Defendant gagged so the trial could proceed. Defendant twice managed to defeat the gag and yell obscenities at the judge. Finally, upon Keever’s request, Defendant was removed from the courtroom and allowed to follow the proceedings via an audio feed in a separate room in the courthouse. Keever renewed his motion for mistrial, which the trial court denied.

Defendant was convicted on 28 June 2013 of two counts of malicious conduct by a prisoner, and was found not guilty of having attained habitual felon status. Defendant appeals.

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Analysis

I.

[1] In Defendant's first argument, he contends the trial court erred in concluding that Defendant was competent to represent himself at trial. We disagree.

Defendant states "the trial court erred and abused its discretion in finding that [Defendant] was capable of representing himself at trial, and erred in finding that he knowingly and voluntarily waived his right to counsel." In his brief, Defendant includes examples of the disruptive and aberrant behavior noted above, but does not argue specifically how any of this behavior is sufficient to demonstrate incompetence when Defendant was determined to be competent by mental health professionals. Further, Defendant does not argue on appeal that the mental health professionals who testified were incorrect that Defendant showed signs of malingering, or that the trial judge erred in finding that Defendant was malingering for the purpose of delaying and disrupting the proceedings. It is not the job of this Court to make Defendant's argument for him. *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Nevertheless, we have thoroughly reviewed the record and hold, based upon the evidence from mental health professionals and Defendant's own behavior, that the trial court did not abuse its discretion in ruling that Defendant was competent to represent himself at trial.

[T]he decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. Defendant has the burden of persuasion with respect to establishing his incapacity. . . . Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required.

State v. Gates, 65 N.C. App. 277, 283-84, 309 S.E.2d 498, 502 (1983) (citations omitted).

Defendant does not contend that he was not competent to stand trial. Defendant argues that he was incompetent to represent himself at trial. However,

[a]lthough standing trial while represented by counsel is an entirely different concept than conducting one's own defense at trial, the Supreme Court has expressly refused

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to adopt a higher standard of competency for self-representation than the basic *Dusky* standard.¹ In *Godinez*, the Court “reject[ed] the notion that competence to . . . waive the right to counsel must be measured by a standard that is higher than (or different from) the *Dusky* standard.” 509 U.S. at 398, 113 S. Ct. at 2686, 125 L. Ed. 2d at 331.

State v. Cureton, __ N.C. App. __, __, 734 S.E.2d 572, 583 (2012). “[A] state is free to adopt higher competency standards for pro se defendants than the *Dusky* standard, but the constitution does not require such action.” *Id.* at __, 734 S.E.2d at 584 (citation omitted). This Court in *Cureton* made clear that, in North Carolina, a defendant may be allowed to represent himself so long as he has met the standard for mental competence to stand trial.

In the present case, there is sufficient evidence that the defendant was competent to stand trial. Although defendant had a low IQ and a history of mental illness, several formal evaluations diagnosed him as malingering. Even if defendant could successfully argue that his diminished mental capacity places him in the “gray-area,” *Indiana v. Edwards* and *Godinez* make it clear that the constitution does not prohibit the self-representation of a “gray-area” defendant.

Id. Even if Defendant had challenged his capacity to stand trial on appeal, because the trial court’s determination that Defendant was competent was supported by the evidence, it is conclusive on appeal. *State v. Robertson*, 161 N.C. App. 288, 292, 587 S.E.2d 902, 905 (2003). Defendant fails in his burden of showing that the trial court abused its discretion in allowing Defendant to proceed *pro se*. *Gates*, 65 N.C. App. at 283-84, 309 S.E.2d at 502.

[2] Defendant also cites to N.C. Gen. Stat. § 15A-1242, which states:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

1. “[T]he ‘test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.’” *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 824 (1960).

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- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2013). Defendant argues that the trial court failed to make the proper inquiry required by N.C. Gen. Stat. § 15A-1242. We hold Defendant's actions absolved the trial court from this requirement.

“Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel.” “A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial.”

State v. Boyd, 200 N.C. App. 97, 102-03, 682 S.E.2d 463, 467 (2009) (citations omitted) (where “defendant willfully obstructed and delayed the trial court proceedings by refusing to cooperate with either of his appointed attorneys and insisting that his case would not be tried[,]” the defendant forfeited his right to an attorney).

This Court explained in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282 (2011):

We have previously outlined the difference between waiver and forfeiture of a defendant's right to counsel:

Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic,

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combine to justify a forfeiture of defendant's right to counsel.

State v. Montgomery, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (citations and quotation marks omitted). Where a defendant forfeits his right to counsel by his own conduct, the trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed pro se. *Id.* at 525, 530 S.E.2d at 69.

Leyshon, 211 N.C. App. at 517-18, 710 S.E.2d at 288. In *Leyshon*, as in the present case, the defendant "obstructed and delayed the trial proceedings" by refusing to answer questions, denying the jurisdiction of the trial court, and responding in contradictory ways concerning his desire to proceed pro se. *Id.* at 518-19, 710 S.E.2d at 288. In the present case, we hold that Defendant, by his own conduct and actions, forfeited his constitutional right to counsel. The trial court did not commit prejudicial error by failing to conduct an N.C. Gen. Stat. § 15A-1242 inquiry under these circumstances. This argument is without merit.

II.

[3] In Defendant's second argument, he contends that the trial court erred in denying Defendant the right to continue representing himself at trial, and forcing Defendant to accept the representation of Mr. Keever. We disagree.

Our Supreme Court has stated "that [t]he right of self-representation is not a license to abuse the dignity of the courtroom,' and 'the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.'" *State v. McGuire*, 297 N.C. 69, 83, 254 S.E.2d 165, 174 (1979) (citation and quotation marks omitted). Defendant's "actual disruption of the proceedings demonstrated what would have happened during trial if defendant had been permitted to represent himself. . . . His trial would have been a farce. Granting defendant's motion to represent himself would have subverted the orderly administration of justice and jeopardized a fair trial of the issues." *Id.* at 83, 254 S.E.2d at 174 (citation omitted). In light of the plenary evidence that Defendant would not allow the trial to proceed while representing himself – or even while he was present in the courtroom – we hold the trial court did not err in activating Keever's representation and having Keever take over Defendant's defense. This argument is without merit.

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[237 N.C. App. 526 (2014)]

III.

[4] In Defendant's third argument, he contends the trial court erred in denying Defendant's motions for mistrial. We disagree.

"The decision whether or not to grant a mistrial is within the sound discretion of the trial judge. A mistrial is appropriate only when there are such serious improprieties as to make it impossible for a fair and impartial verdict to be rendered." *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989) (citation omitted). "It is well established that arguments for a mistrial do not carry great weight when the grounds relied upon arise from a defendant's own misconduct." *State v. Perkins*, 181 N.C. App. 209, 223, 638 S.E.2d 591, 600 (2007) (citation omitted). Much of Defendant's outrageous conduct was committed outside the presence of the jury. However, "[i]f defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." *Marino*, 96 N.C. App. at 507, 386 S.E.2d at 73. The trial court ruled that Defendant's actions were for the purpose of disrupting the trial, and that any prejudice was invited error. There was plenary evidence to support these rulings. We hold the trial court did not abuse its discretion in refusing Defendant's motions for mistrial. This argument is without merit.

No error.

Judges HUNTER, Robert C. and BELL concur.

STATE OF NORTH CAROLINA
v.
JAIREN ANTONIO JONES, DEFENDANT

No. COA14-463

Filed 2 December 2014

1. Appeal and Error—preservation of issues—failure to object—presumptive range sentencing

Defendant's argument that the trial court erred in sentencing him for three of five habitual violation of a domestic violence protective order counts was properly before the Court of Appeals, notwithstanding his failure to object at trial and notwithstanding that he was sentenced within the presumptive range.

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[237 N.C. App. 526 (2014)]

2. Domestic Violence—habitual violation—communications—interference with a witness

The trial court erred by sentencing defendant for three of five habitual violation of a domestic violence protective order counts and interfering with a witness. Defendant should not have been sentenced on the three counts which were based on his three letters to the victim since these communications also formed the basis for his conviction for interfering with a witness.

3. Sentencing—habitual misdemeanor assault—assault on female—habitual felon

The trial court erred by sentencing defendant for both habitual misdemeanor assault and assault on a female. The assault on a female conviction was vacated and remanded for resentencing of defendant as a habitual felon on the habitual misdemeanor assault conviction.

4. Witnesses—interfering with witness—jury instruction

The trial court did not err in its instruction on the charge of interfering with a witness. The jury was functionally informed that the victim did not have to have a summons to be protected under this statute.

Appeal by Defendant from judgments entered 10 July 2013 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 23 September 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Melissa H. Taylor, for the State.

Appellate Defendant Staples Hughes, by Assistant Appellate Defendant John F. Carella, for Defendant-appellant.

DILLON, Judge.

Jaired Antonio Jones (“Defendant”) appeals from convictions for interfering with a witness, assault on a female, habitual misdemeanor assault, five counts of habitual violation of a domestic violence protective order (“DVPO”), and attaining the status of habitual felon. For the following reasons, we find no error in part, vacate three of Defendant’s convictions for habitual violation of a DVPO and the conviction for assault on a female, and remand for resentencing on these judgments.

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[237 N.C. App. 526 (2014)]

I. Background

Defendant was indicted on a number of charges arising from his “on-and-off-again,” five-year relationship with Ms. Smith¹, the mother of his child. On 21 February 2012, Ms. Smith took out a temporary restraining order against Defendant due to a pattern of violent behavior he had exhibited towards her. The next day, Defendant confronted Ms. Smith as she attempted to deliver Defendant’s personal items that were in her home to his father’s apartment. During the confrontation, Defendant became physically violent towards Ms. Smith. Police arrived on the scene and arrested Defendant.

Defendant was subsequently served the restraining order while in jail. In spite of the restraining order, Defendant contacted Ms. Smith at least twice by telephone. After Ms. Smith had the protective order extended to a full year, Defendant sent Ms. Smith three letters between 23 March 2012 to 18 June 2012 asking her to drop the charges and not come to court.

Defendant was tried by a jury and found guilty of assault on a female, five counts of habitual violation of a DVPO (for the two phone calls and three letters), and interfering with a witness (for the three letters). Defendant pled guilty to attaining the status of habitual felon based on past felonies unrelated to his relationship with Ms. Smith.

The trial court entered three separate judgments: (1) a judgment sentencing Defendant as a habitual felon to a term of 127 to 165 months of imprisonment for the interfering with a witness conviction; (2) a consolidated judgment for the assault on a female conviction, which was upgraded to habitual misdemeanor assault, and sentenced Defendant as a habitual felon to a consecutive term of 128 to 166 months imprisonment; and (3) a consolidated judgment for the five habitual violation of DVPO convictions, sentencing Defendant as a habitual felon to a consecutive term of 128 to 166 months imprisonment. Defendant filed timely notice of appeal from the trial court’s judgments.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

1. A pseudonym.

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[237 N.C. App. 526 (2014)]

A. Habitual Violation of DVPO and Interfering with Witness

In his first argument, Defendant contends that the trial court erred in sentencing him for three of the five habitual violation of DVPO counts. Specifically, he argues that he should not have been sentenced on the three counts which were based on his three letters to Ms. Smith since these communications also form the basis for his conviction for interfering with a witness. We agree.

1. Appellate Review

[1] Before reaching the merits of Defendant’s argument, we address the State’s contention that Defendant failed to properly preserve his argument, citing *State v. Potter*, 198 N.C. App. 682, 680 S.E.2d 262 (2009). We disagree and believe this issue is controlled by our Supreme Court’s 2010 opinion in *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010).

North Carolina Rule of Appellate Procedure 10(a)(1) requires 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[.]” Defendant admits that he did not raise a specific objection at trial regarding this sentencing error, but, citing *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65, argues that this issue of statutory interpretation is properly before us.

In *Davis*, the defendant argued that he could not be convicted for *both* felony death by vehicle *and* second degree murder arising from the same conduct because the felony death by vehicle statute expressly states that a defendant could be convicted and sentenced for felony death by vehicle “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” *Id.* at 301-02, 698 S.E.2d at 67-68. Our Supreme Court held that the defendant’s argument that the trial court acted “contrary to statutory mandate” was preserved, “notwithstanding [his] failure to object at trial.” *Id.* at 301, 698 S.E.2d at 67 (citation and quotation marks omitted).

In *Potter*, the defendant argued that the trial court committed a statutory error by sentencing him on *both* robbery with a dangerous weapon *and* habitual misdemeanor assault based on misdemeanor assault on a female. 198 N.C. App. at 684, 680 S.E.2d at 263. The misdemeanor assault on a female statute, G.S. 14-33(c), contained the language “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” *Id.* at 684 n.2, 680 S.E.2d at 263 n.2 (emphasis omitted). This Court held that the defendant’s argument was not preserved based on N.C. Gen. Stat. § 15A-1444(a1) because the defendant was sentenced

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in the presumptive range for both convictions. *Id.* at 684-85, 680 S.E.2d at 264.

We note, however, that the judgments entered by the trial court against the defendant in *Davis* indicate that the defendant was sentenced in the presumptive range, like the defendant in *Potter*. To the extent that our Court's holding in *Potter* conflicts with our Supreme Court's holding in *Davis* on this issue, we must follow *Davis*; and, therefore, we hold that Defendant's argument is properly before us, notwithstanding his failure to object at trial and notwithstanding that he was sentenced within the presumptive range. We next turn to review Defendant's substantive statutory arguments.

2. Substantive Statutory Analysis

[2] Defendant contends that the trial court erred in entering judgment and sentencing him on *both* three counts of habitual violation of a DVPO *and* one count of interfering with a witness based on the same conduct, sending three letters to the alleged victim asking her not to show up for his court date. Defendant concludes that based on this error, we should vacate the three convictions for habitual violation of a DVPO based on the letters and remand for resentencing. The State argues that based on our opinion in *State v. Hines*, 166 N.C. App. 202, 600 S.E.2d 891 (2004), Defendant did not receive improper double punishment.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). As our Supreme Court has stated:

[t]he intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction.

Davis, 364 N.C. at 302, 698 S.E.2d at 68.

Habitual violations of DVPO's are covered under N.C. Gen. Stat. § 50B-4.1 (2013), which generally provides in subsection (a) that the violation of a DVPO is a Class A1 misdemeanor and further provides in subsection (f) that "[u]nless covered under some other provision of law providing greater punishment, any person who knowingly violates a [DVPO], after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony. *Id.* (emphasis added). Defendant argues that the phrase "[u]nless covered under some other provision of law providing greater punishment," means he could not be

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punished for habitual violation of a DVPO, a class H felony, if he was also being punished for interfering with a witness, a Class G felony for the same conduct. We believe Defendant's interpretation is consistent with interpretations by our appellate courts of the phrase "[u]nless covered under some other provision of law providing greater punishment" found in other criminal statutes. *See Davis*, 364 N.C. at 304, 698 S.E.2d at 69 (finding that this clause in N.C. Gen. Stat. § 20-141.4(b) "indicates the General Assembly was aware . . . that other, higher class offenses might apply to the same conduct" and in that situation "the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense or for the section 20-141.4 offense, but not both." (emphasis in original)); *State v. Jamison*, ___ N.C. App. ___, ___, 758 S.E.2d 666, 671 (2014); *State v. Williams*, 201 N.C. App. 161, 174, 689 S.E.2d 412, 419 (2009).

As to the three letters sent by Defendant, we note that the indictment for interfering with a witness specifically alleged Defendant's "course of conduct of sending [the witness and victim] letters asking her to not come to court" as the basis for the indictment. Defendant's indictment for habitual violations of DVPO charges Defendant with three counts based on the three letters sent to the victim. At trial, only three letters from Defendant to the victim were presented into evidence. As both convictions were based on these same three letters and Defendant was convicted and sentenced for both offenses, the trial court violated the statutory mandate of N.C. Gen. Stat. § 50B-4.1(f).

We are not persuaded by the State's argument that *State v. Hines* controls. In *Hines*, the defendant was convicted of robbery with a dangerous weapon and of aggravated assault on a handicapped person under N.C. Gen. Stat. § 14-32.1. The defendant argued that the punishment for both crimes violated the statutory language of G.S. 14-32.1(e), which contains the language "[u]nless [defendant's] conduct is covered under some other provision of law providing greater punishment[.]" 166 N.C. App. at 208, 600 S.E.2d at 896. This Court, though acknowledging prior holdings regarding this phrase in other statutes, overruled the defendant's argument, stating "North Carolina courts have consistently allowed convictions for both robbery with a dangerous weapon and felonious assault." *Id.* at 208-09, 600 S.E.2d at 896-97. Our Supreme Court in *Davis* distinguished *Hines* stating "that separate sentences for aggravated assault on a handicapped person and the greater felony of robbery with a dangerous weapon were permissible as punishing distinct conduct—an assault and a robbery." 364 N.C. at 305, 698 S.E.2d at 69-70. Here, unlike *Hines*, the convictions were based on the same

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conduct, Defendant communicating with the victim through three letters. The State's argument is overruled.

Accordingly, we vacate Defendant's three convictions for habitual violations of DVPO based on the three letters he sent the victim and remand the consolidated judgment to resentence Defendant as a habitual felon for the two habitual violations of the DVPO convictions based on his two phone calls to the victim.

B. Habitual Misdemeanor Assault and Assault on Female

[3] In his second argument, Defendant contends that the trial court erred in sentencing him for *both* habitual misdemeanor assault *and* assault on a female since both convictions arose out of his assault on Ms. Smith at his father's apartment. The State contends that the sentence was proper, noting that although the misdemeanor assault on a female conviction appears on the judgment, "[t]here was no separate sentence entered for Defendant's crime of assault on a female."

Defendant's statutory challenges to the trial court's judgment are preserved, notwithstanding his failure to object at trial. *Davis*, 364 N.C. at 301, 698 S.E.2d at 67. We apply *de novo* review to Defendant's argument. *Largent*, 197 N.C. App. at 617, 677 S.E.2d at 517.

For the crime of "assault on a female," the statute states in relevant part:

(c) *Unless the conduct is covered under some other provision of law providing greater punishment*, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor[.]

....

(2) Assaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c)(2) (2013) (emphasis added). Recently, this Court in *State v. Jamison*, held this "prefatory clause [in N.C. Gen. Stat. § 14-33(c)] unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault." ___ N.C. App. ___, ___, 758 S.E.2d 666, 671 (2014). Assault on a female can be upgraded pursuant to N.C. Gen. Stat. § 14-33.2 (2013), to a felony where the defendant has prior assault convictions as set forth in that statute.

Here, the jury found Defendant guilty of assault on a female, a class A1 misdemeanor, and, based on his admissions to prior convictions

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for assault, the trial court upgraded this conviction to “habitual misdemeanor assault” pursuant to G.S. 14-33.2, a Class H felony. As Defendant had pled guilty to attaining the status of habitual felon, his conviction for this Class H felony was upgraded to a Class D felony. However, the judgment also lists the underlying misdemeanor conviction for assault on a female and also upgrades it to a Class D felony. As determined in *Jamison*, the trial court could not administer punishment for both habitual misdemeanor assault, a Class H felony, and assault on a female, a class A1 misdemeanor, based on the unambiguous phrase “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” in G.S. 14-33(c). These convictions were based on the same conduct as they were derived from the same indictment for assault on a female. We also note that although, Defendant pled guilty to attaining the status of habitual felon, N.C. Gen. Stat. § 14-7.6 only permits a “felony” to be upgraded as part of attaining the status of habitual felon, not a misdemeanor. Therefore, we hold that the trial court erred in including on the judgment the misdemeanor conviction for assault on a female. Accordingly, we vacate the assault on a female conviction listed on the judgment and remand for resentencing of Defendant as a habitual felon on the habitual misdemeanor assault conviction.

C. Jury Instructions—Interfering With A Witness

[4] Lastly, Defendant contends that the trial court erred in instructing on the charge of “interfering with a witness” because “it [was] immaterial that the victim was regularly summoned or legally bound to attend” as this instruction effectively negated the State’s burden to prove the first element of this offence that “a person was summoned as a witness in a court of this state.” Defendant cites *State v. Shannon*, ___ N.C. App. ___, 750 S.E.2d 571 (2013) and *State v. Neely*, 4 N.C. App. 475, 166 S.E.2d 878 (1969) in support of his argument. The State argues that the trial court’s instruction was correct because *Shannon* and *Neely* state that the first element is established if the victim is a “prospective witness” and the instruction clarifies this element pursuant to these holdings.

Here, defense counsel objected to the trial court’s instruction on the charge of interfering with a witness, preserving this issue for appeal. See N.C. R. App. P. 10(a)(2). We review a trial court’s rulings regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). In *Shannon*, this Court summarized the Neely holding as follows:

In *State v. Neely*, a witness testified against the defendant during the defendant’s initial trial[.] After the defendant was

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convicted in that court and had appealed to the superior court for a trial *de novo*, the defendant threatened the witness. Defendant was subsequently convicted of intimidating a witness and appealed to this Court. On appeal, the defendant argued that his conviction should have been dismissed because, when the threat was made, the witness had already completed his testimony in the first trial and was not under a subpoena to testify in the superior court trial. This Court rejected the defendant's argument, noting that the witness "was in the position of being a prospective witness" because, at the time of the threat, the defendant had already appealed for a trial *de novo* and the defendant was trying to prevent the witness from testifying in the superior court trial. The Court further explained that because "[t]he gist" of the offense of intimidating a witness is the obstruction of justice, "[i]t is immaterial . . . that the person procured to absent himself was not regularly summoned or legally bound to attend as a witness."

___ N.C. App. at ___, 750 S.E.2d at 573-74 (citations omitted). The *Shannon* Court stated that *Neely* established "that 'prospective witness' was the standard by which to determine whether an individual qualifies as being a 'person summoned or acting as such witness' under N.C. Gen. Stat. § 14-226(a)." *Id.* at ___, 750 S.E.2d at 574-75 (emphasis omitted).

Here, the trial court instructed the jury on the elements of "interfering with a witness[.]" including the first element, which is at issue in Defendant's argument:

First, that a person was summoned as a witness in a court of this state. *You are instructed that it is immaterial that the victim was regularly summoned or legally bound to attend.*

(Emphasis added.) The second sentence in the first element is from a footnote in the pattern jury instructions which cites to this Court's holding in *Neely*.

Here, the State had not introduced into evidence a summons for Ms. Smith to testify. Therefore, in order to clarify this issue for the jury, the trial court included the portion of the instruction italicized above to show that the victim need only be a "prospective witness" for this element to be satisfied. Evidence supporting Ms. Smith's "prospective witness" status included testimony that she had been summoned several times, she had received a letter from the District Attorney informing

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her that she would be a witness, and she was named as the victim on the indictment. Although, as Defendant contends, the footnote does not include the words “prospective witness[,]” it functionally informs the jury that Ms. Smith did not have to have a summons to be protected under this statute, as held in *Neely* and *Shannon*. Therefore, Defendant’s argument is overruled.

III. Conclusion

Based on the foregoing, we find no error in part, vacate three of Defendant’s convictions for habitual violations of a DVPO (13CRS003101), vacate Defendant’s conviction for assault on a female (12CRS204285), and remand for resentencing on these consolidated judgments, as discussed above.

NO ERROR IN PART; VACATED IN PART; and REMANDED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ASHLEY MANN, DEFENDANT

No. COA14-347

Filed 2 December 2014

1. Indictment and Information—felony secret peeping—consent—adequately alleged

An indictment for felony secret peeping sufficiently charged the offense, specifically the lack of consent. Language in the indictment that defendant unlawfully, willfully and feloniously did secretly and surreptitiously attempt to capture photographic images of the victim indicated that defendant intended to capture images of the victim without her consent.

2. Appeal and Error—preservation of issues—issue not raised at trial

Defendant’s argument concerning the sufficiency of the evidence in a felony peeping prosecution was waived where he did not raise it at trial.

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3. Evidence—questions directing attention—not leading

The trial court did not abuse its discretion and committed no prejudicial error by allowing the prosecutor to allegedly ask leading questions of the victim in a prosecution for felony peeping. The questions were part of the prosecutor's more general questioning of the victim and the specific questions challenged by defendant merely directed the witness's attention to the subject at hand without suggesting an answer.

4. Evidence—prior statements—corroboration—opened door

The trial court did not abuse its discretion and commit prejudicial error by admitting prior statements by the victim as corroborative evidence where defendant himself opened the door to admission of these statements.

Appeal by defendant from judgment entered 15 August 2013 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

BRYANT, Judge.

An indictment which sets forth a clear statement of the offense for which the defendant has been charged is not fatally defective. Where a defendant presents one argument to the trial court and a different argument on appeal, defendant's argument on appeal will be deemed waived. Where three questions asked by the prosecutor were not necessarily leading, and where defendant failed to show how the asking of those questions prejudiced him, the trial court did not abuse its discretion in allowing those questions to be asked of a witness. Defendant may not complain on appeal about the admission of testimony to which he opened the door before the trial court.

On 29 May 2012, defendant Christopher Ashley Mann was indicted on one count of felony secret peeping. The charge came on for trial during the 13 August 2013 criminal session of Pitt County Superior Court, the Honorable Alma J. Hinton, Judge presiding. At trial, the State's evidence tended to show the following.

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In August 2010, defendant and his wife Amy invited Amy's friend, Barbara Dauberman, to stay with them at their home in Winterville. Barbara accepted the invitation since she needed a place to stay while her infant son was being treated for a heart defect at Pitt County Memorial Hospital. While staying at defendant's home, Barbara lived in an upstairs bedroom which shared a bathroom with a second upstairs bedroom. Defendant and Amy's bedroom was located downstairs.

On 13 September 2010, Barbara spent the day at the hospital with her son, returning to defendant's home at around 10:00 p.m. that evening. After returning to the home, Barbara went upstairs to fold her laundry and use the bathroom. Upon entering the bathroom, Barbara noticed a screw in the sink and some pink insulation in the toilet. Barbara then looked up and noticed that the air vent in the ceiling was missing a screw, that its slats had been bent, and that a neon blue light was visible inside the vent. After getting a chair to stand on so she could inspect the vent more closely, Barbara noticed a black surveillance camera inside the air vent.

Barbara then went downstairs and asked Amy to come upstairs with her to see the camera. Upon seeing the camera, Amy appeared to be "in shock" and "disgusted." Amy retrieved a screwdriver from downstairs to unscrew the air vent cover and attempted to pull out the camera, but she had to go into the attic to unplug the camera's cables. When defendant came upstairs to see what Barbara and Amy were doing, Barbara accused defendant of installing the camera. After defendant denied having any involvement with the installation of the camera, both women told defendant to call the police.

After defendant called the police, Barbara packed up her belongings, left the home, and called her husband to tell him about the camera. While on the phone with her husband, Barbara saw a police car pull up to defendant's home and leave shortly after Amy ran out of the home and spoke to the police officer. Amy then called Barbara and asked her to return to the home. When she reached the driveway, Barbara stated that defendant began crying and apologizing to her for installing the camera. Amy removed the camera's monitor from defendant's truck and gave it to Barbara, who then left.

Barbara testified that she spoke to Amy several times over the phone and in person after she moved out of defendant's home. Barbara stated that Amy asked her not to call the police for the sake of Amy's son and step-daughters. At the hospital, Barbara received a bouquet of flowers

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and an apology note from defendant; Barbara threw away the note and gave away the flowers.

Barbara testified that Amy visited her several times at the hospital after Barbara moved out of Amy's house, and that Amy attended the funeral of Barbara's son in December. In January 2011, Barbara became concerned about her and her family's safety after she learned that defendant and Amy were considering becoming members of Barbara's church. In March, Barbara engaged the Kellum Law Firm to represent her because she wanted to keep defendant away from her and her family. Barbara stated that after she realized the Kellum Law Firm would require her to sign a confidentiality agreement, she ended the firm's representation of her and contacted the Pitt County Sheriff's Office.

Barbara was interviewed by Detective Jeremy Monette of the Pitt County Sheriff's Office, and provided Detective Monette with a written statement and the surveillance camera and monitor. Detective Monette identified the surveillance camera as having been purchased at Sam's Club on 12 September 2010 by a person using defendant's membership card; he also confirmed that defendant sent flowers and a note to Pitt County Memorial Hospital for Barbara. Defendant declined to be interviewed. When interviewed by Detective Monette, Amy stated that she had installed the surveillance camera in Barbara's bathroom as part of a sexual role-playing game between herself and defendant, and denied that defendant had any knowledge of the camera.

On 15 August 2013, a jury convicted defendant of felony secret peeping. Defendant was sentenced to six to eight months imprisonment, with the trial court suspending that sentence and placing defendant on thirty-six months supervised probation. Defendant appeals.

On appeal, defendant contends: (I) the indictment was insufficient to charge felony secret peeping; and (II) the trial court erred in denying defendant's motion to dismiss the charge due to insufficient evidence. Defendant further argues that the trial court abused its discretion and committed prejudicial error in (III) allowing the prosecutor to ask leading questions; and (IV) admitting statements as corroborative evidence.

I.

[1] Defendant first argues that the indictment was insufficient to charge felony peeping. We disagree.

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This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

Defendant contends the trial court erred in denying his motion to dismiss the indictment as fatally defective. Specifically, defendant contends the indictment was fatally defective because it did not allege all of the elements of felony secret peeping.

“It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). It is well established that “[a]n indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.” *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (citation and quotation omitted).

As a general rule[,] [an indictment] following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner. . . . [unless] the statutory language fails to set forth the essentials of the offense, [in which case] the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged.

