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CASES REPORTED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TAMMY BURGER, PLAINTIFF-APPELLANT
v.
JEFFERY C. BURGER, DEFENDANT-APPELLEE

No. COA16-113

Filed 16 August 2016

1. Divorce—income—expenses

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by its determination of defendant husband's income and expenses, and plaintiff wife's income.

2. Divorce—alimony—retroactive

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by awarding defendant husband retroactive alimony effective 1 January 2011 even though plaintiff wife claimed she should not have an alimony obligation for the period of 1 January 2011 through 1 February 2015.

3. Divorce—equitable distribution—savings plan—current value—passive changes—passive gains and losses

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by its distribution of plaintiff wife's Wachovia/Wells Fargo Savings Plan. Because no evidence was presented on the plan's current value and no evidence was presented on any passive changes in the plan's value, the trial court erred in distributing the passive gains and losses without additional findings of fact.

Appeal by plaintiff from Order entered 12 August 2015 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 8 June 2016.

CHURCH WATSON LAW, PLLC, by Kary C. Watson, for plaintiff-appellant.

The Law Office of Stephen Corby, PLLC, by Stephen M. Corby, for