State v. Barneycastle, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983) (citations omitted).

The indictment against defendant, returned pursuant to N.C. Gen. Stat. § 14-202, stated that:

The jurors for the State upon their oath present that on or about the date of offense shown and in the County named above the defendant named above unlawfully, willfully and feloniously did secretly and surreptitiously install a wireless camera/device capable of creating a photographic image in the guest bathroom located at 562 Shadow Ridge Dr, Winterville, NC, to look at the victim, Barbara Dauberman, with the intent to capture an image for arousal and gratifying the sexual desire of himself or any person.

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During the trial, defendant asked the State to clarify which section of N.C.G.S. § 14-202 the State wished to proceed under. Upon the State indicating that it would proceed under N.C.G.S. § 14-202(f), defendant made a motion pursuant to N.C. Gen. Stat. § 15A-924 to dismiss the indictment because the indictment lacked the element of consent as required by N.C.G.S. § 14-202(f). *See* N.C.G.S. § 14-202(f) (2013) (“Any person who, for the purpose of arousing or gratifying the sexual desire of any person, secretly or surreptitiously uses or installs in a room any device that can be used to create a photographic image with the intent to capture the image of another without their consent shall be guilty of a Class I felony.”). The trial court denied defendant’s motion on grounds that the language of the indictment was sufficient.

North Carolina General Statutes, section 15A-924, requires that every criminal pleading contain:

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

N.C.G.S. § 15A-924(5) (2013).

We disagree with defendant’s contention that the indictment was fatally defective, since a review of the indictment in conjunction with N.C.G.S. § 14-202 indicates that the indictment, as returned, was sufficient to charge felony secret peeping. Although defendant is correct in his assertion that N.C.G.S. § 14-202(f) includes the language “without their consent,” it is well-established by this Court that any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person’s consent. *See In re Banks*, 295 N.C. 236, 242, 244 S.E.2d 386, 390 (1978) (“This Court has, therefore, indicated that the word ‘secretly’ as used in G.S. 14-202 conveys the definite idea of spying upon another with the intention of invading her privacy. Hence, giving the language of the statute its meaning as interpreted by this Court, G.S. 14-202 prohibits the wrongful spying into a room upon a female with the intent of violating the female’s legitimate expectation of privacy. This is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions.”).

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Moreover, it is also clear from the language used in the indictment that the omission of the words “without their consent” did not render the indictment fatally defective. The indictment states that defendant “unlawfully, willfully and feloniously did secretly and surreptitiously” attempt to capture photographic images of “the victim, [Barbara].” Such strong language indicates that defendant intended to capture images of Barbara without her consent, since terms such as “feloniously,” “unlawfully,” “surreptitiously,” and “victim” clearly allege that defendant has done something to another person (here, Barbara) without that person’s consent. See BLACK’S LAW DICTIONARY 1582, 1703 (9th ed. 2009) (defining “surreptitious” as “unauthorized and clandestine; stealthily and usu[ally] fraudulently done”; defining “victim” as “[a] person harmed by a crime, tort, or other wrong”). Further, this Court has held that the element of “without consent” has been adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously. See *State v. McCormick*, 204 N.C. App. 105, 112, 693 S.E.2d 195, 198-99 (2010) (holding that the element of “without consent” did not need to be specifically pled in a burglary indictment where it was clear that the language of the indictment, stating that defendant “unlawfully, willfully and feloniously,” indicated that defendant acted without consent or welcome in entering his estranged wife’s house); *State v. Pennell*, 54 N.C. App. 252, 259-60, 283 S.E.2d 397, 402 (1981) (the element of “without consent” was presumed to exist within the indictment where “the language in the indictment, that the defendant ‘unlawfully and wil[l]fully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees,’ implies that defendant did not have the consent of the Board of Trustees [to enter their building].”). Therefore, the indictment was sufficient to charge felony secret peeping so that defendant’s argument is, accordingly, overruled.

II.

[2] Defendant next argues that the trial court erred in denying defendant’s motion to dismiss the charge for insufficient evidence. Specifically, defendant contends the trial court erred in denying his motion to dismiss because the State did not present sufficient evidence to satisfy the *corpus delicti* rule. Defendant’s argument cannot be reached on appeal, however, since defendant did not raise this argument before the trial court.

It is well-established by this Court that “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount

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in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted). When, as here, a party changes theories between the trial court and an appellate court, the argument is deemed not properly preserved and is, thus, waived. *Id.* at 123-24, 573 S.E.2d at 685.

In his argument before the trial court, defendant made a general motion to dismiss the charge for insufficiency of the evidence, arguing that pursuant to the indictment, the State failed to demonstrate each element of N.C.G.S. § 14-202(f). The trial court denied the motion. The following day, defendant renewed his motion to dismiss for insufficiency of the evidence, this time arguing that under N.C.G.S. § 14-202(f) the State had failed to show how the surveillance camera met the statutory requirements for capturing an image; this motion was also denied.

On appeal, defendant now attempts to raise a new argument by contending that the State failed to satisfy the *corpus delicti* rule. However, as defendant never presented any argument concerning the corpus delicti rule to the trial court, his argument has not been properly preserved for appeal. *See State v. Shelly*, 181 N.C. App. 196, 206, 638 S.E.2d 516, 524 (2007) (holding that where defendant made a motion to dismiss before the trial court for lack of premeditation and deliberation and on appeal argued a theory of *corpus delicti*, defendant had waived his argument on appeal).¹ Accordingly, defendant’s argument is dismissed.

III.

[3] Defendant next argues that the trial court abused its discretion and committed prejudicial error in allowing the prosecutor to ask leading questions. We disagree.

“Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion.” *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citation omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *Id.* (citations omitted). “[T]he

1. We further note that defendant’s *corpus delicti* rule argument could not be sustained on appeal even if it were properly before this Court. The *corpus delicti* rule would only apply if defendant’s admission had been the only evidence of his commission of the crime. *See State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985) (holding that “an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime.”). Here, there was additional evidence before the jury of defendant’s guilt such that the application of the *corpus delicti* rule would have been inappropriate.

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trial court has discretionary authority to permit leading questions in proper instances, and absent a showing of prejudice the discretionary rulings of the court will not be disturbed. If the testimony is competent and there is no abuse of discretion, defendant's exceptions thereto will not be sustained." *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 595 (1979) (citations omitted).

Defendant contends the trial court erred in allowing the prosecutor to ask leading questions of Barbara. During the State's examination of Barbara, the prosecutor asked the following three questions defendant now argues were leading:

[THE STATE:] Do you feel an expectation of privacy in that bathroom?

[DEFENDANT]: Objection to the form of his question.

THE COURT: Overruled.

[BARBARA:] Yes.

[THE STATE]: If I can have one brief second, Your Honor.

THE COURT: Yes.

[THE STATE:] Did you ever give anyone permission to place a camera in the bathroom at the Mann's house that you--

[DEFENDANT]: Objection. Form of his question again.

[BARBARA:] No.

[THE STATE]: I'll re-form that question, Your Honor.

[THE STATE:] Did you consent to ever being filmed at the Mann's house?

[BARBARA:] Absolutely not.

[DEFENDANT]: Objection to the form of his question.

THE COURT: Overruled.

"A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977) (citations omitted). However, a question cannot be deemed leading simply because it calls for a yes or no answer. *State v. White*, 349 N.C. 535, 557, 508 S.E.2d 253, 267 (1998) (citation omitted). Questions which direct a witness towards

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a specific topic of discussion without suggesting any particular answer are not leading. *Id.* (citations omitted).

Defendant's argument that these three questions by the prosecutor were leading lacks merit, since a review of the record indicates that these questions were part of the prosecutor's more general questioning of Barbara regarding who typically used that bathroom and might have known about the existence of the surveillance camera. The specific questions challenged by defendant merely directed the witness's attention to the subject at hand without suggesting an answer.

Further, assuming *arguendo* that these questions were in fact leading, defendant has not demonstrated how allowing these questions constituted an abuse of discretion or otherwise prejudiced him. Prior to asking the challenged questions, Barbara had already testified to being shocked and disgusted upon discovering the hidden camera. This and other evidence presented at trial clearly showed that Barbara had not given anyone consent to film her (especially in the bathroom where she had an expectation of privacy). Defendant's argument is, therefore, overruled.

IV.

[4] In his final argument on appeal, defendant contends the trial court abused its discretion and committed prejudicial error in admitting statements as corroborative evidence. We disagree.

"The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroborative purposes." *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations omitted).

Defendant argues that the trial court erred in admitting prior statements made by Barbara to Detective Monette for corroborative purposes. However, a review of the trial transcript indicates that defendant himself opened the door to admission of these statements. Defendant asked Barbara on cross-examination about her interview with Detective Monette and the typed statement Detective Monette requested she make and give to him regarding the events of 13 September 2010. A defendant cannot on appeal complain when he opened the door to the admission of this evidence in the trial court below. *State v. Moore*, 103 N.C. App. 87, 96, 404 S.E.2d 695, 700 (1991) (holding that where the defendant introduced evidence on cross-examination of a witness, "the defendant ha[d] 'opened the door' to this testimony and [could] not be heard to complain [on appeal]." (citation omitted)).

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Moreover, even if defendant had not opened the door to Barbara's prior statements, these statements were admissible as corroborative evidence.

[C]orroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness'[] prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

Tellez, 200 N.C. App. at 526-27, 684 S.E.2d at 740 (citations omitted). "The trial court is [ultimately] in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter]." *State v. Bell*, 159 N.C. App. 151, 156, 584 S.E.2d 298, 302 (2003) (citation omitted). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Tellez*, 200 N.C. App. at 527, 684 S.E.2d at 740 (citation omitted).

During defendant's cross-examination of Barbara, Barbara testified about her interviews with Detective Monette and about the typed statement she had prepared and given to Detective Monette at his request. On redirect, the State questioned Barbara further about her statements to Detective Monette for purposes of clarifying her answers. A review of the trial transcript indicates that Barbara's prior statements made to Detective Monette were indeed corroborative, since the statements were consistent with her testimony regarding the sequence of events involving defendant that transpired beginning 13 September 2010. Further, although defendant challenged Barbara about specific details contained in her prior statements, such as the order in which Amy removed the surveillance camera and its components from the air vent and attic, any slight variations between Barbara's prior statements and her trial testimony did not create a fundamental inconsistency in

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her account of discovering the surveillance camera and what happened thereafter. *See State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) (“[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness’ in-court testimony.” (citation omitted)). Accordingly, defendant’s final argument is overruled.

No error.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
JAMES EARL PARKER, JR., DEFENDANT

No. COA14-412

Filed 2 December 2014

Kidnapping—insufficient evidence—restraint—separate from sexual assault

The trial court erred by denying defendant’s motions to dismiss the charge of kidnapping. The State offered insufficient evidence to establish that defendant restrained the victim in a way that was separate and apart from the restraint inherent in the rapes and the sexual assault for which he was convicted.

Appeal by Defendant from judgments entered 30 August 2013 by Judge W. Douglas Parsons in Sampson County Superior Court. Heard in the Court of Appeals 7 October 2014.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant-appellant.

DILLON, Judge.

James Earl Parker, Jr. (“Defendant”) appeals from his conviction for first-degree kidnapping. For the following reasons, we vacate Defendant’s conviction.

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[237 N.C. App. 546 (2014)]

I. Background

The State's evidence tended to show that on the evening of 27 October 2009, Kelly¹ was walking from a park through a field to a laundromat in Clinton to use the bathroom. As Kelly was walking, Defendant grabbed her from behind by the back of her neck, pulled her behind a storage building located at the edge of the field, and threw her to the ground beside some bushes and a fence.

When Kelly fell, she hit her head on the fence. Defendant forced himself on Kelly, penetrating her vaginally, and forcing her to perform oral sex on him. During this time, Defendant put his hands around Kelly's neck. At some point, Kelly lost consciousness. When she regained consciousness, Defendant was leaving the area.

Defendant was indicted on second-degree sexual offense, first-degree kidnapping, and two counts of second-degree rape. Defendant was tried by a jury. Defendant made motions to dismiss all charges at the close of the State's evidence and at the close of all evidence. Both motions were denied by the trial court.

The jury found Defendant guilty of all charges, and the trial court sentenced Defendant in four separate judgments. For the two second-degree rape and the second-degree sexual offense convictions, the trial court imposed active sentences of 90 to 117 months for each conviction to run consecutively. The trial court noted the first-degree kidnapping conviction but sentenced Defendant for second-degree kidnapping to a consecutive term of 37 to 54 months imprisonment. Defendant entered notice of appeal in open court.

II. Argument

In his only argument on appeal, Defendant contends that the trial court erred in denying his motions to dismiss the charge of kidnapping. Specifically, Defendant argues that the State offered insufficient evidence to establish that Defendant restrained the victim in a way that was separate and apart from the restraint inherent in the rapes and the sexual assault for which he was convicted.

The standard of review for a trial court's denial of a defendant's motion to dismiss for insufficiency of the evidence is well established:

A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of

1. A pseudonym.

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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.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). Additionally, "[t]he 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. Phillipott*, 213 N.C. App. 468, 478, 713 S.E.2d 202, 209 (2011) (citation omitted), *disc. review denied*, 365 N.C. 544, 720 S.E.2d 393 (2012).

Our law mandates that anyone who, without consent, unlawfully confines, restrains, or removes someone sixteen years of age or older shall be guilty of kidnapping when it is done for the purpose of facilitating commission of a felony. N.C. Gen. Stat. § 14-39(a)(2)(2009).

In the present case, the indictment for kidnapping alleged all three theories—that Defendant confined, restrained, and removed the victim. However, the trial court limited its instruction on kidnapping based on restraint. Further, during the charge conference, the trial court indicated his intention of limiting its instruction solely on the theory of restraint, and the State stipulated to the instruction. As the State abandoned any theory of confinement or removal at trial, our analysis is limited only to whether there was sufficient evidence of restraint.

N.C. Gen. Stat. § 14-39(b)(2009) states that when a victim of kidnapping is sexually assaulted, the kidnapping charge is raised from second-degree to first-degree kidnapping. Upon sufficient evidence, a defendant may be convicted of first-degree kidnapping and the underlying sexual offense which raised it to first-degree, although the defendant cannot be punished for both. *State v. Freeland*, 316 N.C. 13, 23-24, 340 S.E.2d 35, 40-41 (1986). In such an instance, it is permissible to punish for the underlying sexual offense and to punish for second-degree kidnapping, *id.*, as was done in the present case.

However, where a defendant is convicted of rape or sexual assault, a separate conviction of kidnapping in any degree based on restraint is sustained only where the restraint "is a separate, complete act, independent of and apart from the rape [or sexual assault]." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) (citation and quotation marks omitted).

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Citing *State v. Ackerman*, 144 N.C. App. 452, 551 S.E.2d 139, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001), Defendant specifically argues that his motions should have been granted because his restraint of Kelly by pushing her to the ground and holding her was inherent in the “restraint necessary to facilitate the sex offenses.” Defendant concludes that this was insufficient to establish kidnapping upon a theory of restraint, the trial court erred in denying his motions to dismiss, and his conviction for kidnapping should be vacated.

The State contends that this case is distinguishable from *Ackerman* in that, “by putting his hands around her throat to the point where [Kelly] blacked out and lost consciousness,” the victim was exposed “to a greater degree of danger than necessary for the accomplishment of the sex offense and rapes[.]” *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001). In concluding this restraint was not inherent in the sex offenses, the State analogizes the restraint to that in *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). In *Fulcher*, the Supreme Court held that there was sufficient evidence of an independent act of restraint where the defendant bound the hands of his victims to facilitate the commission of crimes against nature; having bound the victims’ hands before compelling them to perform oral sex on him, “the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature ever occurred.” *Id.* at 507, 523-24, 243 S.E.2d at 342, 351-52.

In a subsequent case, the Supreme Court further explained its rationale in *Fulcher*:

[A] kidnapping charge cannot be sustained if based upon restraint which is an inherent feature of another felony [for which the defendant is also convicted]. . . . Defendant argues that the time which he restrained the victim was necessary for him to prepare for the sex act. The test established in *Fulcher* does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense.

State v. Williams, 308 N.C. 339, 346-47, 302 S.E.2d 441, 447 (1983).

In *Ackerman*, we held that there was insufficient evidence of independent restraint to support a kidnapping charge. 144 N.C. App. at 458-59, 551 S.E.2d at 143-44. We expressed that the defendant’s “continuous confinement” of the victim in a vehicle was “restraint inherent in his commission of the sexual offense,” even though “the sexual assault comprised only a small portion of the total time” they were in the vehicle,

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and even though the defendant had choked the victim and beaten her with a bottle to the point where she pretended to be unconscious to end the beating. *Id.* at 458-59, 551 S.E.2d at 143-44. In finding there was no independent restraint, despite the sexual offense having comprised a small portion of the time in the vehicle, we explained that the test turns to what is inherent in the actual commission of the offense, not what is necessary to commit it. *Id.* We explained that there was no independent restraint such as what occurred in *Williams*, where “the defendant forced the victim to sit in the living room and to accompany him to the kitchen so that the defendant could get something to drink.” 308 N.C. at 458, 551 S.E.2d at 143.

In the present case, we believe that the evidence of restraint was insufficient to support the charge of kidnapping because Defendant’s restraint of the victim was inherent in the underlying felonies of sexual assault and rape. The State’s evidence of restraint amounted to the following: Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than *necessary* to accomplish the rapes and sexual assault, the restraint was inherent “in the actual commission” of those acts. *See Williams, supra.* Unlike in *Fulcher*, where the victims’ hands were bound *before* any sexual offense was committed, Defendant’s acts of restraint occurred as part of the commission of the sexual offenses.

We note the State’s argument in its brief that there was evidence that Defendant “removed” Kelly from the open field to the fence area behind the building. Such evidence might be sufficient to sustain a punishment for kidnapping separate from the punishments for the rapes and sexual assault. *See, e.g., State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). However, since the trial court only instructed based on “restraint” and the State stipulated to the instruction, this argument is overruled.

As the State’s evidence shows that Defendant’s restraint of the victim was merely inherent to the commission of the underlying felonies, second-degree rape and second-degree sexual offense, *see Williams*, 308 N.C. at 347, 302 S.E.2d at 447, there was insufficient evidence to take this charge to the jury on the theory of restraint, and the trial court erred in denying Defendant’s motions to dismiss as to this charge.

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III. Conclusion

Accordingly, we vacate Defendant's conviction for first-degree kidnapping and his sentence for second-degree kidnapping.

VACATED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

STATE OF NORTH CAROLINA

v.

JAMES M. ROBERTS

No. COA14-175

Filed 2 December 2014

1. Jurisdiction—standing—constitutionality of alcohol breath test—mandatory presumption—language not included in instruction

Defendant lacked the standing necessary to challenge the constitutionality of statutory language concerning alcohol breath tests which allegedly created a mandatory presumption. The trial court did not include that language in its instructions to the jury.

2. Motor Vehicles—driving while impaired—alcohol breath test—observation period

The trial court did not err by refusing to suppress the results of defendant's alcohol breath test where defendant contended that the trooper did not sufficiently observe defendant during the 15-minute observation period. None of the events listed in 10A N.C.A.C. 41B.0101(b) as affecting the accuracy of the test occurred. Nothing in the regulatory language requires the analyst to stare at the person to be tested with an unwavering gaze for the observation period.

3. Motor Vehicles—driving while impaired—instructions—admissibility of test—legal determination

The trial court in a driving while impaired prosecution did not express an opinion in its instructions on the admissibility of the chemical test, which is a legal determination for the trial court rather than an issue of fact for the jury to decide.

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4. Criminal Law—instructions—conflict between defendant’s argument and previous stipulation

The trial court did not err in a driving while impaired prosecution in its instruction on the time stamp of the video of the recording of the testing room. The argument advanced by defendant in his closing argument conflicted with his earlier assertions and there was no error in the trial court’s decision to correct the record using information to which defendant had, in effect, previously stipulated.

5. Criminal Law—initiation of prosecution—impaired driving—presentment rather than citation

A defendant in a prosecution for driving while impaired was not deprived of the equal protection of the laws where the prosecution was initiated with a presentment instead of a citation, unlike other attorneys charged. The present process required the use of a special prosecutor and non-resident judge on one rather than two occasions, thus furthering judicial economy.

6. Appeal and Error—standard of review—prosecutor’s closing argument—objections below sustained

Appellate review of a prosecutor’s closing arguments in a prosecution for driving while impaired was limited to whether the argument was so grossly improper that the trial court should have intervened *ex mero motu* where defendant lodged contemporaneous objections to only two of the challenged arguments and the trial court sustained both of those objections.

7. Criminal Law—prosecutor’s closing argument—not grossly improper

The prosecutor’s closing argument in a prosecution for driving while impaired was not so grossly improper as to have necessitated *ex mero motu* intervention by the trial court where the comments were not relevant, were upheld elsewhere, or did not render the hearing fundamentally unfair.

8. Constitutional Law—driving while impaired—alcohol level exceeding minimum needed for conviction—enhanced punishment

The defendant in a driving while impaired prosecution was not twice placed in jeopardy for the same offense by the State using the same breath test to establish the factual basis for defendant’s plea and to support the aggravating factor used to enhance defendant’s punishment. Instead of being punished twice, defendant was subjected to a more severe punishment for an underlying substantive

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offense based upon a blood alcohol test that was higher than needed to support a conviction.

Appeal by defendant from judgment entered 27 June 2013 by Judge Christopher W. Bragg in Pitt County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant.

ERVIN, Judge.

Defendant James M. Roberts appeals from a judgment entered based upon his conviction for driving while subject to an impairing substance. On appeal, Defendant argues that the trial court erred by allowing the use of an unconstitutional mandatory presumption regarding the effect of the results of the chemical analysis of Defendant's breath that was admitted into evidence, allowing the admission of evidence concerning the result of a chemical analysis of his breath, erroneously instructing the jury concerning the extent to which the chemical analyst had complied with the applicable regulations and the extent to which the time stamps shown on a video introduced into evidence accurately reflected the amount of time that elapsed during the time that certain events occurred, denying his motion to dismiss the charge that had been lodged against him based upon the State's failure to prosecute other similarly situated defendants using the presentment process, failing to intervene without objection to preclude the prosecutor from making inappropriate comments during her final argument, and placing him in jeopardy twice for the same offense by using the results of a chemical analysis of his breath to establish both the factual basis needed to support his guilty plea and as the primary support for the aggravating factor that the jury found to exist for sentencing-related purposes. 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

At approximately 8:00 p.m. on 26 January 2012, Defendant was seen in the parking lot of a Harris Teeter grocery store. At that time,

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Defendant was walking in a slow, unsteady manner and appeared to be having trouble locating his vehicle. After making these observations, Robert Aiken approached Defendant for the purpose of ascertaining if he needed assistance. However, Defendant failed to make eye contact with or otherwise acknowledge Mr. Aiken's presence. According to Mr. Aiken, Defendant was "wasted."

After noticing that Defendant had purchased beer, Mr. Aiken enlisted the help of another man in an attempt to prevent Defendant from getting in his car and driving away. As this was occurring, Trooper William Brown of the North Carolina State Highway Patrol arrived in the parking lot. Mr. Aiken flagged Trooper Brown down and told Trooper Brown what he had observed. As Mr. Aiken talked with Trooper Brown, Defendant reached his automobile, placed a bag in the vehicle's interior, and walked away.

After learning of Defendant's condition from Mr. Aiken, Trooper Brown waited to see if Defendant would return to his vehicle. About 30 minutes later, Defendant returned to the parking space in which his automobile was located, entered his vehicle, and began driving out of the parking lot. While following Defendant, Trooper Brown observed that Defendant crossed the fog line twice and ran a red light. As a result, Trooper Brown stopped Defendant's vehicle, placed Defendant under arrest for driving while subject to an impairing substance, and transported Defendant to the Pitt County Detention Center for the purpose of chemically testing Defendant's breath for the presence of alcohol.

After Trooper Brown and Defendant reached the testing room, Trooper Brown removed Defendant's handcuffs and asked Defendant if he had anything in his mouth. In response, Defendant mentioned "Copenhagen," raked his finger between his lips and his teeth, and displayed a tin of Copenhagen chewing tobacco. Trooper Brown did not, however, see anything in Defendant's mouth. Although Defendant wanted to wash his mouth out before the chemical test of his breath was administered, Trooper Brown refused to allow Defendant to do so.

At 9:22 p.m., Trooper Brown advised Defendant of his rights relating to the testing process and began the statutory observation period, during which he was required to ensure that Defendant did not put anything in his mouth, regurgitate, vomit, smoke, eat, or drink. At 9:33 p.m., Defendant exercised his right to call someone in an attempt to obtain the presence of a witness during the testing process. Shortly thereafter, Trooper Brown left the testing room with Defendant for the purpose of allowing Defendant to use the restroom. After Trooper Brown and

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Defendant returned to the testing room, Defendant placed his fingers in his mouth, causing Trooper Brown to place Defendant in handcuffs and initiate a new observation period, which began at 9:52 p.m.

At 10:06 p.m., Trooper Brown and Defendant left the testing room for the purpose of ascertaining if Defendant's witness had arrived. During that process, Defendant wiped his mouth on his jacket on two separate occasions. Upon returning to the testing room, Trooper Brown took three samples of Defendant's breath, after which he reported that Defendant had a 0.19 blood alcohol level.

B. Procedural History

On 26 January 2012, a citation charging Defendant with driving while subject to an impairing substance was issued. On 13 August 2012, the Pitt County grand jury returned a presentment requesting the District Attorney to investigate the underlying circumstances and submit a bill of indictment charging Defendant with driving while subject to an impairing substance. On that same date, the Pitt County grand jury returned a bill of indictment charging Defendant with driving while subject to an impairing substance.

The charge against Defendant came on for trial at the 24 June 2013 criminal session of the Pitt County Superior Court. On 25 June 2013, the trial court summarily denied Defendant's Motion to Suppress Evidence (*Miranda*) and denied in part and granted in part Defendant's Motion in *Limine* and/or Motion to Prohibit the State From Introducing Any Expert Testimony. On 26 June 2013, the trial court denied Defendant's Motion to Dismiss, Motion to Suppress Chemical Analysis of Breath, and Motion to Suppress Evidence (Investigatory Stop & Seizure).¹ After the trial court announced its rulings with respect to Defendant's pre-trial motions, Defendant entered a plea of guilty to driving while subject to an impairing substance while preserving his right to seek appellate review of the denial of his pretrial motions. After concluding that there was a factual basis for Defendant's plea, the trial court accepted his plea of guilty.

On 26 June 2013, the issue of whether Defendant had a blood alcohol concentration of 0.15 or more within a relevant time after driving came on for hearing before the trial court and a jury. On 27 June 2013, the jury returned a verdict finding the existence of the aggravating factor delineated in N.C. Gen. Stat. § 20-179(d)(1). At the conclusion of the ensuing

1. The trial court entered written orders denying these motions on 13 August 2013.

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sentencing hearing, the trial court determined that Level III punishment should be imposed and entered a judgment sentencing Defendant to a term of 90 days imprisonment in the custody of the Sheriff of Pitt County, suspending Defendant's sentence, and placing Defendant on supervised probation for 12 months on the condition that he pay the court costs and a \$1,000 fine, surrender his driver's license and not operate a motor vehicle until properly licensed to do so, complete 72 hours of community service within 60 days, abstain from alcohol consumption for a period of 60 days as verified by a continuous alcohol monitoring system, and comply with the usual terms and conditions of probation.² Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Validity of Breath Test Result Presumption

[1] In his first challenge to the trial court's judgment, Defendant contends that language added to N.C. Gen. Stat. § 20-179(d)(1) in 2007 creates an unconstitutional mandatory presumption. More specifically, Defendant contends that the statutory provision to the effect that the result of a chemical test of a defendant's breath for the presence of alcohol "shall be conclusive, and shall not be subject to modification by any party" for purposes of determining that Defendant's sentence should be enhanced violates his federal and state constitutional rights not to be deprived of liberty without due process of law and to have the existence of an aggravating factor proven beyond a reasonable doubt. N.C. Gen. Stat. § 20-179(d)(1). We do not believe that Defendant is entitled to relief from the trial court's judgment on the basis of this contention.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766-67 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (stating that "*de novo* review is ordinarily appropriate in cases where constitutional rights are implicated"). "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. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

2. According to the transcript developed during the trial of this case, the judgment was entered on 27 June 2013. However, the judgment included in the record on appeal is dated 25 June 2013, a clerical error that creates the necessity for us to remand this case to the trial court for correction.

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According to N.C. Gen. Stat. § 20-179(d)(1), an aggravated sentence can be imposed following a defendant's conviction for driving while subject to an impairing substance in the event that there is:

Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after driving. For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.

The trial court did not, however, include the language to which Defendant's constitutional challenge is directed in its instructions to the jury concerning the extent, if any, to which the jury should find that Defendant's sentence should be enhanced pursuant to N.C. Gen. Stat. § 20-179(d)(1). Instead, the trial court instructed the jury that:

when a defendant denies the existence of an aggravating factor, he is not required to prove that the aggravating factor does not exist. It is presumed that the aggravating factor does not exist. The State must prove to you beyond a reasonable doubt that the aggravating factor exists.

In addition, the trial court instructed the jury that, although "the testing procedures and test results are admissible . . . you are the sole judges of the credibility and weight to be given to any evidence, and you must determine the importance of this evidence in light of all other believable evidence." Finally, the trial court instructed the jury that:

The defendant having pled guilty to Driving While Impaired, you must now consider the following question: Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor?

The defendant had an alcohol concentration of .15 or more at the time of the offense or within a relevant time of the driving involved in this offense.

If you find from the evidence beyond a reasonable doubt that the aggravating factor exists, then you will write "yes" in the space after the aggravating factor on the verdict sheet. If you have found the existence of the aggravating factor and have written "yes" in the space after the

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aggravating factor, then you will also answer Issue One “yes” and write “yes” in the space after Issue One on the verdict sheet.

As a result, instead of instructing the jury in accordance with the portion of N.C. Gen. Stat. § 20-179(d)(1) upon which Defendant’s constitutional challenge to the trial court’s judgment is based, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption into its instructions and specifically instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury.

A criminal defendant lacks standing to challenge the constitutionality of a specific statutory provision in the absence of a showing he has suffered, or is likely to suffer, an injury stemming from the application of the challenged provision in the case in which he is involved. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (stating that “[s]tanding to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law’s enforcement”) (internal quotation marks and citation omitted); *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 304 (1973) (stating that, “[u]niformly, the accused has been permitted to assert the invalidity of the law only upon a showing that his rights were adversely affected by the particular feature of the statute alleged to be in conflict with the Constitution”). In the absence of such a showing, the defendant is precluded from attacking the constitutionality of the relevant statutory provision. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) (stating that “[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter”) (citations omitted). Defendant has not directed our attention to any portion of the record which tends to suggest that the jury’s decision to find the existence of the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) was in any way affected by the statutory provision upon which Defendant’s constitutional argument rests. As a result, Defendant lacks the standing necessary to support a challenge to the constitutionality of the statutory provision discussed in his brief and is not, for that reason, entitled to relief from the trial court’s judgment on the basis of this argument.

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B. Admissibility of the Breath Test Results

[2] Secondly, Defendant argues that the trial court erred by failing to suppress the results of the chemical analysis of his breath that Trooper Brown performed following Defendant's arrest. More specifically, Defendant contends that, since Trooper Brown failed to satisfactorily comply with the statutory requirement that there be a fifteen minute "observation period" prior to the administration of the chemical test of Defendant's breath mandated by N.C. Gen. Stat. § 20-139.1, the trial court should have granted his motion to suppress the breath test results and refused to allow the admission of the chemical analysis results into evidence. Defendant's argument lacks merit.

1. Standard of Review

As this Court has previously recognized, a defendant is entitled to challenge the denial of a motion to suppress the result of a chemical test of his breath as having been obtained in violation of the applicable provisions of the General Statutes by means of a motion to suppress filed pursuant to N.C. Gen. Stat. § 15A-974. *State v. Hatley*, 190 N.C. App. 639, 642-44, 661 S.E.2d 43, 45-46 (2008). "Our review of a denial of a motion to suppress by the trial court is '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. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L. Ed. 2d 1074 (2003).

2. Applicable Legal Principles

N.C. Gen. Stat. § 20-139.1(b)(1) provides that a chemical analysis of a defendant's breath is admissible if "[i]t is performed in accordance with the rules of the Department of Health and Human Services." According to 10A N.C.A.C. 41B.0322(2), which governs testing performed using equipment designed to analyze a defendant's breath, the analyst must have ensured that the applicable "observation period requirements have been met." The applicable regulations define "observation period" as:

a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. The chemical analyst may observe while conducting the

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operational procedures in using a breath-testing instrument. Dental devices or oral jewelry need not be removed.

10 N.C.A.C. 41B.0101(6). According to well-established North Carolina law, the State bears the burden of proving compliance with the “observation period” requirement set out in N.C. Gen. Stat. § 20-139.1. *State v. Drdak*, 101 N.C. App. 659, 664, 400 S.E.2d 773, 775 (1991), *rev'd on other grounds*, 330 N.C. 587, 411 S.E.2d 604 (1992); *State v. Gray*, 28 N.C. App. 506, 507, 221 S.E.2d 765, 765 (1976). In his brief, Defendant argues that Trooper Brown violated the “observation period” requirement by leaving Defendant alone on two occasions, failing to observe that Defendant had wiped his face or mouth on his jacket twice, and focusing his attention on unrelated activities, and that these violations of the “observation period” requirement should have led to the suppression of Defendant’s breath test results. We do not find this argument persuasive.

3. Evidentiary Analysis

As an initial matter, Defendant was accompanied by Trooper Brown on both of the occasions when he left the chemical testing room. For that reason, we are unable to find any record support for Defendant’s contention that Trooper Brown left him alone on two occasions during the required observation period. In addition, Defendant fails to specify the exact conduct in which Trooper Brown engaged at the time that he allegedly focused his attention on irrelevant matters. However, Trooper Brown did acknowledge that there were “split second[s]” when his eyes were not trained directly on Defendant and that there were times during which his “attention [was both] on [Defendant] and where [he was] going.” As a result, Defendant’s contention that Trooper Brown failed to satisfy the observation requirement hinges upon the fact that, when Trooper Brown and Defendant left the testing room at 10:06 p.m. in order to ascertain if Defendant’s witness had arrived, Trooper Brown allowed Defendant to walk behind him and may have failed to observe that Defendant wiped his mouth on his jacket on two occasions.

According to Defendant, the term “to observe” means “to watch carefully[,] especially with attention to details or behavior for the purpose of arriving at a judgment.” *Merriam-Webster Dictionary*. Although we agree with Defendant that the concept of “observation” as outlined in 10A N.C.A.C. 41B.0322(2) contemplates the maintenance of a careful watch over the subject to be tested, a proper resolution of Defendant’s challenge to the trial court’s ruling must necessarily depend on the purpose for which the observation period requirement was imposed. As we have already noted, the observation period requirement was adopted to

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ensure that “a chemical analyst observes the person or persons to be tested to *determine* that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen.” 10A N.C.A.C. 41B.0101(6). As a result, since the analyst is supposed to focus his or her observations on the extent, if any, to which any event that might affect the accuracy of the test has occurred, nothing in the relevant regulatory language requires the analyst to stare at the person to be tested in an unwavering manner for a fifteen minute period prior to the administration of the test.³ Thus, given that the record shows that Trooper Brown observed Defendant over the course of a period of 21 minutes, during which Defendant did not “ingest[] alcohol or other fluids, regurgitate[], vomit[], eat[], or smoke[],” 10A N.C.A.C. 41B.0101(6), and during which Trooper Brown only lost direct sight of Defendant for very brief intervals in the course of attempting to ensure that Defendant’s right to the presence of a witness was adequately protected, we are unable to conclude that the trial court erred by determining that Trooper Brown failed to comply with the applicable observation period requirement. As a result, Defendant is not entitled to relief from the trial court’s judgment based upon the denial of his motion to suppress the results of the chemical analysis of his breath.

C. Trial Court’s Instructions

Thirdly, Defendant argues that the trial court erred by instructing the jury that the trial court had previously determined that the breath test upon which the State relied had been performed in accordance with the applicable regulations, so that the test results were admissible, and that the video footage of Defendant’s activities in the breath testing room did not reflect the actual elapsed time because of the manner in which the video camera in question operated. According to Defendant, the challenged instructions constituted an impermissible expression of opinion and lacked adequate evidentiary support. We do not find Defendant’s arguments persuasive.

1. Admissibility of the Chemical Test Results

[3] In his first challenge to the trial court’s instructions, Defendant argues that the trial court erred by stating that:

3. Our determination to this effect is reinforced by the fact that the applicable regulations were amended in 2001 so as to allow a single officer to observe multiple subjects simultaneously. Should an analyst be required to act in the manner described in Defendant’s brief, an analyst could never, as the 2001 amendment allows, properly observe more than one subject at a time.

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earlier in this case and out of your presence[,] the Court heard evidence regarding the chemical analysis testing of the Defendant . . . by Trooper Brown. The Court has concluded that Trooper Brown followed the North Carolina Department of Health and Human Services regulations and standards regarding the chemical analysis of the Defendant's breath and that the testing procedures and test results are admissible for purposes of this trial.

The trial court delivered the challenged instruction in light of the State's objection to the "attack on the chemical analysis" made in Defendant's opening argument. Although the trial court allowed Defendant's trial counsel to attack the credibility of and the weight to be given to the chemical analysis, it concluded that an instruction to the effect that the trial court had deemed the chemical test results to be admissible would be appropriate in order to eliminate any concern that the jury might have about the admissibility of the breath test results.

In his brief, Defendant contends that the trial court's instruction violated N.C. Gen. Stat. § 15A-1222, which provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury," and N.C. Gen. Stat. § 15A-1232, which provides that, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." Although the relevant statutory provisions prohibit the trial court from "express[ing] any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury," *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 733 (internal quotation marks and citation omitted), *cert. denied*, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999), we are not persuaded that the trial court expressed such an opinion in this instance. On the contrary, the challenged portion of the trial court's instruction related to the admissibility of the chemical test, which is a legal determination to be made by the trial court, *see* N.C. Gen. Stat. § 8C-104(a), rather than an issue of fact to be determined by the jury. In addition, Defendant's argument overlooks the trial court's subsequent statement that, "[a]s I have previously instructed you, you are the sole judges of the credibility and the weight to be given to any evidence and you must determine the importance of this evidence in light of all other believable evidence." After carefully analyzing the trial court's instructions in their entirety, we are unable to see how the challenged instruction in any way impinged on the jury's right to

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make a determination concerning the credibility of or the weight to be given to the chemical test results. As a result, we do not believe that the trial court expressed an opinion about a matter of fact that the jury was required to decide in order to determine whether the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) existed.

2. Testing Room Camera

[4] Secondly, Defendant challenges the appropriateness of the trial court's instruction that:

on the video that you watched concerning [Defendant] and Trooper Brown in the Intox room in the Pitt County Sheriff's Detention Center, that the numbers on the bottom of that indicate the length of the tape. Okay? It is not a true or accurate reflection of the time. The reason being is the cameras in the Intox room are . . . motion activated. If someone walks into the room, the camera will begin to record automatically. In fact, it will start and record ten seconds before. When someone walks out of the room, ten seconds later the camera will stop. It does not—and then when someone walks back into the room, whether it's a minute, two minutes, 10 minutes, or 30 minutes later, the camera will resume recording from where it stopped. So it does not show accurate reflections of the length of the time. That number on the bottom is the total amount of recorded time.

In challenging this instruction, Defendant contends that the record did not contain any support for the trial court's comments. Once again, we do not find Defendant's argument persuasive.

The testing room video was introduced into evidence at the hearing concerning the existence of the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) by Defendant, rather than by the State. Admittedly, the State did introduce the testing room video during the hearing held in connection with Defendant's motion to suppress the test results, at which counsel for both parties stipulated to the video's authenticity and acknowledged that the video did not accurately depict the amount of time that actually transpired during the events depicted on the resulting footage given that the camera used to produce the video stopped recording 10 seconds after any persons in the testing room left and resumed recording when someone re-entered the room. As a result, the parties both appeared to have agreed during an earlier stage of this proceeding that the durational information shown on the video did not accurately

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reflect the time that actually elapsed during the events depicted on the resulting video footage.

In the course of his closing argument, Defendant's trial counsel implied that the video accurately depicted the amount of time covered in the recording. More specifically, Defendant's trial counsel argued that:

Now here's what we know for absolute sure if you look at the video, look at the time. From the time Trooper Brown and [Defendant] walk out to go to that bathroom until the time that they come back in is 35 seconds—35 seconds. So he is gone, walked out, gone down to the bathroom down the hallway, done all these horrible things he's described and come back, and he's in the room in about 34—it would be 34 seconds if you look at the video.

After the State objected to the argument being made by Defendant's trial counsel and requested the trial court to deliver a curative instruction, the trial court told Defendant's trial counsel that "You're saying that these things are true when I know them not to be true, and you're saying because the State didn't prove that, I can argue that they're not true or didn't offer evidence on that. And . . . I can't accept that." As a result, the trial court gave the curative instruction about which Defendant now complains.

As a general proposition, "one who causes . . . the court to commit error is not in a position to repudiate his action and assign it as ground for a new [sentencing hearing]." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); *see also* N.C. Gen. Stat. § 15A-1443(c) (stating that "[a] defendant is not prejudiced . . . by error resulting from his own conduct"). In view of the fact that the argument advanced by Defendant's trial counsel conflicted with Defendant's earlier assertions concerning the manner in which the timing mechanism on the testing room video equipment operated, we see no error of law in the trial court's decision to correct the record using information to which Defendant had, in effect, previously stipulated. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the alleged instructional errors discussed in his brief.

D. Prosecution by Presentment

[5] Fourthly, Defendant argues that the State deprived him of the equal protection of the laws by initiating the present proceeding using a presentment instead of prosecuting him in reliance upon the issuance of

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a citation.⁴ More specifically, Defendant, who is a licensed attorney, argues that he was denied his right to equal protection of the laws given that other attorneys who had been charged with driving while subject to an impairing substance had been charged using a citation rather than the presentment process. Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.⁵

As a result of the fact that, as Defendant acknowledges, attorneys practicing in Pitt and surrounding counties do not constitute a suspect class, the challenged governmental conduct must be upheld if "there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State University v. American Assoc. of University Professors*, 526 U.S. 124, 128, 119 S. Ct. 1162, 1163, 143 L. Ed. 2d 227, 231 (1999) (citing *Heller v. Doe*, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2639, 125 L. Ed. 2d 257, 266 (1993)). In other words, in the present context, "the burden is on the one attacking the [act] to negate every conceivable basis which might support it." *Heller*, 509 U.S. at 320, 113 S. Ct. at 2643, 125 L. Ed. 2d at 271 (internal quotation marks and citations omitted). As a result, in order to obtain relief from the trial court's judgment on the basis of this claim, Defendant must show that there was no rational basis for proceeding against him utilizing the presentment process rather than using a citation as the charging instrument.

As the record clearly reflects, Defendant is an attorney who lives and practices in Pitt County and who has had dealings with the court

4. As an aside, we note that, although the argument heading contained in the relevant portion of his brief makes reference to a due process violation, Defendant did not advance any argument in the body of his brief to the effect that he had been deprived of his liberty without due process of law as the result of the State's reliance upon the presentment process. For that reason, Defendant has abandoned any due process claim that he might have intended to assert. N.C. R. App. P. 28(b)(6) (stating 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."); *Viar v. North Carolina Dep't of Transportation*, 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 the appellant"). Thus, the discussion in the text of this opinion will focus entirely on Defendant's equal protection claim.

5. Although the State has not addressed this issue in its brief, we question whether Defendant waived his right to challenge the denial of his dismissal motion on appeal by pleading guilty. *State v. White*, 213 N.C. App. 181, 183, 711 S.E.2d 862, 864 (2011) (holding that a defendant is entitled to challenge only a limited number of issues after entering a plea of guilty, with the denial of a dismissal motion not being included among them) (citations omitted). However, given that the parties have not addressed this issue in their briefs in any detail and the fact that Defendant's contention lacks merit as a substantive matter, we will simply assume, without in any way deciding, that Defendant's contention is properly before us.

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system and the District Attorney's Office. For this reason, the district court and superior court judges residing in Pitt County recused themselves from presiding over Defendant's case and the District Attorney's Office recused itself from prosecuting the charge that had been lodged against Defendant. For that reason, Defendant was prosecuted by a special prosecutor and the trial of this case was presided over by a jurist brought in from a different division. As the State notes, considerations of judicial economy justified the use of the presentment process, given that proceeding against Defendant by presentment rather than citation obviated the necessity for utilizing a special prosecutor and a non-resident trial judge on two occasions, rather than one. As a result, given that the State clearly had a rational basis for proceeding against Defendant by means of a presentment rather than on the basis of a citation, Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

E. Prosecutor's Final Argument

[6] Next, Defendant argues that several comments made during the prosecutor's final argument were so grossly improper that the trial court should have intervened in the absence of an objection to preclude the making of those comments. More specifically, Defendant contends that, as a result of the trial court's failure to preclude the making of these improper prosecutorial arguments, he was deprived of his state and federal constitutional right not to be deprived of liberty without due process of law. Once again, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

"[A]rguments of counsel are left largely to the control and discretion of the trial judge," with counsel being "granted wide latitude in the argument of hotly contested cases." *State v. Fullwood*, 343 N.C. 725, 740, 472 S.E.2d 883, 891 (1996), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997). As a result of the fact that Defendant only lodged contemporaneous objections to two of the comments that he now challenges on appeal and the fact that the trial court sustained both of Defendant's objections,⁶ appellate "review [of Defendant's challenges to the prosecutor's jury argument] is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

6. Defendant has not contended that he is entitled to any relief on the basis of the arguments to which the trial court sustained Defendant's objection.

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[7] In his brief, Defendant challenges the prosecutor's reference to Defendant as "an alcoholic"; her statement that Defendant "can tolerate his booze"; her contention that Defendant sought to "make [Trooper Brown] out to be a liar"; her question as to whether "it seem[s] reasonable that [Trooper Brown] would give up his career, his integrity, his family, his livelihood just to get that guy"; her contention that Trooper Brown "was fair and because he's honest and because he's decent," "he's telling the truth"; that Trooper Brown "was out protecting and serving you" and "did not come in this room and lie about it"; that the "judge has already told you [that the time shown on the video footage] is not an accurate time"; that the "[b]reath test is in. It's done. It's absolutely done"; and that "the only way you can find [that the breath test results] didn't happen is if you pretend." Although the prosecutor might have been better advised to refrain from making some of the challenged comments, we do not believe that Defendant has established that "the [prosecutor's] argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *Gladden*, 315 N.C. at 417, 340 S.E.2d at 685.

A number of the prosecutorial comments to which Defendant's argument is addressed relate to Defendant's status as an alcoholic and the extent to which he had developed a tolerance for alcoholic beverages, neither of which appear to us to be directly relevant to the issue of whether Defendant had a blood alcohol level sufficient to trigger application of the relevant aggravating factor. In addition, we have already held that, given the unusual circumstances present in this case, it was not error for the trial court to instruct the jury that the time stamp on the video footage that the jury saw at the hearing held for the purpose of determining whether the aggravating factor set out in N.C. Gen. Stat. § 20-179.1(d)(1) existed did not accurately reflect the time that actually elapsed during the events depicted on that footage. A considerable number of the comments upon which Defendant's contention is based stemmed from the prosecutor's efforts to rebut Defendant's contention that the jury should conclude that Trooper Brown's testimony was not credible.⁷ Although a number of the comments that the prosecutor made in the course of defending Trooper Brown's credibility may lack adequate evidentiary support, we are unable to say that the making of those comments rendered the hearing fundamentally unfair given the strength

7. For example, Defendant's trial counsel argued to the jury that "[t]hat should raise you some concerns . . . about Mr. Brown's credibility" and stated, "[h]ow's his balance and coordination? Is it consistent with what Trooper Brown said? Because I say that's a credibility issue[.]"

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of the evidence in favor of the existence of the aggravating factor upon which the State relied.⁸ Finally, the prosecutor's suggestion that the jury would have to "pretend" in order to refrain from accepting the validity of the breath test results strikes us as nothing more than a permissible argument that Defendant's challenge to the validity of the breath test results had no merit. Thus, for all of these reasons, we are unable to conclude that the prosecutor's argument was so grossly improper as to have necessitated *ex mero motu* intervention by the trial court. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of his challenge to the prosecutor's jury argument.

F. Defendant's Double Jeopardy Claim

[8] Finally, Defendant argues that the trial court violated his right not to be placed in jeopardy twice for the same offense given that the State used the breath test result to assist in establishing the factual basis for Defendant's plea and to support the aggravating factor used to enhance Defendant's punishment. We do not find Defendant's argument persuasive.

"The constitutional prohibition against double jeopardy protects a defendant from additional punishment and successive prosecution for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (internal quotation marks and citation omitted). Put another way, the double jeopardy clause protects criminal defendants against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Although Defendant appears to claim that he

8. In support of his challenge to the prosecutor's defense of Trooper Brown's credibility, Defendant cites our decision in *State v. Potter*, 69 N.C. App. 199, 202-04, 316 S.E.2d 359, 360-64, *disc. review denied*, 312 N.C. 624, 323 S.E.2d 925 (1984), in which we granted the defendant a new trial based, at least in part, on the trial court's failure to sustain Defendant's objections to the prosecutor's repeated suggestion that the arresting officers risked being prosecuted for perjury, being fired from their jobs, and losing their retirement benefits if they were untruthful, and asked the jury to "form some opinion in your mind as to who has the most to lose by not telling the truth in this case." *Id.* at 202, 316 S.E.2d at 360. Although the prosecutor in this case did assert that Trooper Brown would not "give up his career, his integrity, his family, his livelihood just to get that guy," Defendant's trial counsel did not object to that statement. In addition, the argument made at Defendant's hearing did not tend to place any juror "in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor." *Id.* at 204, 316 S.E.2d at 362. As a result, given the absence of an objection to the challenged prosecutorial argument and the fundamental difference between the argument at issue in *Potter* and the argument at issue in this case, *Potter* provides no basis for awarding Defendant any relief.

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has been subjected to multiple punishments for the same offense, his argument to this effect cannot succeed given that, instead of being punished twice, he has been subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense.⁹ Defendant had not cited any case in support of his contention that a double jeopardy violation occurs in the event that the same item of evidence is used once to prove an element of a substantive offense and a second time to support the imposition of an enhanced sentence, particularly when the evidence in question is used to support different factual determinations in each instance. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the final argument set out in his brief.

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, except that the judgment should be, and hereby is, remanded to the trial court for the correction of a clerical error.

NO ERROR. REMANDED TO TRIAL COURT FOR CORRECTION OF CLERICAL ERROR.

Judges Robert C. HUNTER and McCULLOUGH concur.

9. According to N.C. Gen. Stat. § 20-138.1(a), a defendant is guilty of driving while subject to an impairing substance in the event that he or she is under the influence of an impairing substance or has an alcohol concentration of at least 0.08 at any relevant time after driving. According to N.C. Gen. Stat. § 20-179(d), an aggravating factor that can be used to enhance the sentence to be imposed upon a person convicted of driving while impaired exists in the event that the defendant had an alcohol concentration of at least 0.15 within a relevant time after the driving. N.C. Gen. Stat. § 20-179(d)(1). As a result, one blood alcohol level suffices to support a finding of the defendant's guilt of the substantive offense and a different, and higher, blood alcohol level suffices to support the enhancement of the defendant's sentence.

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JO ANN WARD, PLAINTIFF

v.

MARK E. FOGEL AND WILLIAM B. WRIGHT, JR., AS CO-TRUSTEES UNDER CERTAIN TRUST
AGREEMENTS DATED FEBRUARY 1, 2005 AND JANUARY 1, 2006; ROBERT E. WARD, III; AND
ROBERT E. WARD, IV, DEFENDANTS

No. COA14-417

Filed 2 December 2014

1. Jurisdiction—subject matter—trusts

The trial court erred in a case involving trusts by granting defendants' motion for summary judgment on the ground that Wake County Superior Court lacked subject matter jurisdiction. The Superior Court had jurisdiction to hear the matter.

2. Statutes of Limitation and Repose—trusts—fraud—not time-barred

The trial court erred in a case involving trusts by granting summary judgment in favor of defendants for plaintiff's failure to timely file the cause of action. Defendants failed to argue in their briefs how the claim was time-barred by the ten-year statute of limitations, and there appeared to be no legal support for such a contention.

3. Fraud—breach of fiduciary duty—trusts—summary judgment proper

The trial court did not err in a case involving trusts by concluding that no genuine issues of material fact existed and defendants were entitled to judgment as a matter of law on plaintiff's substantive claims for breach of fiduciary duty and constructive fraud as they related to the REW trust.

4. Fraud—fraudulent inducement—breach of fiduciary duty—summary judgment improper

The trial court erred in a case involving trusts by concluding that no genuine issues of material fact existed and defendants were entitled to judgment as a matter of law on plaintiff's claims for fraudulent inducement, constructive fraud, and breach of fiduciary duty as they related to the WF trust. Plaintiff forecast sufficient evidence regarding the creation of the WF trust to survive summary judgment.

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5. Trusts—divorce clause—not void as contrary to public policy

The trial court did not err in a case involving trusts by granting summary judgment in favor of defendants. The divorce clause in the trust was not void as contrary to public policy.

Appeal by plaintiff from order entered 2 December 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 23 September 2014.

Brady Morton, PLLC, by Travis K. Morton, for plaintiff-appellant.

Ward and Smith, P.A., by Gary J. Rickner, for defendants-appellees Mark E. Fogel and William B. Wright, Jr., co-trustees.

Narron, O'Hale & Whittington, P.A., by Jason W. Wenzel, for defendant-appellee Robert E. Ward, III.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr., for defendant-appellee Robert E. Ward, IV.

HUNTER, Robert C., Judge.

Jo Ann Ward (“plaintiff”) appeals from an order granting summary judgment in favor of defendants Robert E. Ward, III (“Mr. Ward”); Robert E. Ward, IV (“Ward’s son”); and Mark E. Fogel and William B. Wright, Jr., as co-trustees of the Robert E. Ward, III Irrevocable Trust Agreement (“the REW trust”) and the Ward Family Irrevocable Trust Agreement (“the WF trust”). On appeal, plaintiff argues that the trial court erred in granting summary judgment for defendants because: (1) North Carolina superior court has subject matter jurisdiction over this dispute; (2) plaintiff’s claims are not time-barred by the statute of limitations; (3) genuine issues of material fact exist as to plaintiff’s claims for fraudulent inducement, constructive fraud, and breach of fiduciary duty; and (4) the “divorce clause” in the REW trust is void as contrary to public policy.

After careful review, we affirm the trial court’s order in part, reverse the order in part, and remand for further proceedings.

Background

Plaintiff and Mr. Ward are residents of Florida, where they have both lived since approximately 2002. They married in North Carolina on 4 April 1987, but separated on 9 October 2009. On 4 June 2010, Mr. Ward

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filed an action against plaintiff for divorce and equitable distribution in Broward County, Florida (“the Florida divorce action”).

During the marriage, Mr. Ward and others formed a business called Environmental Protection Services, Inc. (“EPS”) in West Virginia. In 1997, after reacquiring a third owner’s stock, Mr. Ward owned fifty percent of EPS. During deposition, Mr. Ward testified that he remembered discussing with the EPS co-owner, Keith Reid, how Mr. Reid’s ex-wife acquired EPS stock through equitable distribution. On or about 1 February 2005, Mr. Ward conveyed his fifty percent interest in EPS to the REW trust. Mr. Wright, Mr. Ward’s friend and business associate, advised him regarding the REW trust. At the time, Mr. Wright had been helping Mr. Ward and plaintiff with their financial questions. Mr. Wright introduced Mr. Ward to C. Wells Hall, III (“Mr. Hall”), who was the attorney that Mr. Ward hired to draft the REW trust.

Mr. Ward was the grantor of the REW trust. He transferred his EPS stock into the trust, which contained a clause stating that income would be provided to plaintiff as the beneficiary so long as she remained married to Mr. Ward (“the divorce clause”). Mr. Ward’s son and any grandchildren of Mr. Ward were the remaining beneficiaries. Mr. Wright and Mark Fogel were named co-trustees of the REW trust. Mr. Hall testified in deposition that the divorce clause was not included in the initial draft of the REW trust but was inserted after having discussions with his client, Mr. Ward. According to Mr. Ward, it was Mr. Hall’s idea to include the divorce clause to protect his assets in the event of divorce.

Plaintiff testified in deposition that she did not know about either the divorce clause or the existence of the other beneficiaries for the REW trust until she saw a copy of the trust document for the first time in late 2009, after her separation from Mr. Ward. All parties agree that she did not participate in the drafting of the REW trust and was not involved in the transfer of EPS shares by Mr. Ward into the trust. She testified that Mr. Ward told her the purpose of the REW trust was to protect EPS shares from claims by the Environmental Protection Agency and other potential judgment creditors. He also said that the trust would hold EPS stock and that plaintiff would be the beneficiary.

After the creation of the REW trust, but before the parties separated on 9 October 2009, checks written from the REW trust were deposited into Mr. Ward’s and plaintiff’s joint bank account. Plaintiff signed forms authorizing these direct deposits. However, plaintiff testified that she never saw bank statements from this account and was not involved in the family’s finances. Rather, Mr. Ward and Mr. Wright controlled the

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family's financial matters and paid their bills, with Mr. Wright having the authority to write checks from the joint account into which distributions from the REW trust were deposited.

In 2006, the WF trust was created with the assistance of Mr. Wright and Mr. Hall. To create this trust, Mr. Ward transferred interests in a number of limited liability companies spun off from EPS to plaintiff, who was told by Mr. Ward to immediately transfer these interests into the WF trust. Thus, plaintiff was the grantor of the WF trust, and Mr. Ward was its beneficiary. Although Mr. Hall testified that he typically represents the grantor of a trust, his client for purposes of drafting the WF trust was Mr. Ward, not plaintiff. He did not recall ever providing plaintiff with drafts of the WF trust or discussing the terms of the trust with her. However, plaintiff testified that she thought Mr. Hall represented her interests in the creation of the WF trust. She also testified that Mr. Ward told her that it was "her turn" to be the grantor of a trust and for him to be the beneficiary, like an inverse of the REW trust. However, Mr. Ward did not disclose the existence of the divorce clause in the REW trust, and no divorce clause was included in the WF trust. Mr. Hall testified that because grantors of a trust retain certain powers of control, the grantor is still liable for payment of taxes on the trust's income. Plaintiff alleges that this tax obligation was not explained to her before she transferred the spun-off LLC interests into the WF trust and became the trust's grantor.

Plaintiff filed this cause of action in Wake County Superior Court on 29 March 2011. The complaint sets forth the following claims: (1) fraudulent inducement; (2) constructive fraud; (3) and breach of fiduciary duty; it also requests the creation of a constructive trust and the termination of the REW and WF trusts. Mr. Ward filed a motion for summary judgment as to all claims on 7 October 2013, and the motion was granted in favor of all defendants on 2 December 2013. However, the trial court failed to specify in its order the grounds upon which it granted summary judgment for defendants, and no transcript has been produced of the hearing on the motion for summary judgment. Plaintiff filed timely notice of appeal.

Discussion**I. Subject Matter Jurisdiction**

[1] Plaintiff first argues that the trial court erred to the extent that it granted summary judgment for defendants on the ground that Wake County Superior Court lacked subject matter jurisdiction to resolve the dispute. We agree.

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Jurisdiction is “the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment.” *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation and internal quotation marks omitted). “Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute.” *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citations and internal quotation marks omitted). “In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*.” *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002).

Here, defendants argue that Wake County Superior Court lacked subject matter jurisdiction to hear this controversy for two reasons: (1) proper jurisdiction to equitably distribute marital property lies exclusively in the Florida courts, since Mr. Ward filed the Florida divorce action before plaintiff filed the current suit; and (2) even if North Carolina is the proper state in which to bring suit, the district court, and not the superior court, has jurisdiction over plaintiff’s claims for marital misconduct. For the following reasons, we find these arguments unpersuasive.

First, defendants rely on *Beers v. Beers*, 724 So.2d 109, 116-17 (Fla. Dist. Ct. App. 1998) for the proposition that “claims for alleged dissipation of marital assets must be settled in the divorce setting of equitable distribution, not in a collateral proceeding.” In *Beers*, the husband filed for dissolution of marriage and equitable distribution against the wife. *Id.* at 112. In response, the wife filed a counter petition alleging fraud, constructive fraud, and breach of fiduciary duty, based on the theory that the husband had secretly depleted marital assets in furtherance of an adulterous relationship throughout the marriage. *Id.* The Florida appellate court held that the judgment entered in favor of the wife on these claims was properly vacated because “[w]here no specific transaction or agreement exists between the spouses, the dissolution of marriage statute . . . provides the exclusive remedy where one’s spouse has intentionally dissipated marital property during the marriage. . . . In our view, there simply is no cognizable tort claim for constructive fraud for a concealed dissipation of marital assets.” *Id.* at 117.

Upon careful review, we find *Beers* to be distinguishable and inapposite. The Florida Court specifically held that “*where no specific transaction or agreement exists between the spouses*,” the statute controlling equitable distribution provides the exclusive remedy for an alleged dissipation of marital property. There was a discrete transaction and agreement here that distinguishes this case from *Beers*. It is

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undisputed that Mr. Ward transferred his fifty percent stake in a number of LLC spinoffs from the EPS stock to plaintiff, with an agreement that plaintiff would immediately transfer those assets into the WF trust, for which Mr. Ward was the beneficiary and plaintiff was the grantor. Thus, there is a “specific transaction and agreement” between the spouses here that is the subject of plaintiff’s claims for fraudulent inducement, constructive fraud, and breach of fiduciary duty that did not exist in *Beers*. Based on this material distinction, *Beers* is not controlling, and the remedy for plaintiff’s claims is not necessarily the Florida equitable distribution action based on that holding.

Furthermore, defendants argue that North Carolina courts should refrain from exercising jurisdiction where the estate is already subject to the proper jurisdiction of the Florida court. Defendants claim that “[t]he res of the marital property is properly subject to the jurisdiction of the Florida court because [Mr. Ward] and [plaintiff] are longtime residents of Florida.” Therefore, defendants argue that because “the relief sought would require the [North Carolina] court to control a particular property or res over which another court already has jurisdiction,” *Whitmire v. Cooper*, 153 N.C. App. 730, 734, 570 S.E.2d 908, 911 (2002) (quotation marks omitted), Wake County Superior Court should abstain from exercising jurisdiction.

The flaw in this argument is the assumption that the Florida court has proper jurisdiction over the trusts, which are the subject of plaintiff’s cause of action. It is well-settled in Florida that “the trial court [in a divorce proceeding] does not have jurisdiction to adjudicate property rights of non-parties.” *Ray v. Ray*, 624 So.2d 1146, 1148 (Fla. Dist. Ct. App. 1993); *see also Mann v. Mann*, 677 So.2d 62, 63 (Fla. Dist. Ct. App. 1996) (holding that because title to marital property was held by an individual not a party to the divorce proceedings, the trial court lacked jurisdiction to control that subject property). Here, neither Mr. Wright nor Mr. Fogel, the trustees of both the REW trust and the WF trust, were named as parties in the Florida divorce action. Thus, under *Ray* and *Mann*, the Florida trial court does not have jurisdiction to adjudicate the property of the trusts. Furthermore, where the third party controlling alleged marital property is a trust, the Florida court must exercise personal jurisdiction over the trustees in order to affect trust property. *See Hanson v. Denckla*, 357 U.S. 235, 245, 2 L. Ed. 2d 1283 (1958) (“Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy.”). As both Mr. Wright and Mr. Fogel are residents of North Carolina and the situs of

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the trust is in North Carolina, there is no indication in the record that the Florida court would be able to exercise personal jurisdiction over these parties in order to enter a ruling affecting the trust property. *See In re Estate of Stisser*, 932 So.2d 400, 402 (Fla. Dist. Ct. App. 2006) (holding that the law requires the court to have personal jurisdiction over the trustees of a trust in order to enter a ruling affecting the corpus of the trust).

Defendants also contend that even if this action could be brought in North Carolina, the district court, and not the superior court, has exclusive jurisdiction. In support of this argument, Mr. Ward cites N.C. Gen. Stat. § 7A-244 (2013), which provides that the district court has jurisdiction over proceedings for divorce and equitable distribution of property. However, the North Carolina district courts only have jurisdiction over divorce and equitable distribution when the marital relationship exists in North Carolina and at least one party is a North Carolina resident. N.C. Gen. Stat. § 1-75.4(12) (2013). Because plaintiff and Mr. Ward have been Florida residents since 2002, the district court would have lacked jurisdiction over any potential divorce or equitable distribution claim that plaintiff could have potentially brought.

Nevertheless, defendants contend that the proper means of seeking the relief requested in plaintiff's complaint is through the equitable distribution process. In support of this argument, defendants rely on *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), and *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001). In each of these cases, this Court concluded that the superior court lacked subject matter jurisdiction to enter orders affecting the same marital property that was already the subject of previous equitable distribution claims properly brought in district court. *See Garrison*, 90 N.C. App. at 672, 369 S.E.2d at 629 (partition action to divide marital home improperly brought in superior court where the marital home was already part of a pending equitable distribution claim); *Hudson*, 145 N.C. App. at 636-37, 550 S.E.2d at 573-74 (declaratory action brought in superior court by third parties concerning ownership of real property that was the subject of a prior equitable distribution action in district court held properly dismissed). However, this Court subsequently noted that "[a]t the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) *the relief sought and available was similar in each suit.*" *Burgess v. Burgess*, 205 N.C. App. 325, 328-29, 698 S.E.2d 666, 669 (2010) (emphasis added).

In *Burgess*, the Court analyzed against the backdrop of *Garrison* and *Hudson* a wife's claims brought in superior court against her husband

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for divestiture of stock, breach of fiduciary duty, accounting, and inspection, because an equitable distribution suit between the husband and wife was already pending in district court. *Id.* In its analysis, the Court focused on the similarity of the relief sought and available in each action to determine whether the wife's separate claims in superior court could be "subsumed" into the equitable distribution action in district court. *Id.* at 329, 698 S.E.2d at 670. Most relevant to the analysis here is the *Burgess* Court's holding that the wife's derivative claim premised on breach of fiduciary duty was not sufficiently similar to the equitable distribution action to warrant dismissal from superior court. *Id.* at 332, 698 S.E.2d at 671. The Court identified the following differences between the wife's derivative claim premised on breach of fiduciary duty and the equitable distribution action: (1) the wife was entitled to a jury trial for the derivative suit, but was barred from having a jury trial in equitable distribution; (2) the most that the wife could receive in equitable distribution was a larger portion of marital or divisible property, whereas success on the derivative suit opened access to the husband's separate property in the form of damages; and (3) the district court could not obtain jurisdiction over plaintiff's derivative suit by statute. *Id.* at 331-32, 698 S.E.2d at 671. Therefore, the Court held that because the district court would be unable to grant the wife the relief she sought, the superior court had subject matter jurisdiction to decide her derivative claim. *Id.*

The reasoning in the *Burgess* Court's holding supports plaintiff's argument that Wake County Superior Court has subject matter jurisdiction over the claims pertaining to the REW trust and the WF trust. First, there is no indication that either of the courts that defendants claim to have more "proper" jurisdiction than Wake County Superior Court in fact have jurisdiction over the trusts. As discussed above, the Florida court does not appear to have personal jurisdiction over the trustees, and the trustees have not been named as parties in the divorce action; therefore, the Florida court lacks jurisdiction to adjudicate the rights pertaining to trust property. *See, e.g., In re Estate of Stisser*, 932 So.2d at 402. Additionally, the North Carolina district court does not have jurisdiction over a potential equitable distribution claim because plaintiff and Mr. Ward have been Florida residents since 2002.

Even if the North Carolina district court did have jurisdiction over the parties, an equitable distribution proceeding would not be able to provide plaintiff the relief she requests. Plaintiff, like the wife in *Burgess*, has demanded a jury trial, to which she would be denied access in district court. *See Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989) (holding that no jury trial is available in an equitable distribution

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action). Additionally, like the wife in *Burgess*, plaintiff is seeking compensatory damages in excess of \$10,000.00, in addition to punitive damages, on her claims for breach of fiduciary duty, constructive fraud, and fraudulent inducement. If she is successful on these claims, she may get a judgment which could be enforced against Mr. Ward's separate property. However, in the equitable distribution claim, the most that plaintiff would be able to win is a favorable distribution of marital or divisible assets. Therefore, as in *Burgess*, the relief plaintiff seeks in superior court would be unavailable in district court, leading us to conclude that Wake County Superior Court has proper jurisdiction to adjudicate these matters.

Thus, for the foregoing reasons, we conclude that the trial court erred to the extent that it granted defendants' motion for summary judgment on the ground that Wake County Superior Court lacked subject matter jurisdiction.

II. Statute of Limitations

[2] Plaintiff next argues that the trial court erred to the extent that it granted summary judgment in favor of defendants for plaintiff's failure to timely file this cause of action. We agree.

Summary judgment entered in favor of a defendant based on the statute of limitations "is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976).

Plaintiff's claim for constructive fraud based on a breach of fiduciary duty is subject to the ten-year statute of limitations under N.C. Gen. Stat. § 1-56 (2013). *Adams v. Moore*, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989). Defendants have failed to argue in their briefs how this claim is time-barred by the ten-year statute of limitations, and there appears to be no legal support for such a contention. Accordingly, we conclude that the trial court erred to the extent that it dismissed plaintiff's claim for constructive fraud on the basis of the statute of limitations.

Additionally, for a claim based on fraud, the statute of limitations is three years from the date that the cause of action accrues. "The cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud[.]" N.C. Gen. Stat. § 1-52(9) (2013). "Discovery" is defined as actual discovery or the time when the fraud should have been discovered in the exercise of due

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diligence. *See Hyde v. Taylor*, 70 N.C. App. 523, 528, 320 S.E.2d 904, 908 (1984).

Whether a plaintiff has exercised due diligence is ordinarily an issue of fact for the jury absent dispositive or conclusive evidence indicating neglect by the plaintiff as a matter of law. In other words, when there is a dispute as to a material fact regarding when the plaintiff should have discovered the fraud, summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the fraud. Failure to exercise due diligence may be determined as a matter of law, however, where it is clear that there was both capacity and opportunity to discover the mistake.

Spears v. Moore, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (citation omitted).

Defendants argue that plaintiff failed to exercise due diligence as a matter of law. They contend that because plaintiff filed her complaint on 29 March 2011, more than three years after she should have known about the alleged fraud, she is time-barred by the statute of limitations. We find this argument unpersuasive. Plaintiff testified that she did not have knowledge of the terms of the REW trust until after she and Mr. Ward separated in October 2009. This claim was corroborated by the fact that Mr. Ward admitted that plaintiff was excluded from the drafting of the trusts and was uninvolved with the couple's financial affairs. Importantly, in discussing plaintiff's involvement in the drafting of the REW trust, Mr. Hall testified that he "wouldn't even consider" discussing the terms of a trust with the beneficiary because the grantor "may not even want the beneficiary . . . to even know the trust exists[.]" Mr. Ward's and Mr. Hall's open exclusion of plaintiff in the drafting of the REW trust undercuts their argument that due diligence required her to seek the document out on her own accord and review it. "[C]onstruing the non-movant's pleadings liberally in [her] favor and giving [her] the benefit of all relevant inferences of fact to be drawn therefrom," *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163, the record does not demonstrate plaintiff's lack of diligence as a matter of law. Accordingly, the trial court erred to the extent that it granted summary judgment in defendants' favor on this ground.

III. Substantive Claims

Plaintiff next argues that the trial court erred by concluding that no genuine issues of material fact exist and defendants are entitled to

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judgment as a matter of law on plaintiff's substantive claims for fraudulent inducement, constructive fraud, and breach of fiduciary duty. We agree with plaintiff's arguments regarding the WF trust, but we affirm the trial court's granting of summary judgment for defendants on any claims pertaining to the REW trust.

A. The REW Trust

[3] First, we hold that the trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims for breach of fiduciary duty and constructive fraud as they relate to the REW trust. Under the Uniform Trust Code, a trust is voidable "to the extent that its creation was induced by fraud, duress, or undue influence." N.C. Gen. Stat. § 36C-4-406 (2013). The elements of a claim of constructive fraud require: "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citing *Sterner v. Penn.*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003)), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "[A]n essential element of constructive fraud is that defendants sought to benefit themselves in the transaction." *Sterner*, 159 N.C. App. at 631, 583 S.E.2d at 674 (quoting *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998)). Like constructive fraud, "[a] claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White*, 166 N.C. App. at 293, 603 S.E.2d at 155; *see also Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (existence of fiduciary duty is essential element of constructive fraud claim), *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002). Although "the relationship between husband and wife is the most confidential of all relationships," our Courts have found that a spouse only breaches a fiduciary duty owed to the other spouse "within the context of a distinct agreement or transaction between the spouses." *Smith v. Smith*, 113 N.C. App. 410, 413, 438 S.E.2d 457, 459 (1994).

As plaintiff concedes, she is merely the beneficiary of the REW trust and was not induced into agreeing to its terms. Thus, the claim for fraudulent inducement in the complaint only applies to the WF trust, not the REW trust. Although Mr. Ward and Mr. Hall included the divorce clause in the REW trust to divest plaintiff of beneficiary rights in the event of divorce, plaintiff cites no authority, and we find none, indicating that the grantor of a trust owes a duty to the beneficiary of a trust to refrain from including such clauses that may divest the beneficiary's rights upon the happening of a certain event. Because plaintiff's claims regarding

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the REW trust do not arise “within the context of a distinct agreement or transaction between the spouses,” *Smith*, 113 N.C. App. at 413, 438 S.E.2d at 459, there was no fiduciary duty owed to plaintiff sufficient to survive summary judgment on her claims for constructive fraud and breach of fiduciary duty.

B. The WF Trust

[4] In contrast, taking the evidence in the light most favorable to the non-moving party, *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163, we hold that plaintiff has forecast sufficient evidence regarding the creation of the WF trust to survive summary judgment on her claims of fraudulent inducement, constructive fraud, and breach of fiduciary duty.

“The essential elements of fraud [in the inducement] are: (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.” *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 453, 678 S.E.2d 671, 684 (2009).

Mr. Ward told plaintiff that it was “her turn” to be the grantor of the WF trust and indicated that the WF trust and the REW trust were merely the inverse of each other regarding which party was to be the grantor and beneficiary, despite the fact that the WF trust did not contain a divorce clause and the REW trust did. Thus, there was a misrepresentation or concealment. Furthermore, unlike in the creation of the REW trust, Mr. Ward owed plaintiff a fiduciary duty to disclose all material information in the creation of the WF trust. “A duty to disclose arises where a fiduciary relationship exists between the parties to a *transaction*. The relationship of husband and wife creates such a duty.” *Sidden v. Mailman*, 150 N.C. App. 373, 376, 563 S.E.2d 55, 58 (2002) (citation and quotation marks omitted). Because Mr. Ward transferred his LLC interests to plaintiff, who was then bidden to transfer those interests to the WF trust as the grantor of the trust, there was a specific transaction that produced a fiduciary relationship between Mr. Ward and plaintiff as husband and wife. The materiality of misrepresentations or concealments is a factual issue left for the jury, *Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010).

Additionally, whether the representations or concealments were calculated or intended to deceive are questions of fact generally left for the jury if the circumstances could demonstrate fraudulent intent. *Latta*, 202 N.C. App. at 600, 689 S.E.2d at 909. We believe such circumstances are apparent here. Mr. Ward knew his former business partner had lost

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much of his EPS stock to his ex-wife during a divorce, he inserted the divorce clause into the REW trust, and he transferred his own property to plaintiff with instructions for her to then transfer those assets into the WF trust, which did not have a divorce clause, for which Mr. Ward was the beneficiary. Plaintiff and Mr. Ward agreed that plaintiff never saw a copy of the REW trust during the marriage, she did not participate in the drafting of the trusts, and she generally left the handling of the couple's assets to Mr. Ward and Mr. Wright. She also testified that she trusted her husband to look after her best interests during the marriage. Taking this evidence in the light most favorable to plaintiff, we believe that the circumstances could demonstrate fraudulent calculation and intent sufficient to go to the jury. *See id.*

Finally, the evidence shows that plaintiff has suffered harm as a result of her reliance on Mr. Ward's representations or concealment because she has a continuing tax burden relating to the WF trust as its grantor.

Accordingly, because plaintiff forecast evidence establishing each element of fraudulent inducement relating to the creation of the WF trust, we conclude that the trial court erred by granting summary judgment for defendants on this claim. Because constructive fraud and breach of fiduciary duty are less demanding causes of action than fraudulent inducement, and the essential elements of each overlap, we further hold that plaintiff has presented sufficient evidence to survive defendants' motion for summary judgment on the remaining claims related to the WF trust. *See Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981); *Ellison v. Alexander*, 207 N.C. App. 401, 408, 700 S.E.2d 102, 108 (2010).

IV. Divorce Clause

[5] Plaintiff's final argument on appeal is that the trial court erred by granting summary judgment in favor of defendants because the "divorce clause" in the REW trust is void as contrary to public policy. We disagree.

"A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve." N.C. Gen. Stat. § 36C-4-404. Plaintiff contends that because the REW trust was funded with marital property, the divorce clause would "circumvent" the parties' prenuptial agreement as to distribution of marital property. We take no position as to whether the EPS stock was separate or marital property. Rather, we reject plaintiff's contention that the divorce clause runs afoul of public policy. North Carolina law already allows for certain rights to terminate upon divorce, such as those in a will. *See N.C. Gen.*

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Stat. § 31-5.4 (2013). In contrast, the commentary to the Restatement (Second) of Trusts illustrates the types of divorce clauses that may contravene public policy. For example, it may be unlawful for a trust to contain a provision for the payment of a sum of money to a beneficiary if he or she were to procure a divorce, because “enforcement would tend to the disruption of the family, by creating an improper motive for terminating the family relation.” Restatement (Second) of Trusts § 62 comment e. Here, rather than serving to disrupt the family unit, the divorce clause in the REW trust incentivized plaintiff to remain married to Mr. Ward so that she may continue to enjoy the distributions from the REW trust as its beneficiary.

Furthermore, some estate planning form manuals recommend using similar divorce clauses if the grantor so chooses. *See* G. Holding and C. Reid, *Estate Planning Forms Manual*, 8-43 (BB&T 2011) (“If my wife and I become divorced or legally separated, she shall be deemed deceased for all purposes of this Trust.”). We agree with defendants that a ruling that the divorce clause here is void as against public policy may disrupt the lives of North Carolina citizens who have already planned their estates based on similar clauses. This argument is overruled.

Conclusion

For the foregoing reasons, we hold that the trial court erred by granting summary judgment for defendants on plaintiff’s claims related to the WF trust. However, we affirm summary judgment for defendants on the claims related to the REW trust.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judges DILLON and DAVIS concur.

WHEELLESS v. MARIA PARHAM MED. CTR., INC.

[237 N.C. App. 584 (2014)]

CLIFFORD ROBERTS WHEELLESS, III, M.D., PLAINTIFF

v.

MARIA PARHAM MEDICAL CENTER, INC., HENDERSON/VANCE HEALTHCARE I, INC. F/K/A MARIA PARHAM ANESTHESIA AND PHYSIATRY, INC. D/B/A NORTHERN CAROLINA SURGICAL ASSOCIATES, CYNTHIA ROBINSON, M.D., INDIVIDUALLY AND AS AN EMPLOYEE AND/OR AGENT OF HENDERSON/VANCE HEALTHCARE I, INC., AND/OR MARIA PARHAM MEDICAL CENTER, INC., JOSEPH MULCAHY, M.D., INDIVIDUALLY AND AS AN EMPLOYEE AND/OR AGENT OF HENDERSON/VANCE HEALTHCARE I, INC., AND/OR MARIA PARHAM MEDICAL CENTER, INC., ROBERT NOEL, JR., M.D., INDIVIDUALLY AND AS AN EMPLOYEE AND/OR AGENT OF HENDERSON/VANCE HEALTHCARE I, INC., AND/OR MARIA PARHAM MEDICAL CENTER, INC., ROBERT SINGLETARY, INDIVIDUALLY AND/OR CEO AND EMPLOYEE AND/OR AGENT OF HENDERSON/VANCE HEALTHCARE I, INC., AND/OR MARIA PARHAM MEDICAL CENTER, INC., JOHN/JANE/IT DOE 1 THROUGH 5, INDIVIDUALLY AND AS AN EMPLOYEE AND/OR AGENT OF HENDERSON/VANCE HEALTHCARE I, INC., AND/OR MARIA PARHAM MEDICAL CENTER, INC., DEFENDANTS

No. COA14-612

Filed 2 December 2014

1. Appeal and Error—appealability—interlocutory orders and appeals—final judgment on some claims

Plaintiff's appeal was from an interlocutory order since his claim for malicious prosecution from his second complaint remained pending before the trial court. However, the trial court order dismissing plaintiff's claims for unfair and deceptive trade practices, medical malpractice, and negligence was immediately appealable because those claims were dismissed for filing a legally insufficient claim, which was an adjudication on the merits, and the dismissal was certified by the trial court as final.

2. Unfair Trade Practices—professional services exception—action between physicians

The trial court did not err by dismissing plaintiff's claim for unfair and deceptive trade practices that arose from the peer review of a physician, a change in his medical privileges, and a complaint to the N.C. Medical Board. It is well settled that a matter affecting the professional services rendered by members of a learned profession falls within an exception to the unfair and deceptive practices statute. Defendants' alleged conduct in making a complaint to the N.C. Medical Board was integral to their role in ensuring the provision of adequate medical care.

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3. Medical Malpractice—peer review and privileges—complaint to medical board—provider-patient relationship not present

The trial court did not err by dismissing plaintiff's claim for medical malpractice and negligence against a medical center and others in an action arising from a medical peer review, actions involving plaintiff's medical privileges, and a complaint to the N.C. Medical Board. It is well settled that the provider-patient relationship is required for medical malpractice; plaintiff was a fellow medical professional rather than a patient of defendants.

4. Abatement—actions between medical providers—significant overlap

In an action involving changes in plaintiff-physician's medical privileges and a complaint to the N.C. Medical Board, the trial court did not err in granting defendants' motions to dismiss a second complaint where there was a significant overlap between the parties, subject matter, issues, and relief demanded in the two lawsuits.

Appeal by plaintiff from orders entered 25 November 2013 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 22 October 2014.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon, and Congdon Law, by Jeannette Griffith Congdon, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by James M. Powell and Theresa M. Sprain, for defendant-appellees Maria Parham Medical Center, Inc., Henderson/Vance Healthcare I, Inc. f/k/a Maria Parham Anesthesia and Physiatry, Inc. d/b/a Northern Carolina Surgical Associates, Maria Parham Medical Center, Inc., and Robert Singletary.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb, Samuel G. Thompson, Jr., and John B. Ward, for defendant-appellees Cynthia Robinson, M.D., Joseph Mulcahy, M.D., and Robert Noel, Jr., M.D.

BRYANT, Judge.

Since defendants are health care professionals rendering professional services, they are not subject to liability for unfair and deceptive trade practices. Where plaintiff cannot show the existence of a

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physician-patient relationship, plaintiff's claim for medical malpractice must be dismissed. The doctrine of abatement is applicable where two complaints are substantially identical as to parties, subject matter, issues involved, and relief demanded.

Plaintiff Clifford Roberts Wheelless, III, M.D., is a board-certified orthopedic surgeon who held active medical privileges at defendant Maria Parham Medical Center ("MPMC") from 1998 to 2006. In 2005, MPMC's medical executive committee conducted a peer review of plaintiff's clinical skills. MPMC then initiated a new peer review in 2006 regarding allegations that plaintiff had violated MPMC's disruptive physician policy. Plaintiff denied these allegations and requested a fair hearing concerning the matter. Prior to the fair hearing, plaintiff and MPMC entered into a mediated settlement agreement in July 2006. This agreement required MPMC to change plaintiff's medical privileges from active to consulting staff, to terminate all further actions against plaintiff, and to abide by a strict confidentiality provision.

Despite the mediated settlement agreement, in August 2006, plaintiff alleged that defendant had failed to honor plaintiff's consulting privileges. Plaintiff again alleged a failure by defendant to acknowledge plaintiff's consulting privileges in early 2007.

In 2009, plaintiff was notified by the North Carolina Medical Board about an anonymous complaint submitted by "W. Blower" alleging inappropriate and disruptive behavior by plaintiff. The anonymous complaint included references to incidents that were raised during the 2005 and 2006 peer reviews. After an investigation by the North Carolina Medical Board, the allegations in the anonymous complaint against plaintiff were dismissed.

On 25 August 2011, plaintiff filed a complaint against defendants MPMC, MPMC Medical Executive Committee, MPMC Board of Directors, Robert Singletary as CEO of MPMC, Cynthia Robinson, M.D., and Whistle Blower 1 through 10. In the complaint, plaintiff alleged, *inter alia*, claims for unfair and deceptive trade practices, breach of contract, fraud, civil conspiracy, and intentional and negligent infliction of emotional distress. On 30 April 2012, plaintiff voluntarily dismissed his claims for intentional and negligent infliction of emotional distress. Defendant MPMC filed a motion for summary judgment on 13 June 2012. By means of an order entered 10 August, the trial court granted MPMC's motion, in part, with respect to plaintiff's claims for, *inter alia*, unfair and deceptive trade practices, actual and constructive fraud, breach of contract, invasion of privacy, civil conspiracy, and tortious interference

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with contractual relations and prospective economic advantage. The remaining claims proceeded to discovery.¹

On 28 June 2013, plaintiff filed a second complaint against MPMC; Henderson/Vance Healthcare I, Inc. *f/k/a* Maria Parham Anesthesia and Physiatry, Inc. *d/b/a* Northern Carolina Surgical Associates; Cynthia Robinson, M.D., individually and as an employee and/or agent of Henderson/Vance Healthcare I, Inc., and/or MPMC; Joseph Mulcahy, M.D., individually and as an employee and/or agent of Henderson/Vance Healthcare I, Inc., and/or MPMC; Robert Noel, Jr., M.D., individually and as an employee and/or agent of Henderson/Vance Healthcare I, Inc., and/or MPMC; Robert Singletary, individually and as CEO and employee and/or agent of Henderson/Vance Healthcare I, Inc., and/or MPMC; and John/Jane/It Doe I through 5, individually and as an employee and/or agent of Henderson/Vance Health I, Inc., and/or MPMC (“defendants”). In the second complaint, plaintiff alleged claims for unfair and deceptive trade practices, malicious prosecution, medical malpractice, negligence, and negligence *per se* against all defendants. Plaintiff sought compensatory, punitive, special, and treble damages and attorneys’ fees.

On 26 July 2013, defendants MPMC, Henderson/Vance Healthcare I, Inc., and Robert Singletary filed a motion to dismiss pursuant to Rule 12(b)(6). On 26 August, defendants Cynthia Robinson, M.D., Joseph Mulcahy, M.D., and Robert Noel, Jr., M.D., filed a motion to dismiss pursuant to Rule 12(b)(6). By means of orders entered on 25 November, the trial court granted defendants’ motions to dismiss with respect to plaintiff’s claims for unfair and deceptive trade practices, medical malpractice, negligence, and negligence *per se*. The trial court denied defendants’ motions with respect to plaintiff’s claim for malicious prosecution. Plaintiff appeals.

[1] As an initial matter, we note that plaintiff’s appeal is interlocutory since plaintiff’s claim from his second complaint for malicious prosecution remains pending before the trial court.

1. Plaintiff and MPMC appealed from separate trial court orders regarding discovery in this earlier case. The trial court order compelling MPMC to supplement its responses to discovery was reversed. A separate order granting MPMC’s motion to compel production of plaintiff’s medical records was affirmed. See *Wheelless v. Maria Parham Med. Ctr., Inc.*, No. COA13-1063, 2014 N.C. App. LEXIS 686 (July 1, 2014); *Wheelless v. Maria Parham Med. Ctr., Inc.*, No. COA13-1475, 2014 N.C. App. LEXIS 772 (July 15, 2014).

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In general, a party cannot immediately appeal from an interlocutory order. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). “The rationale behind [this rule] is that no final judgment is involved in such a denial and the movant is not deprived of any substantial right that cannot be protected by a timely appeal from a final judgment which resolves the controversy on its merits.” *Block v. Cnty. of Person*, 141 N.C. App. 273, 276-77, 540 S.E.2d 415, 418 (2000) (citation omitted).

However, an interlocutory order may be reviewed on appeal “(1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, [or] (2) if delaying the appeal would prejudice a substantial right.” *Milton v. Thompson*, 170 N.C. App. 176, 178, 611 S.E.2d 474, 476 (2005) (citation omitted).

In its orders granting, in part, defendants’ motions to dismiss, the trial court noted that:

Plaintiff’s motion to certify the Court’s ruling dismissing Counts I [unfair and deceptive trade practices] and III [medical malpractice and/or negligence] as a Final Judgment under Rule 54(b) is allowed. Dismissal of Counts I and III of the Plaintiff’s complaint is a final judgment and there is no just reason for delay.

Plaintiff’s claims, for unfair and deceptive trade practices, medical malpractice, negligence, and negligence *per se*, were dismissed by order of the trial court pursuant to defendants’ motions to dismiss under Rule 12(b)(6). As a motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, a finding that the claim was legally insufficient amounts to a final judgment with respect to that claim. *See Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988) (“[D]ismissal under Rule 12(b)(6) is an adjudication on the merits[.]”). Further, we note that the trial court certified the dismissal of this claim as final under Rule 54(b). *See Milton*, 170 N.C. App. at 178, 611 S.E.2d at 476. Therefore, the trial court’s order dismissing plaintiff’s claims for unfair and deceptive trade practices, medical malpractice, negligence, and negligence *per se* is immediately appealable.

Plaintiff raises two issues on appeal concerning whether the trial court erred (I) by granting defendants’ motions and dismissing plaintiff’s claim for unfair and deceptive trade practices; and (II) by granting

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defendants' motions and dismissing plaintiff's claims for medical malpractice and/or negligence.

I.

[2] Plaintiff contends that the trial court erred by granting defendants' motions and dismissing plaintiff's claim for unfair and deceptive trade practices. We disagree.

"On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (citation and quotation omitted).

Plaintiff argues that the trial court erred by granting defendants' motions to dismiss plaintiff's claim for unfair and deceptive trade practices. Specifically, plaintiff contends that the trial court erred because the "learned profession" exception under N.C. Gen. Stat. § 75-1.1 does not apply to defendants in this matter.

North Carolina General Statutes, Chapter 75-1.1, holds that:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C.G.S. § 75-1.1(a), (b) (2013). To determine whether the "learned profession" exclusion applies, a two-part inquiry must be conducted: "[f]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citations omitted).

Plaintiff concedes that defendants, as medical professionals, "are members of [a] learned profession." Plaintiff argues, however, that the learned profession exception under N.C.G.S. § 75-1.1 does not apply here because, by "illegally access[ing], shar[ing], and us[ing] Plaintiff's peer review materials and patients' confidential medical records out of malice and for financial gain for illegal improper purpose[.]" defendants have not rendered professional services.

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The improper conduct by defendants of which plaintiff complains concerns the anonymous complaint sent by “W. Blower” to the North Carolina Medical Board. This anonymous complaint contained references to matters addressed by the 2005 and 2006 peer reviews, matters which plaintiff alleges were to be kept confidential and private as a result of the 2006 mediated settlement agreement between plaintiff and MPMC. Despite this complaint having been sent anonymously to the North Carolina Medical Board, plaintiff asserts that all defendants, including “John/Jane/It Doe 1 Through 5,” were potentially involved with this anonymous complaint because only these parties had access to the materials covered by the 2006 mediated settlement agreement. As such, the conduct of which plaintiff complains involves correspondence sent by one or more medical professionals (defendants) to another group of medical professionals (the North Carolina Medical Board) concerning the conduct of yet another medical professional (plaintiff) committed in a professional setting.

It is well-settled by our Courts that “a matter affecting the professional services rendered by members of a learned profession . . . therefore falls within the exception in N.C.G.S. § 75-1.1(b).” *Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (2001) (citations omitted); *see also Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000) (“[M]edical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a) and thus it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this particular statute.”). Indeed,

[o]ur Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). This exception for medical professionals has been broadly interpreted by this Court, *see Phillips v. A Triangle Women’s Health Clinic*, 155 N.C. App. 372, 377-79, 573 S.E.2d 600, 604-05 (2002); *Burgess*, 142 N.C. App. 393, 544 S.E.2d 4 (2001); *Gaunt*, 139 N.C. App. 778, 534 S.E.2d 660 (2000); *Abram v. Charter Medical Corp.*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990); *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 447, 293 S.E.2d 901, 921 (1982), and includes hospitals under the definition of “medical professionals.”

Shelton v. Duke Univ. Health Sys., Inc., 179 N.C. App. 120, 126, 633 S.E.2d 113, 117 (2006) (citation omitted) (affirming the trial court’s dismissal of the plaintiff’s claim for unfair and deceptive trade practices

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against the defendant hospital on grounds that such a claim cannot be brought against medical professionals pursuant to N.C.G.S. § 75-1.1). In this case, defendants' alleged conduct in making a complaint to the Medical Board is integral to their role in ensuring the provision of adequate medical care. Accordingly, plaintiff's argument is without merit.

II.

Next, plaintiff argues that the trial court erred by granting defendants' motions and dismissing plaintiff's claim for medical malpractice and/or negligence. We disagree.

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

Burgin, 181 N.C. App. at 512, 640 S.E.2d at 428-29 (citations and quotation omitted).

Plaintiff contends that the trial court erred by granting defendants' motions to dismiss plaintiff's third claim for medical malpractice, negligence, and negligence *per se*. In his second complaint, plaintiff also raised a claim for relief based on *res ipsa loquitur*; plaintiff further orally asserted a claim for relief based on corporate negligence before the trial court.

A. Medical Malpractice

[3] In his complaint, plaintiff alleged that defendants engaged in medical malpractice pursuant to N.C. Gen. Stat. § 90-21.11. North Carolina General Statutes, Chapter 90-21.11, holds that a medical malpractice claim may be brought in the following instances:

- a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

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b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2) (2013).

Plaintiff contends that his claim for medical malpractice has satisfied the pleading requirements of N.C.G.S. § 90-21.11 because defendants are medical providers and a medical provider—patient relationship is not required to assert such a claim. Plaintiff cites *Jones v. Asheville Radiological Grp., P.A.*, 129 N.C. App. 449, 500 S.E.2d 740 (1998), *rev'd in part on other grounds by* 351 N.C. 348, 524 S.E.2d 804 (2000), in support of his argument.

In *Jones*, the plaintiff sued her defendant physician and medical provider, alleging that the defendants had disclosed her medical records without her authorization. *Id.* at 453, 500 S.E.2d at 742. The trial court granted the defendants' motion to dismiss on the grounds that the unauthorized disclosure of medical records did not give rise to a claim for medical malpractice. *Id.* at 455, 500 S.E.2d at 744. This Court disagreed, stating that "in the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract and breach of fiduciary duty/confidentiality should all be treated as claims for medical malpractice." *Id.* at 456, 500 S.E.2d at 744 (citation omitted). The trial court's dismissal of the plaintiff's claim was then affirmed, however, on the grounds that the plaintiff had failed to comply with the statute of limitations in filing her complaint. *Id.* at 456-57, 500 S.E.2d at 744-45.

Jones is not applicable to the instant case since, in *Jones*, the plaintiff was a patient of the defendants and, thus, a clear physician/medical provider to patient relationship existed between the plaintiff and the defendants. Here, plaintiff was not a patient of defendants, but rather a fellow medical professional and associate of MPMC. "[I]t is well settled that the relationship of health-care provider to patient must be established to maintain an actionable claim for medical malpractice." *Massengill v. Duke Univ. Med. Ctr.*, 133 N.C. App. 336, 338, 515 S.E.2d 70, 72 (1999)

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(citing *Easter v. Lexington Mem'l Hosp., Inc.*, 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981) (“It is well settled that the relationship of physician to patient must be established as a prerequisite to an actionable claim for medical malpractice.”) (citation omitted)). Therefore, the trial court did not err by granting defendants’ motions to dismiss with respect to plaintiff’s claim for medical malpractice.

B. Negligence, Negligence per se, Corporate Negligence, Res Ipsa Loquitur

[4] Plaintiff also brought written claims for negligence, negligence *per se*, and *res ipsa loquitur* in his second complaint, and orally attempted to assert a claim of corporate negligence before the trial court. Plaintiff alleges that these negligence claims arose from defendants’ failure to “exercise reasonable care and due diligence in safeguarding the medical records generated by Plaintiff, and Plaintiff’s peer review materials stored under the exclusive care, custody and control of MPMC[.]” In its order dismissing these claims, the trial court noted that “The motion to dismiss Plaintiff’s claim for medical malpractice and/or negligence (Count III) is allowed. The Court’s decision to dismiss Count III is not based on Rule 9(j) of the Rules of Civil Procedure.”

In his second complaint, plaintiff alleged that defendants are medical providers and staff for whom plaintiff generated confidential patient medical records. Plaintiff also alleged that, because defendants engaged in two peer reviews of plaintiff, defendants owed plaintiff a duty to “properly safeguard[] and protect[]” records relating to these reviews which were “stored under the exclusive care, custody and control of MPMC[.]” Plaintiff further alleged that, in addition to defendants “fail[ing] to exercise reasonable care and due diligence in safeguarding [the] medical records generated by Plaintiff, and Plaintiff’s peer review materials,” defendants are liable under the doctrine of *res ipsa loquitur* because defendants’ “failure to safeguard Plaintiff’s private and confidential materials is evidenced by the fact that said Defendant[s] had exclusive possession, custody and control of said materials, which would not have been disclosed, but for [defendants’] negligence.”

As a result, plaintiff has alleged that he is entitled to recover damages from defendants based upon his claims for negligence against defendants, including actions for negligence, negligence *per se*, corporate negligence, and *res ipsa loquitur*. However, these claims have been abated.

Under the law of this state, where a prior action is pending between the same parties for the same subject

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matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action. The prior pending action doctrine involves essentially the same questions as the outmoded plea of abatement, and is, obviously enough, intended to prevent the maintenance of a subsequent action [that] is wholly unnecessary and, for that reason, furthers the interest of judicial economy. The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?

Jessee v. Jessee, 212 N.C. App. 426, 439, 713 S.E.2d 28, 37 (2011) (citations and quotations omitted).

A review of plaintiff's two lawsuits indicates that there exists significant overlap between the parties, subject matter, issues, and relief demanded. Specifically, each lawsuit concerns a core group of defendants (MPMC, Cynthia Robinson, Robert Singletary, and Whistle Blower 1 Through 10/ Doe 1 Through 5), and identical subject matter and issues (that defendants' failure to safeguard medical records generated by plaintiff and peer review records concerning plaintiff has harmed plaintiff). As plaintiff's two lawsuits "present a substantial identity as to parties, subject matter, issues involved, and relief demanded[,]" plaintiff's second complaint has been abated by plaintiff's first complaint. *See id.* Accordingly, the trial court did not err in granting defendants' motions to dismiss.

Affirmed.

Judges ELMORE and ERVIN concur.

WILMOTH v. HEMRIC

[237 N.C. App. 595 (2014)]

GLENN R. WILMOTH, PLAINTIFF

v.

GILBERT W. HEMRIC AND VAN W. HEMRIC, DEFENDANTS

No. COA14-459

Filed 2 December 2014

Negligence—motion for directed verdict—causation of injuries

The trial court erred in a negligence case by denying defendants' motion for a directed verdict, and the judgment was vacated. Plaintiff failed to present sufficient evidence to establish that defendants' negligence caused plaintiff's injuries.

Appeal by defendants from judgment entered 18 December 2013 by Judge A. Robinson Hassell in Surry County Superior Court. Heard in the Court of Appeals 5 November 2014.

Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for defendants-appellants.

Jay Vannoy and Franklin D. Smith, for plaintiff-appellee.

ELMORE, Judge.

On 21 November 2013, a jury found that plaintiff was injured as a result of defendants' negligence. Defendants appeal from the judgment that resulted from the jury verdict and, in relevant part, challenge the trial court's denial of their motion for a directed verdict. After careful consideration, we reverse the trial court's denial of that motion and vacate the judgment.

I. Facts

On 9 July 2008, Glenn Wilmoth (plaintiff) observed two cows wearing numbered purple identification tags in his sister's garden between 4:30 p.m. and 5:30 p.m. Plaintiff moved the cows out of his sister's garden to a nearby wooded area. Later that evening, between 8:30 p.m. and 8:45 p.m., plaintiff went back to his sister's house. As he was leaving, he saw the same two cows at the edge of the driveway. Plaintiff went back inside the house to retrieve his brother-in-law. Plaintiff and his brother-in-law exited the house only to find one cow standing in the driveway. Plaintiff walked around the premises for the purpose of locating the

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other cow, at which point that cow charged and struck him, resulting in severe injuries to his back and legs.

Plaintiff's sister transported plaintiff to the hospital, and he stayed there overnight. Approximately five days after plaintiff left the hospital, he called Van Hemric (defendant Van Hemric) after discovering that he might own the cows. Defendant Van Hemric did not answer the phone so plaintiff left a voicemail.

On or about 20 July 2008, approximately eleven days after plaintiff sustained his injuries, a vehicle struck a cow less than a mile from plaintiff's home on CC Camp Road. Plaintiff went to the accident scene and was able to identify the cow, based on the purple tag, as the same one that injured him. Plaintiff called defendant Van Hemric a day later and was able to speak with him on the phone. Plaintiff told defendant Van Hemric about the vehicle collision and the prior event that led to his injuries.

On 25 April 2011, plaintiff filed a complaint alleging, in relevant part, that defendants failed to act "as . . . ordinary, reasonable, and prudent person[s] would have done upon learning the cattle and/or livestock had roamed from the pasture."

At trial, and after plaintiff presented all of his evidence, defendants made a motion for a directed verdict, which was denied by the trial court. Defendants thereafter presented evidence, and Larry Chappell testified that defendants employed him during the summer of 2008 to check cattle. The two particular cows subject to this action were kept in the Kirk Pasture. Among his duties, Chappell visited the Kirk pasture twice a week to check the fences, count the cows, and record his results in a book (the book). At some point in July 2008 he discovered that two cows were missing, but Chappell could not recall when in July this had occurred. He testified that he recorded the exact date in the book but threw it away after he stopped working in the Kirk Pasture and well before he had knowledge of plaintiff's injuries or plaintiff's complaint.

A day after noticing that the two cows were missing, Chappell reported that information to defendant Van Hemrick. Defendant Van Hemrick testified that Chappell notified him about the missing cows before 21 July 2008, but he could not recall the specific day.

At the close of all the evidence, defendants renewed, and the trial court once again denied, their motion for a directed verdict. The jury found that plaintiff was injured as a result of defendants' negligence. Pursuant to the jury's determination of damages, the trial court ordered

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that plaintiff recover \$350,000 from defendants with interest at the legal rate of eight percent per annum. Defendants moved for a judgment notwithstanding the verdict, which the trial court denied.

II. Analysis

Defendants argue that the trial court erred in denying their motion for a directed verdict because plaintiff failed to present sufficient evidence to establish that defendants' negligence caused plaintiff's injuries. We agree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

Generally, a negligence recovery requires proof of a legal obligation, a breach of that obligation, proximate cause, and actual damages. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48, *aff'd*, 360 N.C. 164, 622 S.E.2d 494 (2005). Within the specific context of an animal owner's liability for negligence:

The liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations. It is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint.

Gardner v. Black, 217 N.C. 573, 576, 9 S.E.2d 10, 11 (1940). Importantly, a plaintiff must present evidence sufficient to indicate that defendant's

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animals “were at large with his knowledge and consent, or at his will, or that their escape was due to any negligence on his part.” *Id.* at 577, 9 S.E.2d at 12.

Here, plaintiff did not offer evidence sufficient to show that the cow escaped due to defendants’ negligence (failure to maintain an adequate fence, leaving a gate open, counting the cows too infrequently, etc.). Rather, plaintiff’s theory of liability at trial was that defendants acted negligently based upon their failure to sufficiently look for the cows once they learned or should have learned that the cows had escaped.

Thus, the dispositive issue is whether plaintiff presented sufficient evidence for the jury to infer that before the time of plaintiff’s injury, defendants knew or should have known that the cows were missing. This knowledge was a necessary prerequisite to establish defendants’ duty to engage in reasonable measures to locate the cows. *See id.*

The evidence taken in the light most favorable to plaintiff shows the following: Chappell checked the pasture on a Tuesday and Thursday each week and remembered a time in July 2008 when he realized that two cows were missing. A day later, Chappell reported that information to defendants. Defendant Van Henric recalled Chappell notifying him about the missing cows before having a phone conversation with plaintiff on 21 July 2008, which was twelve days after plaintiff sustained his injuries. However, neither defendants nor Chappell recalled the exact day in July that Chappell discovered the cows were missing. Thus, whether defendants’ alleged negligent conduct (their failure to properly search for the cows) occurred before or after plaintiff’s injury is a matter of pure speculation.

We also note that although plaintiff saw the two cows in his sister’s garden on 9 July 2008 between 4:30 p.m. and 5:30 p.m., and again at the time of his injury between 8:30 p.m. and 8:45 p.m., such evidence by itself only shows that the cows escaped, not that defendants knew or should have known that the cows escaped, especially because Chappell conducted his cow-count on Tuesdays and Thursdays, and 9 July 2008 was on a Wednesday.

We therefore hold that no sufficient evidence at trial showed that defendants had violated a duty of care to search for the cows at the time of plaintiff’s injury. Plaintiff failed to establish that defendants knew or should have known that the cows had escaped before the time of his injury. *See Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971) (“Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion

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... for a directed verdict.”). Accordingly, the trial court erred by denying defendants’ motion for a directed verdict.

III. Conclusion

In sum, we reverse the trial court’s denial of defendants’ motion for a directed verdict and vacate the trial court’s judgment.

Reversed and vacated.

Judges ERVIN and DAVIS concur.

MAYFORD WYATT, PLAINTIFF

v.

HALDEX HYDRAULICS, EMPLOYER, AND SENTRY INSURANCE, CARRIER, DEFENDANTS

No. COA14-335

Filed 2 December 2014

1. Workers’ Compensation—compensable injury—doctor’s opinion legally sufficient

The Industrial Commission did not err in a workers’ compensation case by concluding that plaintiff’s brain condition was caused by his work accident and was compensable under the Workers’ Compensation Act. The testifying medical doctor’s opinion was legally sufficient to support the Commission’s determination that plaintiff’s injury was compensable.

2. Workers’ Compensation—compensable injury—causation—doctor’s opinion legally sufficient

The Industrial Commission did not err in concluding that a testifying medical doctor’s causation opinion was legally sufficient to establish that plaintiff’s lifting injury caused an exacerbation or aggravation of his underlying and pre-existing cervical spine condition.

3. Workers’ Compensation—claim timely filed—prior to expiration of statute of limitations

The Industrial Commission did not err in a workers’ compensation case by concluding that plaintiff timely filed a claim for workers’ compensation benefits where plaintiff filed his Form 18 prior to the expiration of the two-year statute of limitations.

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4. Workers' Compensation—compensable injury—first prong of Russell test

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's brain and cervical spine injuries were compensable. Plaintiff met his burden of proof by satisfying the first prong of the test set forth in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762.

Appeal by Defendants from opinion and award entered 10 January 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2014.

Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for Plaintiff.

Hill Evans Jordan & Beatty, PLLC, by Richard T. Granowsky, for Defendants.

STEPHENS, Judge.

Employer Haldex Hydraulics and its insurer Sentry Insurance (collectively, "Defendants") appeal from an opinion and award of the full North Carolina Industrial Commission ("the Commission") filed 10 January 2014. The Commission's opinion and award affirmed an opinion and award by Deputy Commissioner Keischa M. Lovelace, filed 13 May 2013, which had determined that Plaintiff Mayford Wyatt sustained compensable injuries to his brain and spine as a result of a workplace lifting accident on 31 October 2008. We affirm.

Background

The evidence before the Commission tended to show that Plaintiff began working at Defendant's Statesville plant in 1988, where he was employed as a CNC Setup Operator and was cross-trained on the operation of several different machines used by Defendant to produce hydraulic gear pumps and transmissions for companies such as John Deere and Caterpillar.

On 31 October 2008, Plaintiff and a co-worker were conducting inventory, counting aluminum parts stored in metal tubs on metal shelves. To remove the tubs, Plaintiff first slid them off the shelves, which were coated with an oil film from the gear manufacturing process, then his co-worker grabbed the front handle while Plaintiff twisted his body to the left and reached into the shelf with his right arm to grab the other handle. The two men then placed the tubs on the floor, counted and labeled

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and replaced the parts, and returned the tubs to the shelves. Plaintiff was injured when he attempted to remove a mislabeled tub that contained parts made of a material much heavier than aluminum: instead of an expected weight of 60 to 70 pounds, the tub weighed approximately 280 pounds. As his co-worker grabbed the front handle, Plaintiff balanced on one knee holding the back handle, then twisted and turned with the tub and fell to the floor with it. Plaintiff was taken to the Iredell Memorial Hospital emergency room twice that day due to pain in his lower back. As a result of his injuries, Plaintiff was out of work from 31 October 2008 through 11 December 2008. Defendants accepted the compensability of Plaintiff's low back condition pursuant to a Form 60.

On 9 December 2008, Plaintiff's primary care physician, Dr. Daniel Bellingham, assessed Plaintiff with right L3-4 nerve root impingement and referred him to a spine surgeon for consultation. Shortly thereafter, Plaintiff was permitted to return to work with light duty restrictions of no lifting over 25 pounds, limited bending and twisting, and no stooping or squatting. Plaintiff received ongoing treatment at OrthoCarolina, and eventually orthopedic surgeon Dr. Theodore Belanger diagnosed Plaintiff's low back condition as lumbar stenosis with persistent back and right leg pain, numbness, and weakness, which did not require surgical intervention. In December 2009, Plaintiff submitted a Form 25R *Evaluation for Permanent Impairment*. On 25 January 2010, the Industrial Commission approved a Form 26A, *Employer's Admission of Employee's Right to Permanent Partial Disability Compensation*, awarding Plaintiff \$12,932.32 for a permanent partial impairment rating of 7.5% as a result of his low back injury.

Throughout the treatment of his low back condition in 2009 and 2010, Plaintiff also complained of seemingly unrelated symptoms that began almost immediately after his 31 October 2008 accident, including dizziness, loss of balance, nausea, stuffy ears, sinus pressure, fatigue, insomnia, severe headaches, and episodic numbness in his face, tongue, torso, and limbs. During the two months he was unable to work in late 2008, Plaintiff's family noticed that he remained in bed and slept most of the time, experienced difficulty walking and balancing, could not keep his car on the road as he was unable to apply steady pressure to the gas pedal, frequently dozed off mid-sentence during conversations, and had difficulty understanding, prompting his relatives to explain things to him in an "elementary way." Previously an active church member who regularly attended services on Wednesday and twice on Sunday, Plaintiff did not attend church for almost two months. When he returned in December 2008, church members noticed an observable decline in his

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health. Plaintiff had trouble maintaining his balance, dragged his foot when walking, had difficulty hearing, and fell into a deep sleep during services and conversations. Upon his return to work, Plaintiff's co-workers observed a noticeable decline in his physical abilities: Plaintiff regularly slept at his work station, walked slowly, and appeared to drag one of his legs while walking. Other machine operators had to be assigned to perform Plaintiff's lifting tasks, and his team leader noticed he had trouble understanding directions and suffered from balance issues.

Plaintiff's doctors offered multiple diagnoses, including sinusitis and sleep apnea, but his symptoms persisted, and in March 2010 he was referred for a neurological consult after an MRI of his brain showed a herniated cerebellar tonsil consistent with a Chiari malformation. A Chiari malformation is a condition at the junction of the neck and skull that causes compression of the part of the central nervous system where the spine joins the brain. There are two types of Chiari malformation: congenital Chiari malformations occur from a person's congenital cranium formation, whereas acquired Chiari malformations can develop through intracranial hypotension, which is a cerebrospinal fluid ("CSF") balance issue between the brain and the spine that can be caused by lifting injuries resulting in cerebrospinal fluid leaks. Chiari malformations can result in a condition known as "brain sag." Typically, the brain is supported within the skull and spinal column by cerebral spinal fluid, but when spinal fluid is at a lower pressure underneath the brain, the brain tends to sag down towards the base of the skull. Classic symptoms of a Chiari malformation include severe headache associated with coughing, problems with balance, dizziness, difficulty walking, and cranial nerve dysfunction which can cause facial symptoms, tongue numbness, and balance and swallowing difficulties. However, symptoms indicative of Chiari malformations are also suggestive of other medical conditions unrelated to the brain, cervical spine compression, and other neurological abnormalities, and it is not uncommon for a person to exhibit symptoms of a Chiari malformation over an extended period of time before diagnosis.

On 18 March 2010, Plaintiff sought treatment with Dr. John Wilson, a board-certified expert in neurological surgery. While certain aspects of Dr. Wilson's examination were indicative of Chiari malformation, other aspects suggested a problem further down Plaintiff's cervical spine. A subsequent cervical MRI showed significant stenosis with cord signal changes, so Dr. Wilson performed an anterior cervical discectomy, decompression, and fusion on 16 April 2010. At his follow-up appointment on 20 May 2010, Plaintiff reported complete resolution of his symptoms,

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which surprised Dr. Wilson, who had anticipated needing to perform a Chiari decompression to alleviate Plaintiff's symptoms. However, on 26 August 2010, Plaintiff returned to Dr. Wilson with complaints of dizziness, difficulty balancing, facial numbness, bowel control issues, and "things not tasting good." On 12 October 2010, Plaintiff complained of the same symptoms, as well as hearing problems, decreased sensation on his right side, and double vision. On 1 November 2010, Dr. Wilson performed two surgical procedures on Plaintiff: a Chiari decompression and a C3 laminectomy with C2-C5 fusion. At a follow-up appointment on 16 December 2010, Plaintiff reported some improvement in his dizziness but complained of persistent balance difficulties, as well as hand-to-eye coordination issues, hearing "echoes," and falling asleep while driving.

On 4 February 2011, Plaintiff was taken to the Iredell Memorial Hospital emergency room suffering from quadriparesis and then immediately transferred to Wake Forest Baptist Hospital for assessment of a neurological emergency. Dr. Thomas Sweasey, a board-certified expert in neurosurgery and neurocritical care, was the neurosurgeon on call and determined after reviewing an MRI that Plaintiff needed surgery to treat cervical spondylosis, severe canal stenosis, and significant spinal cord impingement with evidence of cord signal change. Dr. Sweasey performed a posterior cervical decompression and fusion. Although Plaintiff recovered from his quadriparesis, his MRIs indicated he suffered from "brain sag," and Dr. Sweasey subsequently assumed responsibility for Plaintiff's care as his treating physician. Between 15 March 2011 and 27 October 2011, Plaintiff was hospitalized four times complaining of extreme somnolence, frontal headaches, trouble balancing and walking, dizziness, hearing loss, slurred speech, memory and comprehension issues, and bladder control problems. At Dr. Sweasey's direction, Plaintiff underwent an array of different diagnostic tests and assessments—including lumbar punctures, a ventricular peritoneal shunt, and two cranioplasty procedures on the back part of his skull—to determine the cause of his "brain sag" and the best options for treatment. Dr. Sweasey consulted with several specialists, including Dr. Thomas Ellis, co-director of the Deep Brain Stimulation Program at Wake Forest, who noted that, although Plaintiff's "presentation is somewhat difficult to truly classify as one diagnosis," his symptoms were "most convincing for communicating hydrocephalus as he has significant brain sag." However, after extensive interviews with Plaintiff and his family regarding his medical history and the onset and progression of his symptoms, Dr. Sweasey eventually diagnosed Plaintiff with cervical cord compression and an acquired Chiari malformation caused by intracranial hypotension.

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Plaintiff continued to work for Haldex Hydraulics between 11 December 2008 and 15 April 2010. On 11 February 2010, Plaintiff suffered a fall while working. He received treatment at an urgent care office for his back and hip, but did not miss any work due to the fall. On 13 April 2010, Plaintiff gave written notice to Defendant that he wished to enter a severance agreement to begin following his short-term disability leave, which ran from 23 April 2010 through the week ending 29 May 2010. On 4 June 2010, Plaintiff signed a severance agreement, release, and waiver, indicating that his employment with Defendant terminated 28 May 2010.

Procedural History

On or about 1 July 2010, Plaintiff filed a Form 18 *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent* with the Commission, alleging injuries to his back, neck, and leg sustained from his 31 October 2008 accident. Plaintiff subsequently filed a Notice of Change of Condition on 28 June 2011. On 14 February 2012, Plaintiff's wife filed a Form 42 *Application for Appointment of Guardian Ad Litem*, which the Commission ultimately approved, because of Plaintiff's difficulties with his hearing, reasoning, and memory. She also averred that she felt it was unsafe to leave Plaintiff alone. On 5 March 2012, Plaintiff filed a Form 33 *Request for Hearing* and on 26 March 2012, Plaintiff filed an Amended Form 33 stating that his injuries were to his back, neck, and brain. Defendants responded and denied compensability for Plaintiff's cervical and cognitive problems. Deputy Commissioner Lovelace heard the matter on 10 August 2012 and issued an opinion and award concluding that Plaintiff's intracranial hypotension, Chiari malformation, and cervical spine conditions were causally connected to his 31 October 2008 work-related injury; that Plaintiff was disabled from working; and that he was entitled to indemnity and medical compensation. Defendants timely appealed the opinion and award to the full Commission on 16 May 2013.

The Full Commission heard the matter on 25 October 2013 and issued an opinion and award on 10 January 2014 affirming Deputy Commissioner Lovelace's opinion and award with minor modifications, over a dissent without written opinion from Chairman Andrew T. Heath. During the course of its hearing into the causation and compensability of Plaintiff's brain and cervical spine injuries, the Commission reviewed depositions taken from Dr. Bellingham, Dr. Belanger, Dr. Wilson, and Dr. Sweasey.

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Dr. Bellingham, Plaintiff's primary care physician, did not render an opinion regarding the causal relationship between Plaintiff's cervical and brain conditions and the 31 October 2008 workplace lifting accident, but testified that he did not expect Plaintiff's condition to improve, stating "we can always hold out hope, but he hasn't made a lot of change for quite some time."

Dr. Belanger, an orthopedic surgeon who treated only Plaintiff's low back condition, agreed with the Chiari malformation diagnosis but opined within a reasonable degree of medical certainty that it was a congenital, rather than acquired, condition and that he therefore did "not see how a single lifting injury of any sort could cause or contribute in any material way to []Chiari malformation, which is a congenital anomaly present since birth." Dr. Belanger also opined to a reasonable degree of medical certainty that Plaintiff's cervical spine condition was due to degenerative cervical spondylosis and therefore not caused by any particular event or injury, including the 31 October 2008 accident, although he did acknowledge it was possible that an acute event could exacerbate or aggravate Plaintiff's underlying condition. However, the Commission assigned little weight to Dr. Belanger's expert opinion, given that Dr. Belanger did not treat Plaintiff for either his cervical spine or his brain condition, and further admitted that only 10 to 15 of the 2,000 to 3,000 patients he treats annually need treatment for symptomatic Chiari malformations, and he typically refers those patients to neurosurgeons.

Dr. Wilson confined his expert opinion to the conditions for which he treated Plaintiff between March and December 2010. He testified that while certain aspects of his examination indicated a Chiari malformation, Plaintiff was not experiencing brain sag at the time of his treatment, and therefore Dr. Wilson would not give a causative opinion regarding Plaintiff's brain sag, although he did note that it may have subsequently developed as a consequence of the Chiari decompression procedure he performed. Further, Dr. Wilson testified that it was plausible for a lifting injury to cause brain sag, although that was not something he considered in his evaluation of Plaintiff. While Dr. Wilson would not give an opinion regarding an acquired Chiari malformation caused by intracranial hypotension, he explained that it could occur

if a person during the course of some kind of injury or heavy lifting . . . developed a spontaneous CSF leak somewhere in their spinal column, and so the CSF is leaking and they develop spontaneous intracranial hypotension, the brain sags, the cerebellar tonsils descend, [and] that is

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hypothetically a possible way you can develop this kind of tonsillar descent.

Regarding Plaintiff's cervical spine condition, Dr. Wilson opined that although a Chiari malformation can cause cervical cord compression, Plaintiff's condition was not causally related to his 31 October 2008 workplace lifting accident, but was instead the result of degenerative cervical spondylosis, which Plaintiff's lifting injury did not exacerbate.

Dr. Sweasey diagnosed Plaintiff with acquired Chiari malformation and opined to a reasonable degree of medical certainty that the most likely cause was intracranial hypotension, of which the most likely proximate cause was a spinal fluid leak secondary to Plaintiff's 31 October workplace lifting injury. Dr. Sweasey's opinion was based upon the significant amount of time he spent conducting tests and discussing Plaintiff's case with other specialists, as well as Plaintiff and his family. Dr. Sweasey further opined that Plaintiff's temporary improvement following the procedures Dr. Wilson performed in April and November 2010 was indicative of intracranial hypotension, explaining that more likely than not, every time Plaintiff's spine is manipulated during a surgical procedure, pressure is left on the thecal sac because there is some blood left behind, and Plaintiff's condition improves dramatically as the blood helps support the brain. The improvement, however, is temporary as Plaintiff's condition worsens as the blood is absorbed by the surrounding tissue. Dr. Sweasey also testified that the cause of Plaintiff's Chiari malformation was unknown during Dr. Wilson's treatment because, he explained, Plaintiff was in a very small group of people "where the mechanism they acquire, the [C]hiari malformation is decreased pressure which allows the brain to sag and the cerebellum to sag through the foramen magnum, which then causes them to be symptomatic." Regarding Plaintiff's cervical cord compression, Dr. Sweasey opined that more likely than not Plaintiff's condition resulted from an aggravation of an underlying cervical condition sustained during his 31 October 2008 workplace injury. As Dr. Sweasey explained, consistent with Plaintiff's gradual onset of symptoms, a person may have spinal cord compression and irritation without initially experiencing pain but then slowly develop a deficit over time. Dr. Sweasey further opined that, more likely than not, Plaintiff's cervical spine issue is related to leakage of spinal fluid from a nerve root with the fluid absorbed by the surrounding tissue. Finally, Dr. Sweasey opined that, more likely than not, Plaintiff will not be able to maintain gainful employment on a permanent basis as a result of his injuries.

Ultimately, the Commission assigned the most weight to Dr. Sweasey's expert opinion. As the Commission explained in its conclusions of law:

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The greater weight of the medical evidence showed that symptomatic [C]hiari malformations, whether congenital or acquired, are rare conditions that are treated by neurosurgeons. Both neurosurgeons who treated Plaintiff diagnosed Plaintiff with a [C]hiari malformation. As stated in the findings of fact, the Full Commission assigned greater weight to the expert opinion of Dr. Sweasey than Dr. Wilson[,] as Dr. Wilson limited his expert opinion to his treatment time period and did not consider the effect of the extensive medical treatment, testing, and specialist consultations that occurred subsequent to Dr. Wilson's treatment of Plaintiff. In contrast, Dr. Sweasey consulted numerous specialists, conducted a variety of diagnostic tests, interviewed Plaintiff and his family extensively[,] and reviewed Plaintiff's voluminous medical records to determine Plaintiff's diagnosis, treatment modalities, and the cause of Plaintiff's condition. Dr. Sweasey's expert opinion is legally sufficient to establish a causal connection between Plaintiff's intracranial hypotension and cervical spine condition to his work-related injury.

Thus, based on a preponderance of the evidence of record, the Commission found as facts that, as a result of his 31 October 2008 workplace lifting injury, "Plaintiff sustained an intracranial hypotension that caused an acquired [C]hiari malformation, or brain sag" and also that "Plaintiff sustained an exacerbation or aggravation of his underlying and pre-existing cervical spondylosis resulting in cervical stenosis, cervical cord compression, and other causally related conditions."

The Commission also concluded that Plaintiff's claim was timely filed and that Plaintiff had met his burden of proof to show he was incapable of earning pre-injury wages in either the same or any other employment and that the incapacity to earn pre-injury wages was caused by Plaintiff's injury, given Dr. Sweasey's testimony that more likely than not, Plaintiff will not be able to return to gainful employment in the future due to his acquired Chiari malformation caused by intracranial hypotension. Therefore, the Commission concluded that "Plaintiff is entitled to have Defendants pay for all related medical expenses incurred or to be incurred that are necessary and reasonable treatment that would effect a cure, give relief or lessen Plaintiff's period of disability" and further ordered that Defendants pay Plaintiff \$663.35 per week in temporary total disability compensation, dating back to 1 November 2010 and continuing until Plaintiff can return to work. Defendants gave timely notice

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of their intent to appeal the Commission's opinion and award pursuant to N.C. Gen. Stat. § 97-86.

Standard of Review

This Court's review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. See *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's conclusions of law are reviewable *de novo*. See *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003) (citation omitted). As for the Commission's findings of fact, if supported by competent evidence, they are conclusive even if the evidence might also support contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted). Indeed, the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight" because our duty "goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (citation omitted).

Causation of Plaintiff's Brain Condition

[1] Defendants first argue that the Commission erred in concluding Dr. Sweasey's expert medical testimony was legally sufficient to establish a causal connection between Plaintiff's brain condition and his work-related lifting accident on 31 October 2008. Specifically, Defendants contend that Dr. Sweasey's opinion does not constitute competent evidence to support the Commission's causation determination because Dr. Sweasey could not definitively confirm the existence of the cerebrospinal fluid leak that he testified caused Plaintiff's intracranial hypotension which in turn resulted in Plaintiff's brain sag. Thus, Defendants claim Dr. Sweasey's opinion was based merely upon speculation and conjecture, which, based on our Supreme Court's decision in *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), Defendants insist is "not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id.* at 230, 538 S.E.2d at 915. Therefore, Defendants argue that the Commission erred in concluding Plaintiff's brain condition was caused by his work accident and compensable under the Workers' Compensation Act. We disagree.

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In *Young*, our Supreme Court reversed this Court's opinion affirming an award of the Commission due to a complete lack of competent evidence to support the Commission's findings of fact—that the plaintiff's fibromyalgia was caused by a work-related accident—because the medical causation testimony the Commission relied upon was based entirely on one expert's speculation and conjecture. *Id.* at 231, 538 S.E.2d at 915. A careful review of that expert's testimony revealed that he considered fibromyalgia to be “an illness or condition of unknown etiology” and that he “frequently could not ascribe a cause for fibromyalgia in his patients.” *Id.* Moreover, the expert admitted there were at least three alternative potential causes for the plaintiff's condition but that he had performed no tests to rule them out, although he did acknowledge that additional tests “need[ed] to have been done.” *Id.* Instead, his diagnosis relied entirely upon the *post hoc ergo propter hoc* fallacy, given his testimony that, “I think that she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the only piece of information that relates the two.” *Id.* at 232, 538 S.E.2d at 916. The Court ultimately concluded that because the expert's testimony “demonstrate[ed] his inability to express an opinion to any degree of medical certainty” as to causation and was based “solely on supposition and conjecture,” it was incompetent and insufficient to support the Commission's findings of fact. *Id.* at 233, 538 S.E.2d at 917.

In the present case, Defendants contend Dr. Sweasey's testimony reveals that his medical causation opinion is founded solely on speculation and conjecture, and is thus analogous to the expert opinion rejected as incompetent in *Young*. Specifically, Defendants point to Dr. Sweasey's testimony that “we don't have any documentation of [a cerebrospinal fluid leak]” when he was asked how he reached his opinion that Plaintiff's condition was caused by intracranial hypotension resulting from the workplace accident. Additionally, Defendants emphasize that Dr. Sweasey acknowledged there are multiple mechanisms by which a person can acquire intracranial hypotension, but was unable to state the percentage of cases in which the event causing the condition was ultimately identified, and did not testify to any diagnostic testing or other actions that he took to rule out other potential causes.

However, the full context of Dr. Sweasey's testimony demonstrates that locating a cerebrospinal fluid leak was just one of “three different pathways” by which Dr. Sweasey could have arrived at his intracranial hypotension diagnosis. Dr. Sweasey went on to explain that his diagnosis was more informed by the nature and sequence of Plaintiff's

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symptoms and Plaintiff's responses to various tests, treatments, and surgical procedures. Notably, Dr. Sweasey testified that the fact Plaintiff's symptoms improve when he is placed in a supine position "suggests that there is a pressure differential inside of his head that allows the sag to occur when he's upright," and that Plaintiff's dramatic temporary improvement immediately following an epidural blood patch—which Dr. Sweasey testified is a "common treatment for spinal fluid leaks"—and two cranioplasties further confirmed that Plaintiff suffered from intracranial hypotension, "the most likely proximate cause of [which] was a spinal fluid leak secondary to his injury."

Defendants also contend that Dr. Sweasey's opinion is based merely upon speculation because his testimony established that there is no scientific basis for working backwards in time to connect Plaintiff's brain sag to his 31 October 2008 injury. Specifically, Defendants highlight Dr. Sweasey's testimony, when asked how to pinpoint precisely how long it takes for brain sag to develop after intracranial hypotension, that

I don't think we have enough cases in our literature to say, you know, how long that is going to take. I'm sure it could be very immediate in some individuals. I'm sure it could take days in some. I'm sure it could take longer in others. But I don't have any way of proving that at this point in time.

Defendants' argument fails to persuade us. Rather than proving his causation opinion "is of no more value than a layman's opinion," as Defendants insist based on *Young*, a careful review of the transcript of Dr. Sweasey's testimony makes clear that his point was that because the medical literature is still evolving and different patients experience the onset of their symptoms at different times, that makes close observation of each individual patient's history and reactions to treatment all the more crucial. And here, unlike the expert in *Young*, Dr. Sweasey spent months consulting with numerous specialists, conducting a variety of diagnostic tests and extensive interviews with Plaintiff and his family, and reviewing Plaintiff's voluminous medical records to determine his diagnosis, treatment modalities, and the cause of Plaintiff's condition, which is why the Commission ultimately found his causation opinion most persuasive.

Defendants further attempt to undermine Dr. Sweasey's causation opinion by contrasting it with Dr. Wilson's testimony. As Defendants emphasize, Dr. Wilson testified that the onset of brain sag and Chiari malformation are not typically associated with traumatic injuries, but

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can develop in response to Chiari decompression surgeries like the one he performed on Plaintiff on 1 November 2010. Indeed, Defendants argue that there is no competent evidence indicating Plaintiff suffered from intracranial hypotension-induced brain sag prior to Dr. Wilson performing the Chiari decompression. However, this argument ignores several of the Commission's findings of fact which, because Defendants do not challenge them, are presumed conclusive. First, testimony from Plaintiff's family, co-workers, and fellow church members describes Plaintiff suffering from symptoms of Chiari malformation and brain sag beginning in the weeks and months immediately following his 31 October 2008 accident. Plaintiff saw multiple physicians for treatment of these symptoms, but it took over a year before he was referred to a neurologist, which is in keeping with the Commission's finding that symptoms indicative of Chiari malformations are also suggestive of other medical conditions unrelated to the brain, cervical spine compression, and other neurological abnormalities, and it is not uncommon for a person to exhibit symptoms of a Chiari malformation over an extended period of time before a correct diagnosis is reached. Finally, Defendants ignore Dr. Wilson's own testimony that it is indeed hypothetically plausible for a lifting injury to cause brain sag. While Dr. Wilson would not give an opinion regarding an acquired Chiari malformation caused by intracranial hypotension because it was not something he considered in evaluating Plaintiff's condition, he explained that it could occur

if a person during the course of some kind of injury or heavy lifting . . . developed a spontaneous CSF leak somewhere in their spinal column, and so the CSF is leaking and they develop spontaneous intracranial hypotension, the brain sags, the cerebellar tonsils descend, [and] that is hypothetically a possible way you can develop this kind of tonsillar descent.

In light of Dr. Sweasey's testimony and the rest of the evidence of record, we conclude Defendant's objections regarding Dr. Sweasey's inability to pinpoint the exact source of Plaintiff's intracranial hypotension go more to the weight of his opinion than its competence. Indeed, despite their claim that Dr. Sweasey's causation opinion is mere speculation, the majority of Defendants' argument reads more like an invitation for this Court to reweigh the evidence that was presented before the Commission. We recognize that Defendants presented substantial evidence that *would* have supported a contrary determination regarding the cause of Plaintiff's brain condition. But as our prior cases make clear, it is not this Court's place or prerogative to second-guess the

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Commission's credibility determinations so long as its findings of fact are supported by competent evidence. *See Adams*, 349 N.C. at 680, 509 S.E.2d at 413. Because we do not agree with Defendants' contention that Dr. Sweasey's opinion was so speculative as to render it incompetent, we hold the Commission did not err in concluding that his causation opinion was legally sufficient to support its determination that Plaintiff's injury was, in fact, compensable under our State's Workers' Compensation Act.

Aggravation of Plaintiff's Cervical Spine Condition

[2] Defendants next argue that the Commission erred in concluding that Dr. Sweasey's causation opinion was legally sufficient to establish that Plaintiff's 31 October 2008 lifting injury caused an exacerbation or aggravation of his underlying and pre-existing cervical spine condition. We disagree.

As indicated in the Commission's findings of fact:

Dr. Sweasey opined that more likely than not, Plaintiff's cervical cord compression for which he underwent surgery on April 16, 2010 and November 1, 2010 resulted from an October 31, 2008 aggravation of an underlying cervical condition. Dr. Sweasey explained that symptom onset was subtle and did not become apparent until over time. A person may have spinal cord compression and spinal cord irritation for which a person does not feel pain, but slowly over time the person develops a deficit. Dr. Sweasey also stated that more likely than not, Plaintiff's cervical spine issue is related to leakage of spinal fluid from a nerve root with the fluid absorbed by the surrounding tissue.

Here again, Defendants challenge the Commission's findings based on their prior argument that Dr. Sweasey's causation opinion was too speculative to be considered competent under *Young* and demonstrates his reliance on the *post hoc, ergo propter hoc* fallacy. To support their claim, Defendants highlight Dr. Sweasey's testimony that,

basically looking backwards, and trying to find what I considered the common thread through the whole picture, you know, original spinal surgery, Chiari decompression, subsequent spine surgery, subsequent shunt, subsequent cranioplasty of two different forms, epidural blood patches, the common thread when I look back through all of that appears to be intracranial hypotension secondary

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to the lifting injury, and more likely than not the problem that we discussed as far as a leakage of spinal fluid from a nerve root.

The spine issue in the cervical spine . . . appears to have a relationship to that, too. So that's why I label that as likely—more likely than not being related to the lifting injury, also. Again, it's my opinion. Finding an actual absolute perfect thread for that one is harder, but I think certainly, you know, I would base my opinions and everything more on the intracranial hypotension issue. And I think that fits better with his picture all the way through.

Defendants repeat their allegations that Dr. Sweasey's testimony is incompetent because it failed to pinpoint the location of Plaintiff's cerebrospinal fluid leak and there is no scientific basis for working backwards from Plaintiff's cervical spine condition to his 31 October 2008 injury. However, as already discussed, these objections go more to the weight of Dr. Sweasey's opinion than its competence.

Defendants also emphasize that neither Dr. Belanger nor Dr. Wilson agreed with Dr. Sweasey's diagnosis. While this appears to be another invitation for this Court to reweigh the evidence that was before the Commission, which we decline to do, we also note that both Dr. Belanger and Dr. Wilson testified that it was plausible that a lifting injury could aggravate a previously asymptomatic degenerative cervical spine condition. Moreover, as the Commission indicated, Dr. Wilson agreed that cervical cord compression can be related to Chiari malformation and that, in this circumstance, causation questions are best viewed retrospectively because of the subtle onset of cervical cord compression symptoms, which can overlap with Chiari malformation symptoms and similarly do not become apparent until over time.

Accordingly, we hold that the Commission did not err in concluding that Dr. Sweasey's causation opinion was legally sufficient to establish that Plaintiff's 31 October 2008 lifting injury caused an exacerbation or aggravation of his underlying and pre-existing cervical spine condition.

Timely Notice to Satisfy Statute of Limitations

[3] Defendants next argue that the Commission erred in concluding that Plaintiff timely filed a claim for workers' compensation benefits for his Chiari malformation caused by intracranial hypotension based on the Form 18 that Plaintiff filed on or about 1 July 2010 seeking benefits for injuries to his neck, back, and leg. Specifically, Defendants contend

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that because Plaintiff's Form 18 did not explicitly reference the injury to his brain, he should be barred from recovery for his brain sag by our Workers' Compensation Act's statute of limitations. We disagree

As Defendants point out, N.C. Gen. Stat. § 97-24 establishes a two-year statute of limitations for claims for compensation arising from work-related injuries, and although Plaintiff's accident occurred on 31 October 2008, Plaintiff did not file any claims for compensation that specifically referenced his resulting brain injury until he filed a Form 33 on 5 March 2012. Nevertheless, as our Supreme Court has made clear, our State's Workers' Compensation Act "requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous technical, narrow and strict interpretation of its provisions." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 36, 653 S.E.2d 400, 406 (2007) (citation and internal quotation marks omitted).

In the present case, Plaintiff suffers from a rare brain condition that is notoriously difficult to properly diagnose given its symptoms, and we believe it would defeat the purpose of the Act to deny him benefits because he was unable to fully diagnose his condition himself within the two-year statute of limitations period. Moreover, because Defendants do not challenge the Commission's finding of fact that

[C]hiari malformation, tonsillar descent, and brain sag affect the region of the body where the cervical spine joins the brain causing neurological abnormalities throughout the central nervous system; therefore, the Full Commission finds that the Form 18 filed on or about July 1, 2010 referencing Plaintiff's back and neck sufficiently stated a claim for his medical condition related to [C]hiari malformation and that his claim is not time barred[.]

we consider it conclusive on appeal. Thus, we agree with the Commission's conclusion of law that the reference in Plaintiff's Form 18 to his neck, back, and leg sufficiently identified the body parts affected by his work-related injury. Therefore, because Plaintiff filed his Form 18 prior to the expiration of the two-year statute of limitations, we hold the Commission did not err in concluding Plaintiff's claim was not time barred.

Temporary Total Disability Benefits and Medical Compensation

[4] Finally, Defendants argue that the Commission erred in its conclusions of law that Plaintiff is entitled to temporary total disability benefits

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and medical compensation based on Dr. Sweasey's causation opinion. However, in light of the analysis above, we hold that the Commission did not err in concluding that Plaintiff's brain and cervical spine injuries were compensable and that Plaintiff met his burden of proof by satisfying the first prong of the *Russell* test through "the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (citation omitted). Accordingly, the opinion and award of the Commission is

AFFIRMED.

Judges CALABRIA and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 DECEMBER 2014)

BOBER v. FORD FIRM, PLLC No. 14-655	Carteret (12SP392) (13CVS75)	Dismissed
COX v. BURNETTE No. 14-434	Rockingham (12CVD1209)	Affirmed
COX v. SMITH-COX No. 14-652	Mecklenburg (12CVD10198)	Dismissed
DEPT OF TRANSP. v. EVANS No. 14-376	Cumberland (11CVS3044)	Affirmed
IN RE FORECLOSURE OF CLOUSE No. 14-153	Jackson (12SP247)	Affirmed
IN RE D.S. No. 14-694	Catawba (08JA231-232)	Affirmed
IN RE E.V. No. 14-686	Currituck (13JA37)	Affirmed
IN RE J.M. No. 14-733	Yadkin (12JT46-47)	Affirmed
IN RE K.P.-J. No. 14-719	Mecklenburg (10JT111-113) (11JT63) (12JT378) (13JT609)	Affirmed
IN RE M.S.K. No. 14-651	Caldwell (11J12)	Affirmed
KEY v. KEY No. 14-235	Wake (08CVD9430)	Affirmed in part, Reversed and Remanded in part, and Dismissed in part
KEYES v. DELK No. 14-557	Caldwell (13CVS610)	Affirmed
MAZZONE v. BANK OF AM., N.A. No. 14-804	Mecklenburg (13CVS12300)	Affirmed
MORGAN v. MORGAN No. 14-471	Iredell (12CVD2937)	Reversed and Remanded

PRICE v. STATE OF N. C. OFF. OF STATE AUDITOR No. 14-375	Wake (13CVS1932)	Affirmed
SAUNDERS v. PEDERSEN No. 13-1134	Union (13CVD808)	Reversed and vacated.
STATE v. BURRIS No. 14-217	Cleveland (12CRS780)	New Trial
STATE v. COFFMAN No. 14-648	Henderson (12CRS54867) (12CRS54928) (12CRS54933) (13CRS489)	No Error in Part, Reversed in Part, and Remanded in Part.
STATE v. DAVIS No. 14-575	Buncombe (12CRS63574) (13CRS195)	Reversed
STATE v. DIPPEL No. 14-91	Mecklenburg (10CRS230954)	No error in part and remanded.
STATE v. HOWARD No. 14-246	Forsyth (11CRS40240) (11CRS730874)	No Error
STATE v. INGRAM No. 14-406	Guilford (11CRS24163) (11CRS24164) (11CRS68756)	No Error
STATE v. KNIGHT No. 14-462	Guilford (08CRS100627) (08CRS100630)	No Error
STATE v. LEMLEY No. 14-359	Wake (12CRS227541)	No Error
STATE v. LONG No. 14-295	Mecklenburg (11CRS244995)	No Error
STATE v. LYNCH No. 13-1193	Wilson (12CRS51365)	No error. Remanded for correction of judgment.
STATE v. MEEKS No. 14-473	Mecklenburg (12CRS206596) (12CRS30953)	No Error in Part; Reverse and Remand in Part.

STATE v. POMPOSO No. 14-330	Mecklenburg (10CRS260984)	No Prejudicial Error
STATE v. RICE No. 14-427	Wayne (12CRS701194)	No Error
STATE v. SCRUGGS No. 14-437	Rutherford (12CRS52994) (13CRS927)	No Error
STATE v. SKINNER No. 14-404	Onslow (12CRS54423) (12CRS54424-25)	No Prejudicial Error
STATE v. SNIPES No. 14-297	Mecklenburg (12CRS230845)	No Error
STATE v. SURRETT No. 14-202	Forsyth (09CRS54539-41)	Affirmed
STATE v. VALENCIA No. 14-516	Randolph (11CRS50969-70) (11CRS50972)	No Error
UPCHURCH v. UPCHURCH No. 14-227	Alamance (10CVD2185)	Vacated and Remanded

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ABATEMENT

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ADMINISTRATIVE LAW

Exhaustion of remedies—statutory basis—wastewater treatment—local board of health rules—The trial court properly exercised subject matter jurisdiction in a case involving the authority of a county to inspect certain wastewater treatment facilities that had already been certified by the State. Although defendant further contended that plaintiffs had failed to exhaust administrative remedies, there are no prescribed administrative remedies available to plaintiffs. **Phillips v. Orange Cnty. Health Dep't.**, 249.

ANIMALS

Felonious cruelty to animals—jury instruction—implied malice—The trial court did not commit plain error in its instruction to the jury in a felonious cruelty to animals and conspiracy to commit felonious cruelty to animals case. The definition of implied malice used in homicide cases could also apply to the crime of felonious cruelty to animals when malice is an element of that offense. **State v. Gerberding**, 502.

Felonious cruelty to animals—jury instruction—without justification or excuse—The trial court did not err in its instructions to the jury in a felonious cruelty to animals and conspiracy to commit felonious cruelty to animals case by incorrectly defining the term “without justification or excuse” in response to a question posed by the jury. The trial court's use of “self-defense” and “accident” as examples did not confuse the jury or lead the jury to believe that there were no justifiable excuses available to defendant in the instant case. **State v. Gerberding**, 502.

APPEAL AND ERROR

Appealability—guilty plea—motion to suppress—motion to dismiss—Based upon defendant's guilty plea in a driving while impaired case, defendant had a right to appeal only the trial court's denial of his motion to suppress and not the denial of his motion to dismiss the charge. **State v. Shepley**, 174.

Appealability—interlocutory orders and appeals—class certification—An order denying a motion for class certification is immediately appealable because the denial of class certification affects a substantial right and could work an injury if not corrected before the final judgment. **Neil v. Kuester Real Estate Servs., Inc.**, 132.

Appealability—interlocutory orders and appeals—final judgment on some claims—Plaintiff's appeal was from an interlocutory order since his claim for malicious prosecution from his second complaint remained pending before the trial court. However, the trial court order dismissing plaintiff's claims for unfair and deceptive trade practices, medical malpractice, and negligence was immediately appealable

APPEAL AND ERROR—Continued

because those claims were dismissed for filing a legally insufficient claim, which was an adjudication on the merits, and the dismissal was certified by the trial court as final. **Wheless v. Maria Parham Med. Ctr., Inc., 584.**

Appealability—jurisdiction—timeliness of appeal—waiver—The Court of Appeals had jurisdiction in an appeal from a determination that petitioners could not operate a shooting range on their property without a special use permit based on petitioners' timely appeal from the County's December letters. Further, where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not waive this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer's interpretation of the law. **Byrd v. Franklin Cnty., 192.**

Appealability—mootness—fruit of poisonous tree—attack on police officers—Although defendant contended the evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his underlying arrest for resisting, delaying, or obstructing was unlawful, this argument was moot in light of the Court of Appeals' conclusion that defendant's arrest was lawful. Further, the fruit of the poisonous tree doctrine does not operate to exclude evidence of attacks on police officers even where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights. **State v. Friend, 490.**

Appealability—policy questions—legislative question—Although plaintiff offered various policy reasons against the application of a six-year statute of limitations to a claim by a utility company seeking injunctive relief for encroachment on an easement, questions regarding public policy are for legislative determination. **Duke Energy Carolinas, LLC v. Gray, 420.**

Appealability—wrong order—Although defendant father contended in a child support case that the trial court abused its discretion when it required him to pay 100% of the private school tuition for the parties' minor children, this issue was not properly before the Court of Appeals. Defendant did not appeal from the 2007 order, but instead appealed from the 2013 order modifying custody and reapportioning uninsured medical expenses. **Moore v. Moore, 455.**

Interlocutory orders and appeals—denial of motion to dismiss—no substantial right—Although defendant NewBridge Bank appealed from the trial court's order denying its motion to dismiss plaintiff's claims for breach of contract, unjust enrichment, and declaratory judgment on res judicata and collateral estoppel grounds, the appeal was from an interlocutory order and thus dismissed. Defendant failed to demonstrate how a substantial right would be lost absent immediate review. **Whitehurst Inv. Props., LLC v. NewBridge Bank, 92.**

Interlocutory orders and appeals—improper Rule 54(b) certification—no substantial right—writ of certiorari—Plaintiff wife's appeal from an interlocutory order vacating her judgment of absolute divorce under N.C.G.S. § 1A-1, Rule 60(b) was dismissed. The trial court's order could not properly be certified under N.C.G.S. § 1A-1, Rule 54(b). Further, plaintiff failed to meet her burden of showing that the order deprived her of a substantial right. The Court of Appeals declined plaintiff's request to construe her appellate filings as a petition for a writ of certiorari. **Campbell v. Campbell, 1.**

APPEAL AND ERROR—Continued

Preservation of issues—discretionary review denied—The Court of Appeals, in its discretion, did not review an improperly preserved issue concerning the sufficiency of the evidence in a prosecution for obtaining property by false pretenses. Nothing in the record or briefs demonstrated circumstances sufficient to justify suspending or varying the rules in order to prevent manifest injustice to defendant. **State v. Everett, 35.**

Preservation of issues—failure to argue at trial—Although the State contended that the trial court erred by granting a motion to suppress even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful since it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause absent the odor of marijuana, the State waived this argument by failing to raise it at trial. **State v. Gentile, 304.**

Preservation of issues—failure to object—presumptive range sentencing—Defendant's argument that the trial court erred in sentencing him for three of five habitual violation of a domestic violence protective order counts was properly before the Court of Appeals, notwithstanding his failure to object at trial and notwithstanding that he was sentenced within the presumptive range. **State v. Jones, 526.**

Preservation of issues—failure to object at trial on the same grounds—The issue of whether defendant's Fourth Amendment rights were violated by an officer's excessive force was not heard on appeal where defendant did not object at trial on those grounds. **State v. Henry, 311.**

Preservation of issues—failure to raise constitutional issue at trial—Although defendant argued on appeal that the data obtained from a GPS device violated his constitutional rights because the trial court had previously ordered that the device be removed, he did not present this constitutional issue at trial and it was not preserved for appeal. **State v. Gardner, 496.**

Preservation of issues—issue not raised at trial—Defendant's argument concerning the sufficiency of the evidence in a felony peeping prosecution was waived where he did not raise it at trial. **State v. Mann, 535.**

Preservation of issues—mistrial not sought at trial—no plain error review—Defendant did not preserve for appeal the issue of whether the trial court erred by failing to declare a mistrial after an outburst by the victim's father in the presence of the jury. Defendant did not seek a mistrial and plain error review is not available on this issue. **State v. Royster, 64.**

Preservation of issues—motion to dismiss—different grounds argued at trial—discretionary review—An argument concerning the denial of defendant's motion to dismiss a charge of obtaining property by false pretenses for a fatal variance was not properly preserved for appeal where defendant at trial based his motion solely on insufficient evidence. However, the issue was reviewed in the exercise of the Court of Appeals' discretion. **State v. Everett, 35.**

Preservation of issues—right to public trial—purpose of objection apparent from context—Defendant preserved for appellate review his argument that the trial court violated his Sixth Amendment right to a public trial when it closed the courtroom during the prosecuting witness's testimony. It was apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom. **State v. Spence, 367.**

APPEAL AND ERROR—Continued

Preservation of issues—written order rendered—driving while impaired—Defendant preserved for appellate review his argument that the trial court erred by denying his motion to suppress evidence in a driving while impaired case. There was no material conflict in the evidence presented, the trial judge clearly rendered the order by stating the rationale for his rulings at the conclusion of the hearing, and the order was ministerially entered by the filing of a written order. **State v. Chavez, 475.**

Standard of review—prosecutor’s closing argument—objections below sustained—Appellate review of a prosecutor’s closing arguments in a prosecution for driving while impaired was limited to whether the argument was so grossly improper that the trial court should have intervened ex mero motu where defendant lodged contemporaneous objections to only two of the challenged arguments and the trial court sustained both of those objections. **State v. Roberts, 551.**

Supreme Court decision—binding on the Court of Appeals—The holding of *Pottle v. Link*, 187 N.C. App. 746, involving a suit between adjoining homeowners over encroachments on an easement appears to be a straightforward application of both the statute of limitations set out in N.C.G.S. § 1-50(a)(3) and the precedent applying that statute. However, even if *Pottle* was wrongly decided, the Court of Appeals would nonetheless be bound by its holding, unless it had been overturned by a higher court. **Duke Energy Carolinas, LLC v. Gray, 420.**

Writ of certiorari—notice—A defendant’s petition for writ of certiorari to reach the merits of her appeal was granted in the discretion of the Court of Appeals even though defendant did not give notice during plea negotiations of her intent to appeal the denial of her motion to suppress and even though the notice of appeal failed to identify the specific court to which the appeal was taken. **State v. Davis, 22.**

ASSAULT

Physical injury on law enforcement officer—discharging duty of office—The trial court did not err by denying defendant’s motion to dismiss the charge of assault causing physical injury on a law enforcement officer even though defendant contended that there was insufficient evidence that Captain Sumner was discharging a duty of his office at the time defendant assaulted him. By remaining at the jail to ensure the safety of other officers, Captain Sumner was discharging the duties of his office. **State v. Friend, 490.**

ATTORNEY FEES

Declaratory judgment action—county’s authority to inspect wastewater facility—award not an abuse of discretion—The trial court’s award of attorneys’ fees to plaintiffs was affirmed in an action involving the county’s authority to inspect certain wastewater treatment facilities. The trial court had subject matter jurisdiction and its decision to award attorneys’ fees was not so arbitrary that it could not have been the result of a reasoned decision. **Phillips v. Orange Cnty. Health Dep’t, 249.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Jury instruction—recent possession—Although defendant contended that the trial court erred in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

case by instructing the jury on the doctrine of recent possession with respect to the Breese offenses, the trial court actually submitted the instruction in connection with the Johnson offenses. Defendant did not challenge the application of the doctrine to the Johnson offenses. **State v. Larkin, 335.**

Motion to dismiss—sufficiency of evidence—shoeprint evidence—The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to dismiss the charges for the Breese offenses. The State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, was sufficient to support defendant's convictions. **State v. Larkin, 335.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse—striking child—The district court did not err when it adjudicated a child to be an abused juvenile. Allegations in an abuse petition must be viewed on a case-by-case basis considering the totality of the evidence. Here, the court's findings of fact include that respondent mother struck the child five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon. The court also found that the child described the discipline as "a beating." **In re H.H., 431.**

Dependent—living with parent able to provide care—The district court erred by adjudicating H.H. and R.H. dependent juveniles. Where, as here, all of the evidence and findings of fact indicate that the juveniles are living with a parent who is willing and able to provide for their care and supervision, the juveniles simply cannot be adjudicated dependent. **In re H.H., 431.**

Neglect—mother overwhelmed—would have supported finding—The district court did not err when it adjudicated R.H. and H.H. neglected juveniles. By respondent mother's own account, she felt so overwhelmed that she could not care for the juveniles, and, rather than await assistance from law enforcement or the Department of Social Services (DSS), she left the juveniles with a person she believed was a substance abuser without even interacting with him in person to assess his sobriety and current fitness to care for the juveniles. She disciplined R.H. in such an inappropriate manner that he has been adjudicated an abused juvenile and respondent mother herself was charged with misdemeanor child abuse. Yet, she refused virtually all assistance offered by DSS. All of this evidence would have supported a finding of fact that respondent mother placed the juveniles at a substantial risk of physical, mental, or emotional impairment as a consequence of her failure to provide proper care, supervision, or discipline. **In re H.H., 431.**

Order to maintain stable housing and employment—not supported by petitions or findings—The district court erred in a neglected and abused juvenile case by ordering respondent mother to maintain stable housing and employment where nothing in the findings of fact suggested that respondent mother's lack of employment or unstable housing contributed to the juveniles' removal from her custody. Respondent mother's inability to properly care for the juveniles may well be due to employment, financial, and/or housing concerns, as opposed to emotional, psychological, or other issues, but the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from respondent mother's custody or formed the basis for their adjudications. **In re H.H., 431.**

CHILD CUSTODY AND SUPPORT

Support—uninsured medical expenses—trial court without authority to modify without request—The trial court abused its discretion in a child support case by ordering defendant to pay 100% of the uninsured medical expenses for the parties' minor children. Because neither party requested a modification of the existing uninsured medical expense obligation, the trial court was without authority to modify the previously agreed upon provision on its own motion. Therefore, this portion of the trial court's order was reversed and remanded for reinstatement of the previous provisions. **Moore v. Moore, 455.**

CLASS ACTIONS

Certification—same issue of law or fact—When ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether each of the prospective class members has an interest in the same issue of law or fact, and that the issue predominates over issues affecting only individual class members. **Neil v. Kuester Real Estate Servs., Inc., 132.**

Certification denied—differing facts—The trial court did not abuse its discretion by denying plaintiff's motion for a class certification in an action involving the retention of security deposits by a landlord. The record revealed the existence of competent evidence that defendants claimed different amounts and types of alleged damages by each plaintiff and charged each plaintiff differing amounts for the alleged damages. **Neil v. Kuester Real Estate Servs., Inc., 132.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Interrogation—not custodial—The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding that defendant was not subject to custodial interrogation under the totality of the circumstances where a reasonable person in defendant's position would not have believed that she was formally arrested or restrained at the time she gave incriminating statements. There was no indication that the trial court utilized a subjective rather than objective test, the trial court did not operate under a misapprehension of law, and competent evidence supported the trial court's factual findings that defendant was neither threatened nor restrained during a fourth interview. **State v. Davis, 22.**

Motion to suppress—non-custodial interview—child sex offense investigation—voluntariness—improper promises by law enforcement—totality of circumstances—The trial court erred by granting defendant's motion to suppress his incriminating statements during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. Although an agent made improper promises to defendant which appeared to have encouraged defendant to make incriminating statements, under the totality of circumstances defendant's statements were not rendered involuntary by law enforcement as a matter of law. Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer. **State v. Flood, 287.**

Statement not coerced—officer's false promise—The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding that defendant's statements were freely and voluntarily given. An officer's promise that defendant would "walk out" regardless of her statements did not render defendant's confession involuntary. **State v. Davis, 22.**

CONSPIRACY

Motion to dismiss—sufficiency of evidence—no agreement—The trial court erred by denying defendant's motion to dismiss the conspiracy charge. The State did not present sufficient evidence of an agreement. **State v. McClaude, 350.**

CONSTITUTIONAL LAW

Double jeopardy—sentencing—kidnapping—underlying sexual offense—The trial court violated double jeopardy by sentencing defendant for both first-degree kidnapping and two of the underlying sexual assault offenses where the victim was not seriously injured or left in an unsafe place. One of the two sex offense charges must serve as the basis for first-degree kidnapping and the trial court's sentencing order was reversed and remanded. **State v. Barksdale, 464.**

Driving while impaired—alcohol level exceeding minimum needed for conviction—enhanced punishment—The defendant in a driving while impaired prosecution was not twice placed in jeopardy for the same offense by the State using the same breath test to establish the factual basis for defendant's plea and to support the aggravating factor used to enhance defendant's punishment. Instead of being punished twice, defendant was subjected to a more severe punishment for an underlying substantive offense based upon a blood alcohol test that was higher than needed to support a conviction. **State v. Roberts, 551.**

Effective assistance of counsel—failure to move to suppress evidence—could not be resolved on appellate record—dismissed—Defendant's argument that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a motion to suppress the evidence seized was dismissed without prejudice to its being asserted in a motion for appropriate relief. The IAC claim could not be resolved based on the record before the Court. **State v. Carter, 274.**

Effective assistance of counsel—failure to object to jury instruction—no prejudice—Defendant did not receive ineffective assistance of counsel in a prosecution for possession of cocaine with intent to sell or deliver by his attorney's failure to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Even assuming arguendo that defendant's attorney was deficient in failing to object to the trial court's jury instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error. **State v. Turner, 388.**

Effective assistance of counsel—reason for not taking plea—revealed to judge—Defendant was not denied effective assistance of counsel in a prosecution for first-degree burglary, first-degree kidnapping, sexual offenses, and other crimes when his attorney revealed defendant's desire to go to trial because he might get lucky. This occurred before the jury was empaneled, could not have affected the finding of guilt, and did not affect the judge's sentencing decision, given the incredibly heinous crimes that defendant committed. **State v. Barksdale, 464.**

Effective assistance of counsel—reason for not taking plea revealed—possible conflict of interest—not prejudicial—Defendant's ineffective assistance of counsel claim was rejected in a prosecution for first-degree burglary, first-degree kidnapping, sexual offenses, and other crimes where defendant argued that his counsel had a conflict of interest in revealing defendant's thoughts about standing trial rather than taking a plea. Even if there was a conflict of interest, it was not per se prejudicial. **State v. Barksdale, 464.**

CONSTITUTIONAL LAW—Continued

Right to confront witnesses—no hearsay admitted—no constitutional issues raised by nonhearsay—Defendant's argument in a possession of cocaine case that his constitutional right to confront an adverse witness was violated through testimony that contained inadmissible hearsay statements was overruled. No hearsay was admitted; defendant failed to cite any authority for his constitutional argument and the argument was deemed abandoned; and even assuming defendant's confrontation clause argument was properly before the court, the admission of nonhearsay raises no Confrontation Clause concerns. **State v. Carter, 274.**

Right to confrontation—GPS tracking reports—The trial court did not violate defendant's right to confrontation by admitting GPS tracking reports. The GPS tracking evidence was properly admitted as a business record since it constituted data compilation. **State v. Gardner, 496.**

Right to confrontation—out-of-state witness—released from summons—The trial court did not err or violate defendant's confrontation rights by releasing a witness from his summons after he testified as a witness for the State. Although defendant argued that the trial court forced the defense to elect whether to call him as a witness with only a few hours' notice, the witness was available at trial and defendant had the opportunity to conduct a cross-examination. Moreover, the subpoena served upon the witness during trial was invalid because the witness was in North Carolina pursuant to the State's summons. **State v. Royster, 64.**

Right to counsel—competency for self-representation—malingering—judge's determination supported by evidence—The trial court did not err by concluding that defendant was competent to represent himself at trial. Although defendant included in his brief examples of disruptive and aberrant behavior, he did not argue specifically how this was sufficient to demonstrate incompetence when mental health professionals had determined him to be competent. Defendant did not argue on appeal that the mental health professionals were incorrect or that the trial judge erred in finding that defendant was malingering, and did not contend that he was not competent to stand trial. Even so, the trial court's determination that defendant was competent was supported by the evidence and was conclusive on appeal. **State v. Joiner, 513.**

Right to counsel—pro se appearance—colloquy with defendant—The trial court did not err by allowing defendant to proceed pro se where the colloquy between the trial court and defendant was not as cogent as in most cases. That was because defendant repeatedly interrupted the court or refused to answer straightforward questions, apparently from his belief that he was not bound by the laws of North Carolina and the United States and that the trial court could not exercise jurisdiction over him. When the record is reviewed as a whole, the trial court's discussion with defendant was sufficient to satisfy the statutory criteria. However, in most cases, the best practice is for trial courts to use the 14 questions approved in *State v. Moore*, 362 N.C. 319, and set out in the Superior Court Judges' Benchbook. **State v. Jastrow, 325.**

Right to counsel—pro se representation—disruptive defendant—invited error—The trial court did not erroneously deny defendant the right to continue representing himself at trial where the trial court ruled that defendant's actions were for the purpose of disrupting the trial and that any prejudice was invited error. There was plenary evidence to support these rulings. **State v. Joiner, 513.**

CONSTITUTIONAL LAW—Continued

Right to public trial—Waller factors—The trial court did not violate defendant's Sixth Amendment constitutional right to a public trial when it closed the courtroom during the prosecuting witness's testimony. The trial court's findings of fact were supported by the evidence, and the findings were adequate to support a courtroom closure pursuant to the four factor test set forth in *Waller v. Georgia*, 467 U.S. 39. **State v. Spence, 367.**

CONTRACTS

Breach of contract—breach of fiduciary trust—claims sufficient to withstand dismissal—no affirmative defenses established—material issue of fact—The trial court erred in a breach of contract, negligence, breach of fiduciary trust, and professional malpractice case by granting defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). Plaintiff stated its claims sufficiently to withstand defendant's motion to dismiss, defendant did not establish any affirmative defenses which would entitle it to dismissal, and defendant failed to clearly establish that no material issue of fact remained to be resolved and that it was entitled to judgment as a matter of law. **Commscope Credit Union v. Butler & Burke, LLP, 101.**

CRIMINAL LAW

Continuance denied—no prejudice—There was no prejudicial error in a first-degree rape prosecution from the trial court's refusal to grant defendant a continuance when defense counsel learned of a potential defense witness on the eve of trial. Defense counsel conceded that defendant had participated in the psychological evaluations and had knowledge of them, and that defense counsel had two months to confer with defendant to prepare the case before trial. Even if the denial of the motion to continue was erroneous, defendant failed to demonstrate prejudice because he was able to use the psychological reports to impeach the victim's testimony. **State v. Blow, 158.**

Defendant proceeding pro se—inquiry by judge—Although defendant argued that the trial court failed to make the proper inquiry when he indicated his desire to proceed pro se, defendant forfeited his constitutional right to counsel by his own disruptive conduct, and the trial court did not commit prejudicial error by failing to conduct a N.C.G.S. § 15A-1242 inquiry under these circumstances. **State v. Joiner, 513.**

Initiation of prosecution—impaired driving—presentment rather than citation—A defendant in a prosecution for driving while impaired was not deprived of the equal protection of the laws where the prosecution was initiated with a presentment instead of a citation, unlike other attorneys charged. The present process required the use of a special prosecutor and non-resident judge on one rather than two occasions, thus furthering judicial economy. **State v. Roberts, 551.**

Instructions—conflict between defendant's argument and previous stipulation—The trial court did not err in a driving while impaired prosecution in its instruction on the time stamp of the video of the recording of the testing room. The argument advanced by defendant in his closing argument conflicted with his earlier assertions and there was no error in the trial court's decision to correct the record using information to which defendant had, in effect, previously stipulated. **State v. Roberts, 551.**

CRIMINAL LAW—Continued

Joinder—motion to sever cases—The trial court did not abuse its discretion in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to sever the cases into three trials. Because defendant did not challenge the fairness and impartiality of the jury, joinder of the cases did not prevent defendant from receiving a fair trial. **State v. Larkin, 335.**

Motion for a mistrial—defendant's disruptive conduct—The trial court did not abuse its discretion in refusing defendant's motions for mistrial where the trial court ruled that defendant's actions were for the purpose of disrupting the trial, and that any prejudice was invited error. There was plenary evidence to support those rulings. **State v. Joiner, 513.**

Postconviction motion for DNA testing—properly denied—The trial court did not err by denying defendant's postconviction motion for DNA testing pursuant to N.C.G.S. § 15A-269. While the results from DNA testing might have been considered relevant, had they been offered at trial, they are not material in this postconviction setting. Furthermore, the court was not required to conduct an evidentiary hearing. **State v. Floyd, 300.**

Prosecutor's closing argument—not grossly improper—The prosecutor's closing argument in a prosecution for driving while impaired was not so grossly improper as to have necessitated ex mero motu intervention by the trial court where the comments were not relevant, were upheld elsewhere, or did not render the hearing fundamentally unfair. **State v. Roberts, 551.**

Prosecutor's closing argument—supported by evidence—proper purpose—The trial court did not err in a first-degree murder case by improperly overruling defendant's objections to three portions of the State's closing argument. The full context of the prosecutor's closing argument demonstrated that the challenged remarks were supported by the evidence and had a proper purpose. **State v. Salentine, 76.**

Third-party flight—instruction denied—not prejudicial error—There was no prejudicial error where defendant argued that the trial court erred in refusing his request to instruct the jury concerning third-party flight. The witness testified that he left the scene of the crime after the shooting because he was in possession of crack, the defense requested a special instruction concerning flight, and the trial court denied the request for the instruction but allowed the defense to argue the point, and the record was replete with evidence from which a jury could find defendant guilty of first-degree murder. **State v. Royster, 64.**

DECLARATORY JUDGMENTS

Appropriate subject—justiciable issue—authority of county to inspect and charge fees—A case involving the authority of a county to inspect and to charge inspection fees for certain wastewater systems when those systems have already been permitted and inspected by the State was an appropriate subject for a declaratory judgment. A justiciable controversy existed even though the inspections plaintiffs complained about had already been completed because plaintiffs argued that defendant had no legal right to conduct those inspections. **Phillips v. Orange Cnty. Health Dep't, 249.**

County health department—authority to inspect—The trial court did not err in a declaratory action concerning a county health department's authority to inspect

DECLARATORY JUDGMENTS—Continued

certain wastewater systems by failing to grant defendant county's motion to dismiss or to grant its motion for judgment on the pleadings. Plaintiffs' complaint set forth a justiciable claim and requested appropriate relief, and the trial court had subject matter jurisdiction over plaintiffs' complaint. **Phillips v. Orange Cnty. Health Dep't**, 249.

DEEDS

Deeds of trust—foreclosure—notice of hearing—The trial court did not abuse its discretion in denying appellant's motion to set aside a foreclosure order. Rule 4(j1) of the Rules of Civil Procedure is disjunctive, not conjunctive, and the record demonstrates that the trustee diligently attempted service before posting notice of the foreclosure hearing on the subject property. **In re Powell**, 441.

DOMESTIC VIOLENCE

Habitual violation—communications—interference with a witness—The trial court erred by sentencing defendant for three of five habitual violation of a domestic violence protective order counts and interfering with a witness. Defendant should not have been sentenced on the three counts which were based on his three letters to the victim since these communications also formed the basis for his conviction for interfering with a witness. **State v. Jones**, 526.

DRUGS

Constructive possession—struggle outside patrol car—The State's evidence was sufficient to prove that defendant actually or constructively possessed the cocaine an officer found after their struggle on the ground near defendant's rental car in a prosecution for possession of cocaine and resisting a public officer. Considered collectively, the patrol car video of the traffic stop, the officer's check of the area immediately before his initial contact with defendant, the absence of another person, the location of the cocaine, and defendant's repeated refusal to open his hand provided sufficient evidence to survive defendant's motion to dismiss. **State v. Henry**, 311.

Possession of cocaine with the intent to sell and/or deliver—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the possession of cocaine with the intent to sell and/or deliver charge. Defendant's own statements coupled with his conduct indicated that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support. **State v. McClaude**, 350.

Possession with intent to sell or deliver—jury instruction—possession with intent to manufacture, sell, or deliver—harmless error—The trial court did not commit plain error when it instructed the jury on the charge of possession of cocaine with the intent to manufacture, sell or deliver where defendant had been indicted for possession of cocaine with intent to sell or deliver. The use of the word "manufacture" in its jury instructions was harmless error. **State v. Turner**, 388.

Possession with intent to sell or deliver—jury instruction—reasonable doubt—fair doubt—The trial court did not commit plain error by instructing the jury that a reasonable doubt was a "fair doubt." Although the trial court did

DRUGS—Continued

deviate from the pattern instruction by using the term “fair doubt” in its preliminary jury instruction to prospective jurors, the charge as a whole was correct. **State v. Turner, 388.**

EMOTIONAL DISTRESS

Intentional infliction—ratification of conduct—The trial court did not err by granting summary judgment for defendant on plaintiff’s claim for intentional infliction of emotional distress. Plaintiff failed to present any evidence that defendant ratified the tortious actions of its employee, who allegedly assaulted plaintiff. **Fox v. Sara Lee Corp., 7.**

EVIDENCE

Expert testimony—sexual assault—physical evidence consistent with—The trial court did not commit plain error in a sexual offense case by allowing two medical witnesses to testify that the victim’s history was consistent with sexual assault. The expert witnesses testified that the physical evidence they observed was consistent with the victim’s allegations of abuse; the witnesses did not state that the victim’s allegations were credible. **State v. Walton, 89.**

Findings of fact—sufficiency of evidence—The trial court did not err in a child sex offense case by making its findings of fact numbers 24–31 since they were accurate and supported by competent evidence. **State v. Flood, 287.**

Findings of fact—sufficiency of evidence—failure to mention break in time—The trial court did not err in a child sex offense case by making finding of fact number 34. Failure to mention a brief break in finding of fact 34 did not so misconstrue the timing of events as to render it unsupported by competent evidence. **State v. Flood, 287.**

Findings of fact—sufficiency of evidence—use of word “recommend”—The trial court did not err in a child sex offense case by making finding of fact number 32. The trial court’s finding that an agent implicitly acknowledged that her use of the word “recommend” could have been misconstrued by defendant was supported by competent evidence. **State v. Flood, 287.**

First-degree rape—improperly excluded under Rule 412—not prejudicial—The trial court did not commit prejudicial error in an assault with a deadly weapon, first-degree burglary, and first-degree rape case. Although the trial court improperly excluded relevant evidence under N.C.G.S. § Rule 412(b)(2) by preventing defendant from presenting evidence that the victim had had a consensual sexual encounter with defendant’s roommate within 72 hours of the rape, defendant failed to show prejudice. **State v. Davis, 481.**

First-degree rape—irrelevant—unduly prejudicial—The trial court did not err in an assault with a deadly weapon, first-degree burglary, and first-degree rape case by preventing defendant from presenting evidence regarding the conditions of the police department’s evidence room refrigerators. The evidence was irrelevant under Rule 401 of the North Carolina Rules of Evidence and its probative value was substantially outweighed by the risk of unfair prejudice pursuant to Rule 403. **State v. Davis, 481.**

EVIDENCE—Continued

Phone calls by witness—not hearsay—not cumulative—The trial court did not abuse its discretion by admitting evidence of phone calls made by a witness for the State to his friends. The recordings were admissible for the non-hearsay purpose of corroborating the witness's testimony and were not a needless presentation of cumulative evidence. The statements in the recordings corroborated the witness's testimony, excluded him as a suspect, and established defendant as the perpetrator of the crime. **State v. Royster, 64.**

Photographic identification cards—failure to redact information—not prejudicial—Even assuming that the trial court erred in a drug possession case by allowing into evidence defendant's ID card photo and a DOC ID card without redacting the words "FELON" and "INMATE," any error was harmless, given defendant's testimony that he had been previously convicted of drug trafficking. There was no reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the challenged evidence. **State v. Carter, 274.**

Prior statements—corroboration—opened door—The trial court did not abuse its discretion and commit prejudicial error by admitting prior statements by the victim as corroborative evidence where defendant himself opened the door to admission of these statements. **State v. Mann, 535.**

Questions directing attention—not leading—The trial court did not abuse its discretion and committed no prejudicial error by allowing the prosecutor to allegedly ask leading questions of the victim in a prosecution for felony peeping. The questions were part of the prosecutor's more general questioning of the victim and the specific questions challenged by defendant merely directed the witness's attention to the subject at hand without suggesting an answer. **State v. Mann, 535.**

Relevancy—ammunition in defendant's house—The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning 9 millimeter ammunition found during a search of defendant's house. The evidence concerning the ammunition was relevant because it tended to link defendant to the scene of the crime and its probative value was not outweighed by its prejudicial value. **State v. Royster, 64.**

Reliability—insufficient indicia of reliability—field tests—presence of cocaine—The trial court abused its discretion by allowing into evidence testimony of an investigator regarding field tests (NIKs) he conducted to detect the presence of cocaine. The State failed to demonstrate the reliability of the NIKs pursuant to any of the indices of reliability under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004) or any alternative indicia of reliability. However, the admission of the evidence amounted to harmless error where there was overwhelming evidence of defendant's guilt. **State v. Carter, 274.**

Testimony elicited by defendant—opened door—The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning a 9 millimeter gun found during a search of defendant's house. He cannot challenge the admission of testimony that he first elicited. **State v. Royster, 64.**

FRAUD

Breach of fiduciary duty—trusts—summary judgment proper—The trial court did not err in a case involving trusts by concluding that no genuine issues of material

FRAUD—Continued

fact existed and defendants were entitled to judgment as a matter of law on plaintiff's substantive claims for breach of fiduciary duty and constructive fraud as they related to the REW trust. **Ward v. Fogel, 570.**

Fraudulent inducement—breach of fiduciary duty—summary judgment improper—The trial court erred in a case involving trusts by concluding that no genuine issues of material fact existed and defendants were entitled to judgment as a matter of law on plaintiff's claims for fraudulent inducement, constructive fraud, and breach of fiduciary duty as they related to the WF trust. Plaintiff forecast sufficient evidence regarding the creation of the WF trust to survive summary judgment. **Ward v. Fogel, 570.**

GAMBLING

Operating electronic sweepstakes—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendants' motion to dismiss charges for operating an electronic sweepstakes in violation of N.C.G.S. § 14-306.4. The jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize. **State v. Spruill, 383.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—burden of proof—summary judgment—The Administrative Law Judge (ALJ) did not err by granting summary judgment in favor of respondent FirstHealth. N.C.G.S. § 131E-188(a) does not prevent an ALJ from entering summary judgment in a contested case challenging a certificate of need (CON) decision. Further, Cape Fear failed to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing. **Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs., 113.**

Certificate of need—no substantial prejudice of rights—Summary judgment was properly entered for respondents in a contested case hearing challenging a certificate of need (CON) decision because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights. **Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs., 113.**

IMMUNITY

Governmental—declaratory judgment action—The trial court did not lack subject matter jurisdiction in an action concerning a county's authority to inspect certain wastewater treatment systems after they had been inspected by the State based on plaintiffs' failure to allege waiver of governmental immunity. This was a declaratory judgment rather than a negligence action. **Phillips v. Orange Cnty. Health Dep't, 249.**

INDICTMENT AND INFORMATION

Felony secret peeping—consent—adequately alleged—An indictment for felony secret peeping sufficiently charged the offense, specifically the lack of consent. Language in the indictment that defendant unlawfully, willfully and feloniously did

INDICTMENT AND INFORMATION—Continued

secretly and surreptitiously attempt to capture photographic images of the victim indicated that defendant intended to capture images of the victim without her consent. **State v. Mann, 535.**

No fatal variance—obtaining property by false pretenses—forged deed—There was no fatal variance between the indictment and the evidence in a prosecution for obtaining property by false pretense where defendant contended that the indictment alleged that he had filed a forged and false deed. However, the indictment did not allege that the false pretense was forging the deed, nor was forgery an essential element of obtaining property by false pretenses. **State v. Everett, 35.**

No variance with evidence—plural and singular usage—The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a public officer due to fatal variances between the indictment and the evidence. Defendant's motion was based on the indictment's statement that defendant refused to drop what was in his "hands," while the evidence was that he refused to drop what was in his right "hand." Not every variance that involves an essential element of the offense charged is necessarily material. **State v. Henry, 311.**

No variance with evidence—resisting an officer—when a traffic stop is complete—Although defendant did not properly preserve the issue for appellate review, there was not a fatal variance between the indictment and the evidence on a charge of resisting a public officer where defendant contended that a traffic stop was over before any resistance occurred. The officer had not yet returned defendant's license and registration at the time he ordered defendant out of his vehicle to conduct a frisk for weapons. **State v. Henry, 311.**

INTEREST

Quantum meruit award—N.C.G.S. § 24-5(b)—The trial court did not err by granting intervenor interest on a quantum meruit award pursuant to N.C.G.S. § 24-5(b), even though intervenor only requested interest pursuant to N.C.G.S. § 24-5(a). The trial court had the authority to address and correct this oversight regardless of the arguments intervenor made. **Robertson v. Steris Corp., 263.**

JURISDICTION

Juvenile appeal of adjudication before disposition hearing—statutory interlocutory appeal—The trial court's disposition order in a juvenile case was vacated and remanded for a new disposition. The General Assembly permits a juvenile to appeal his adjudication before the disposition hearing if that hearing does not take place within 60 days after adjudication. Because an appeal divested the trial court of jurisdiction over the matter when the juvenile took a statutory interlocutory appeal of the adjudication under N.C.G.S. § 7B-2602, the trial court was divested of jurisdiction to modify the order or proceed to disposition during the pendency of the appeal. **In re J.F., 218.**

Standing—constitutionality of alcohol breath test—mandatory presumption—language not included in instruction—Defendant lacked the standing necessary to challenge the constitutionality of statutory language concerning alcohol breath tests which allegedly created a mandatory presumption. The trial court did not include that language in its instructions to the jury. **State v. Roberts, 551.**

JURISDICTION—Continued

Subject matter—final order appealed—motion and resolution prior to appeal docketed—The trial court did not lack subject matter jurisdiction to hear intervenor's motion for interest because plaintiffs' appeal of the trial court's final order did not divest the trial court of authority to hear that motion. Intervenor's Rule 60(a) motion and the resolution of that motion occurred before plaintiffs' appeal was docketed. **Robertson v. Steris Corp.**, 263.

Subject matter—necessary parties—The trial court did not lack subject matter jurisdiction based on the failure to join necessary parties because defendant did not raise the issue below, and because failure to join a necessary party does not negate a court's subject matter jurisdiction. **Phillips v. Orange Cnty. Health Dep't**, 249.

Subject matter—Rule 60(a) motion—interest on award—correction of clerical error—Intervenor's post-trial claim for interest on an award in quantum meruit was a correction of a clerical mistake that fell within the ambit of Rule 60(a). Failure to include interest mandated by N.C.G.S. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a). **Robertson v. Steris Corp.**, 263.

Subject matter—standing—termination of parental rights—Petitioners' failure to include a copy of the petition to adopt in the record in a termination of parental rights case deprived the trial court of subject matter jurisdiction. Because the district court lacked jurisdiction, the order terminating respondent mother's parental rights was vacated without prejudice to petitioners' right to file a new petition alleging facts that would show they had standing to bring the action. **In re N.G.H.**, 236.

Subject matter—trusts—The trial court erred in a case involving trusts by granting defendants' motion for summary judgment on the ground that Wake County Superior Court lacked subject matter jurisdiction. The Superior Court had jurisdiction to hear the matter. **Ward v. Fogel**, 570.

Subject matter—written order—filed after judge's resignation—The Clerk of Court was not divested of jurisdiction to properly enter the order following the resignation of the judge who signed an order. Where a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry. **Robertson v. Steris Corp.**, 263.

JURY

Misconduct—denial of mistrial not arbitrary—inquiry sufficient—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial based on juror misconduct and refusing defendant's request to make further inquiry into the misconduct. The trial court's decision to credit the testimony of a live witness over vague, partially substantiated hearsay was not so arbitrary that it could not have been the result of a reasoned decision. Furthermore, it was well within the trial court's discretion to end its inquiry and proceed with sentencing based upon the juror's responses and the court's own observations. **State v. Salentine**, 76.

JUVENILES

Sufficiency of petitions—first-degree sexual offense—crime against nature—identification of particular sex act not required—The trial court did not err by denying a juvenile's motion to dismiss on the ground that the petitions for first-degree sexual offense and crime against nature were defective. The State was not required to identify the particular sex acts involved or describe the manner in which they were performed. Further, nothing in the crime against nature statute required that the accused be the one performing the sexual act. **In re J.F., 218.**

KIDNAPPING

Insufficient evidence—restraint—separate from sexual assault—The trial court erred by denying defendant's motions to dismiss the charge of kidnapping. The State offered insufficient evidence to establish that defendant restrained the victim in a way that was separate and apart from the restraint inherent in the rapes and the sexual assault for which he was convicted. **State v. Parker, 546.**

LIBEL AND SLANDER

Libel per se—libel per quod—failure to state a claim—dismissal proper—Plaintiff's complaint was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) because it failed to state a claim for defamation based on libel per se or libel per quod. Plaintiff's claims for negligent supervision were properly dismissed as derivative of his substantive claims. **Skinner v. Reynolds, 150.**

MEDICAL MALPRACTICE

Peer review and privileges—complaint to medical board—provider-patient relationship not present—The trial court did not err by dismissing plaintiff's claim for medical malpractice and negligence against a medical center and others in an action arising from a medical peer review, actions involving plaintiff's medical privileges, and a complaint to the N.C. Medical Board. It is well settled that the provider-patient relationship is required for medical malpractice; plaintiff was a fellow medical professional rather than a patient of defendants. **Wheless v. Maria Parham Med. Ctr., Inc, 584.**

MOTOR VEHICLES

Driving while impaired—alcohol breath test—observation period—The trial court did not err by refusing to suppress the results of defendant's alcohol breath test where defendant contended that the trooper did not sufficiently observe defendant during the 15-minute observation period. None of the events listed in 10A N.C.A.C. 41B.0101(b) as affecting the accuracy of the test occurred. Nothing in the regulatory language requires the analyst to stare at the person to be tested with an unwavering gaze for the observation period. **State v. Roberts, 551.**

Driving while impaired—blood draw—pursuant to search warrant—no right to have a witness present—The trial court properly denied defendant's motion to suppress evidence from a blood draw and to dismiss an impaired driving charge. Defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, and defendant did not have a right under N.C.G.S. § 20-16.2 to have a witness present. Furthermore, defendant was not prejudiced by the denial of the opportunity to have a witness observe his condition. **State v. Chavez, 475.**

MOTOR VEHICLES—Continued

Driving while impaired—blood test—no right to witness—refusal of breath test—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the results of a blood test. Because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, he did not have a right under N.C.G.S. § 20-16.2 to have a witness present. **State v. Shepley, 174.**

Driving while impaired—instructions—admissibility of test—legal determination—The trial court in a driving while impaired prosecution did not express an opinion in its instructions on the admissibility of the chemical test, which is a legal determination for the trial court rather than an issue of fact for the jury to decide. **State v. Roberts, 551.**

Driving while impaired—motion to dismiss—sufficiency of evidence—warrantless blood draw—suppression of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. While defendant's motion asserted that the warrantless blood draw was a flagrant violation of his constitutional rights, his motion in no way detailed how there was irreparable damage to the preparation of his case. The only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as the proper remedy if a constitutional violation was found. **State v. McCrary, 48.**

Driving while impaired—public vehicular area—vacant lot—The trial court erred in a driving while impaired prosecution where there was insufficient evidence that a cut-through on a vacant lot was a public vehicular area. There was no evidence concerning ownership of the vacant lot, nor was there evidence that the vacant lot had been designated as a public vehicular area by the owner; the fact that people walked and bicycled across the vacant lot as a shortcut did not turn the lot into a public vehicular area. Even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C.G.S. § 20-4.01(32)(a). **State v. Ricks, 359.**

NEGLIGENCE

Motion for directed verdict—causation of injuries—The trial court erred in a negligence case by denying defendants' motion for a directed verdict, and the judgment was vacated. Plaintiff failed to present sufficient evidence to establish that defendants' negligence caused plaintiff's injuries. **Wilmoth v. Hemric, 595.**

Social host liability—contributory negligence—driving while voluntarily intoxicated—The trial court did not err by granting defendants' motion to dismiss plaintiff's action for negligence under a common law theory of social host liability. Plaintiff's claim was barred by decedent's contributory negligence of driving while voluntarily intoxicated. **Mohr v. Matthews, 448.**

Social host liability—special relationship—parent and child—decedent no longer a minor—The trial court did not err by granting defendants' motion to dismiss plaintiff's action for negligence under a common law theory of social host liability even though plaintiff alleged a special relationship of parent and child. Because decedent was over 18 years old at the time of the accident, he was not a minor and, therefore, was not under the legal control of his parents. **Mohr v. Matthews, 448.**

PARTIES

Real party in interest—not raised at trial—Defendant consented to being treated as the real party in interest by declining to raise the issue before the trial court. **Phillips v. Orange Cnty. Health Dep't, 249.**

POLICE OFFICERS

Resisting, delaying, or obstructing a public officer—officer did not produce warrant—officer not engaged in lawful conduct—The trial court erred when it denied defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Because the officer who arrested defendant for resisting a public officer did not read or produce a copy of the warrant to defendant prior to seeking to search defendant's person, in violation of N.C.G.S. § 15A-252, the arresting officer was not engaged in lawful conduct. **State v. Carter, 274.**

Resisting, delaying, or obstructing public officer—seatbelt citation—failure to provide identity—The trial court did not err by denying defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Defendant's failure to provide an officer with the information necessary to issue him a seatbelt citation did constitute resistance, delay, or obstruction. Further, defendant did not make any showing that he was justified in refusing to provide his identity. **State v. Friend, 490.**

RAPE

First-degree rape—jury instructions—invited error—Defendant's argument that the trial court committed plain error by instructing the jury in a manner that permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act was dismissed. Any error stemming from the trial court's instructions was invited by defendant. **State v. Spence, 367.**

First-degree rape—prosecuting witness—referred to as victim—The trial court did not commit plain error in a first-degree rape case by referring to the prosecuting witness as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to her as "the victim" in its final jury instructions. The use of the words "the victim" did not have a probable impact on the jury's finding of guilt in this case. **State v. Spence, 367.**

Number of counts—evidence ambiguous—The ambiguous characterization of the number of times defendant penetrated a rape victim as "a couple" was insufficient to charge defendant with three counts of first degree rape. Defendant's admission to three instances of "sex" with the victim, did not equate to an admission of vaginal intercourse; he openly admitted to performing oral sex on the victim, among other sexual acts, but vehemently denied penetrating her vagina with his penis. **State v. Blow, 158.**

ROBBERY

Attempted—two counts—two people in residence—separate rooms—There was sufficient evidence to support defendant's two separate attempted robbery convictions where defendant argued that the evidence showed that he robbed a single residence in the presence of two people, but, when the robbery occurred, the two victims were in different rooms. **State v. Jastrow, 325.**

ROBBERY—Continued

Attempted—two counts—unexpected person in house—The trial court did not err by denying defendant's motion to dismiss a conviction for attempted robbery with a dangerous weapon where defendant argued that he only participated in the plan to rob one of the two residents of the house. If two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime, and is also guilty of any other crime committed by the other in pursuance of the common purpose. Viewed in the light most favorable to the State, the facts were sufficient to show that the robbery of the unexpected person was pursuant to the group's common purpose. **State v. Jastrow, 325.**

SATELLITE-BASED MONITORING

Aggravated offense—date of offense—prior to enactment of statute—The trial court erred in a first-degree rape case by submitting defendant to lifetime sex offender registration and satellite-based monitoring. Because the date of the offense in this case was 22 September 2001, it could not be considered an "aggravated offense" for the purposes of N.C.G.S. § 14-208.6(1a). **State v. Davis, 481.**

SEARCH AND SEIZURE

Frisk—reasonable suspicion—Although a defendant in a prosecution for cocaine possession and resisting a public officer did not preserve for appeal the argument that the officer lacked reasonable suspicion for a frisk, the officer had reasonable suspicion to conduct a frisk for weapons to ensure his safety. Moreover, his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights. **State v. Henry, 311.**

Motion to dismiss—traffic stop—probable cause—operating moped without proper helmet—reasonable suspicion—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the evidence based on an alleged illegal traffic stop. The deputy observed defendant operating his moped without wearing a proper helmet, and a law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation. Thus, the deputy's stop of defendant was supported by reasonable suspicion. **State v. Shepley, 174.**

Motion to suppress—illegal drugs—drug paraphernalia—anonymous tip—unlawful search of curtilage—The trial court did not err by granting defendant's motion to suppress illegal drugs and drug paraphernalia seized as the result of an unlawful search. When the detectives smelled the odor of marijuana, their purported general inquiry about the information received from an anonymous tip was a trespassory invasion of defendant's curtilage. **State v. Gentile, 304.**

Motion to suppress—vehicle search—inevitable discovery—The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to suppress evidence that resulted from a search of his vehicle. The State proved inevitable discovery based on the information contained in the search warrant and the detective's testimony that he would have searched for defendant's vehicle, no matter the location. **State v. Larkin, 335.**

SEARCH AND SEIZURE—Continued

Motion to suppress evidence—warrantless blood test—exigent circumstances—additional findings of fact required—The trial court erred in a driving while impaired and communicating threats case by denying defendant's motion to suppress the evidence that resulted from a warrantless blood test. The case was remanded to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed. **State v. McCrary, 48.**

SENTENCING

Calculation of prior record points—clerical error—no change in sentence—jurisdiction—Defendant's prior record level points were incorrectly calculated where two of the misdemeanors listed on the worksheet had the same date of conviction and only one should have been counted. A new sentencing hearing was not necessary because the sentence imposed would not be affected by a recalculation of defendant's prior record points and the matter was treated as a clerical error and remanded to the trial court for correction. Whether the trial court would have had jurisdiction to amend defendant's prior record level points was inapposite because the trial court did not attempt to correct its own error while the case was on appeal. **State v. Everette, 35.**

Defendant's refusal of plea bargain—judge's statement—The trial court did not impermissibly punish the defendant for his decision to reject a plea bargain and go to trial in a prosecution for burglary, kidnapping, sexual offenses, and other crimes. In context, the trial court's statement concerning the effect of defendant's crimes on people was a reflection on how terrible the crimes were, not on defendant's choice to go to trial. **State v. Barksdale, 464.**

Habitual misdemeanor assault—assault on female—habitual felon—The trial court erred by sentencing defendant for both habitual misdemeanor assault and assault on a female. The assault on a female conviction was vacated and remanded for resentencing of defendant as a habitual felon on the habitual misdemeanor assault conviction. **State v. Jones, 526.**

SEWAGE

Spray irrigation wastewater systems—authority of local health department—The trial court's conclusion that a county health department did not have the authority to inspect plaintiffs' spray irrigation wastewater systems was supported by the facts and by appropriate law. The statutes expressly created a different system of regulation for wastewater systems that discharge effluent onto the land surface. **Phillips v. Orange Cnty. Health Dep't, 249.**

Wastewater irrigation system—exclusive authority of State—summary judgment—The trial court did not err in granting plaintiffs' motion for summary judgment in an action involving the authority of a county health department to inspect certain wastewater systems. The parties indicated at the hearing that there were no genuine issues as to the material fact, and, by statute, only the State has the authority to regulate plaintiffs' spray irrigation systems. **Phillips v. Orange Cnty. Health Dep't, 249.**

SEWAGE—Continued

Wastewater treatment systems—local inspections—preemption by State—A health department facing a challenge to its authority to inspect certain waste water treatment systems was not entitled to judgment on the pleadings on its contention that it adopted more stringent rules for the regulation of plaintiffs' spray irrigation systems than required by the State. It was held elsewhere in the opinion that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs' wastewater systems. **Phillips v. Orange Cnty. Health Dep't**, 249.

SEXUAL OFFENSES

Attempted second-degree sexual offense—request for fellatio—violent, threatening context—force and against victim's will—The trial court erred by denying defendant's motion to dismiss an attempted second-degree sexual offense charge arising from defendant's request for fellatio. Given the violent, threatening context, defendant's request amounted to an attempt to engage the victim in a sexual act by force and against her will. **State v. Miles**, 170.

First-degree sex offense charges—insufficient evidence—The trial court erred in a first-degree rape and first-degree sex offense case by denying defendant's motion to dismiss certain first-degree sex offense charges. There was insufficient evidence of each element of the challenged charges. **State v. Spence**, 367.

First-degree sexual offense—crimes against nature—penetration—The trial court erred in a first-degree sexual offense and crimes against nature case by failing to require the State to prove that penetration occurred. Although penetration is not a required element of first-degree sexual offense, it is for crimes against nature. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden and the crime against nature adjudications were reversed. **In re J.F.**, 218.

First-degree sexual offense—crimes against nature—sexual purpose—The trial court did not err by failing to require the State to present evidence of sexual purpose with respect to the first-degree sexual offense and crimes against nature charges. The Court of Appeals must give effect to each of the statutes as written, and it does not have the power to add a sexual purpose element to a statute that does not contain one. **In re J.F.**, 218.

Jury instruction—use of the term victim—The trial court did not commit plain error in a sexual offense case by referring to the complainant as the victim. The physical evidence of the victim's injuries corroborated her testimony and the jury would not reasonably have reached a different verdict if the reference to "victim" in the jury instructions had not occurred. **State v. Walton**, 89.

STATUTES OF LIMITATION AND REPOSE

Encroachment on power company easement—expiration—The six-year statute of limitations had expired when plaintiff Duke Power brought an action alleging encroachment on an easement. The statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time. Furthermore, plaintiff should reasonably have known of the existence of a completed house that encroached on its easement. **Duke Energy Carolinas, LLC v. Gray**, 420.

STATUTES OF LIMITATION AND REPOSE—Continued

Encroachment on power company easement—limitation effective as to claim—easement not extinguished—The only effect of plaintiff's failure to file suit before expiration of the statute of limitations was to bar its lawsuit against defendant based upon this specific encroachment. The trial court did not terminate or extinguish plaintiff's easement and plaintiff may pursue any future claims arising from an encroachment to the easement, whether caused by this defendant or by another party. **Duke Energy Carolinas, LLC v. Gray, 420.**

Encroachment on power company easement—not an action under seal—An action involving an easement and the statute of limitations was not subject to the ten-year statute of limitations for actions under seal. There was no dispute that plaintiff had an easement on part of defendant's property but defendant was not a principal to the original contract, defendant did not sign the agreement, defendant was not an assignee of either principal, and defendant did not obtain any rights or defenses that might have been available to the principals. **Duke Energy Carolinas, LLC v. Gray, 420.**

Encroachment on power company easement—six years—The statute of limitations for an action alleging an encroachment on a power company easement was six years. N.C.G.S. § 1-50(a)(3) establishes a six-year statute of limitations for claims based upon injury to any incorporeal hereditament and the 8th edition of Black's Law Dictionary defines an incorporeal hereditament as an intangible right in land, such as an easement. **Duke Energy Carolinas, LLC v. Gray, 420.**

Trusts—fraud—not time-barred—The trial court erred in a case involving trusts by granting summary judgment in favor of defendants for plaintiff's failure to timely file the cause of action. Defendants failed to argue in their briefs how the claim was time-barred by the ten-year statute of limitations, and there appeared to be no legal support for such a contention. **Ward v. Fogel, 570.**

TERMINATION OF PARENTAL RIGHTS

Appointment of GAL—mother with substance abuse and mental health issues—The trial court abused its discretion in a termination of parental rights case by not conducting an inquiry into whether it was necessary to appoint a guardian ad litem (GAL) for a mother who had a substance abuse history and was schizophrenic. Although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into the need for a GAL. **In re T.L.H., 239.**

Competency hearing—appointment of guardian ad litem—The trial court did not abuse its discretion in a termination of parental rights case by conducting the termination proceedings without first holding a hearing to determine whether a guardian ad litem should have been appointed for respondent mother. The record did not suggest that respondent's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she was non compos mentis and would be unable to aid in her defense at the termination of parental rights proceeding. **In re J.R.W., 229.**

Grounds—dependency—extended incarceration of parent—no alternative child care arrangement—The trial court did not err by terminating respondent mother's parental rights based on dependency. Respondent's extended incarceration constituted a condition that rendered her unable or unavailable to parent the minor

TERMINATION OF PARENTAL RIGHTS—Continued

child. Further, respondent had not proposed an alternative child care arrangement. The Court of Appeals did not address respondent's arguments that grounds also existed to terminate parental rights under N.C.G.S. § 7B-1111(a)(1) since one ground was already found to be sufficient. **In re L.R.S., 16.**

Grounds—initial grounds beyond father's control—little effort to involve himself with child—The trial court had sufficient grounds to terminate a father's parental rights under N.C.G.S. § 7B-1111(a)(2) (willfully leaving the juvenile in foster care and not making reasonable progress toward correction of the circumstances that led to removal). Although the conditions which lead to the child's placement with foster parents were not in the father's control, he made essentially no effort to involve himself with the child until the mother indicated that she was voluntarily terminating her parental rights so that the child could be adopted by the foster parents. Moreover, there was a sufficient basis in the record for terminating the father's parental rights that had nothing to do with poverty. **In re A.W., 209.**

Grounds—one sufficient—Although a father challenged each of the statutory grounds under N.C.G.S. § 7B-1111 on which the trial court terminated his parental rights, a finding of any one of the enumerated grounds for termination of parental rights under the statute is sufficient to support a termination. **In re A.W., 209.**

Right to appeal—guardian—ad litem's motion to withdraw—Respondent had no right under N.C.G.S. § 7B-1001(a) to appeal the trial court's order entered on her assistive guardian ad litem's motion to withdraw. Further, even if respondent had had a right to appeal under section N.C.G.S. § 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it. Finally, even if the Court of Appeals had suspended its rules pursuant to N.C.R. App. P. 2, respondent's argument would have been moot. **In re J.R.W., 229.**

Trial counsel's concession—other grounds for termination—The trial court did not err in a termination of parental rights proceeding by relying on trial counsel's concession that grounds may have existed to terminate a father's parental rights. There were unrelated findings of fact that sufficiently supported the trial court's terminating the father's parental rights. **In re A.W., 209.**

TRUSTS

Divorce clause—not void as contrary to public policy—The trial court did not err in a case involving trusts by granting summary judgment in favor of defendants. The divorce clause in the trust was not void as contrary to public policy. **Ward v. Fogel, 570.**

UNFAIR TRADE PRACTICES

Professional services exception—action between physicians—The trial court did not err by dismissing plaintiff's claim for unfair and deceptive trade practices that arose from the peer review of a physician, a change in his medical privileges, and a complaint to the N.C. Medical Board. It is well settled that a matter affecting the professional services rendered by members of a learned profession falls within an exception to the unfair and deceptive practices statute. Defendants' alleged conduct in making a complaint to the N.C. Medical Board was integral to their role in ensuring the provision of adequate medical care. **Wheless v. Maria Parham Med. Ctr., Inc., 584.**

WILLS

Plain language of statute—rules of testamentary construction—class determined upon testator's death—The trial court did not err in a wills case by granting summary judgment in favor of defendants. According to the plain language of the instrument and prevailing rules of testamentary construction, the class of testator's "heirs" as referenced in the portion of the third codicil as issue was determined upon testator's death. **Barnes v. Scull, 184.**

WITNESSES

Denial of motion for additional time to locate witness—denial of motion to reopen evidence for witness testimony—The trial court did not err by denying defendant's request for additional time to locate a witness and his motion to reopen the evidence so that the witness could testify. The trial court acted within its authority to expedite the trial proceedings in light of credible information that the witness had not been subpoenaed and the witness's attorney had indicated that he would not be testifying. Further, defendant failed to advance any argument that he was prejudiced as a result of the trial court's denials. **State v. McClaude, 350.**

Interfering with witness—jury instruction—The trial court did not err in its instruction on the charge of interfering with a witness. The jury was functionally informed that the victim did not have to have a summons to be protected under this statute. **State v. Jones, 526.**

WORKERS' COMPENSATION

Claim timely filed—prior to expiration of statute of limitations—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff timely filed a claim for workers' compensation benefits where plaintiff filed his Form 18 prior to the expiration of the two-year statute of limitations. **Wyatt v. Haldex Hydraulics, 599.**

Compensable injury—causation—doctor's opinion legally sufficient—The Industrial Commission did not err in concluding that a testifying medical doctor's causation opinion was legally sufficient to establish that plaintiff's lifting injury caused an exacerbation or aggravation of his underlying and pre-existing cervical spine condition. **Wyatt v. Haldex Hydraulics, 599.**

Compensable injury—doctor's opinion legally sufficient—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's brain condition was caused by his work accident and was compensable under the Workers' Compensation Act. The testifying medical doctor's opinion was legally sufficient to support the Commission's determination that plaintiff's injury was compensable. **Wyatt v. Haldex Hydraulics, 599.**

Compensable injury—first prong of Russell test—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's brain and cervical spine injuries were compensable. Plaintiff met his burden of proof by satisfying the first prong of the test set forth in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762. **Wyatt v. Haldex Hydraulics, 599.**

Expiration of policy—end of policy period—renewal premium not paid—A workers' compensation insurance policy did not cover defendants at the time of plaintiff's injury where defendants did not pay the renewal premium by the expiration date of the policy and the policy expired. Neither N.C.G.S. § 58-36-105 nor

WORKERS' COMPENSATION—Continued

N.C.G.S. § 58-36-110 govern the expiration of a workers' compensation insurance policy at the end of the policy period. **Estrada v. Timber Structures, Inc., 202.**

Findings—suspension from dispatch service—effect on municipal permit—The Industrial Commission erred in a workers' compensation case in a finding concerning the effect of a suspension from defendant's dispatching service on defendant's municipal taxi permit. Although the Commission found that plaintiff could not legally operate the taxi under suspension from defendant, the testimony indicated that suspension from defendant's dispatching service did not amount to suspension of the municipal driving permit. **Ademovic v. Taxi USA, LLC, 402.**

Independent contractor—taxi driver—source and exclusivity of calls—In a workers' compensation case concerning whether plaintiff taxi driver was an independent contractor, findings concerning the number of calls plaintiff received in a day from defendant dispatch service and that plaintiff only received customers through defendant were supported by competent evidence in the record. **Ademovic v. Taxi USA, LLC, 402.**

Injury to taxi driver—operating certificate—finding supported by evidence—A finding of fact in a workers' compensation case involving the operating certificate under which plaintiff operated his taxi was supported by competent record evidence. **Ademovic v. Taxi USA, LLC, 402.**

Occupational disease—asbestosis—calculation of average weekly wage—last year of employment—The Industrial Commission did not err in a workers' compensation case by ordering defendant Travelers Casualty & Surety to pay death benefits to plaintiff widow. Based on the facts of this case, the Full Commission did not err in calculating decedent's average weekly wages based on the wages during the last year of employment at SDC rather than on the statutory minimum. **Lipe v. Starr Davis Co, Inc., 124.**

Taxi driver—right of control—independent contractor—not an employee—The Industrial Commission erred in a workers' compensation case by ultimately concluding that plaintiff taxi driver was an employee of defendant dispatch service. Plaintiff and defendant entered into an agreement stating that plaintiff was an independent contractor. Furnishing certain equipment and decals, requiring that the taxi be painted yellow, and a provision allowing termination of the contract at any time with or without notice or cause did not definitively establish that the right of control rested with defendant. **Ademovic v. Taxi USA, LLC, 402.**

ZONING

Unified development ordinance—shooting range—The superior court did not err by affirming the County's order that petitioners cease and desist from operating a shooting range on their property. Although the superior court erred in its interpretation of the Unified Development Ordinance (UDO) by concluding that the shooting range fell within the Open Air Games category on the Table, the Table did in fact prohibit shooting ranges anywhere in the County by providing that uses not specifically listed in the Table were prohibited. Thus, the portion of the trial court's order determining that the UDO required petitioners to obtain a special use permit to operate their shooting range was reversed, even though the ultimate result reached by the trial court was affirmed on different grounds. **Byrd v. Franklin Cnty., 192.**

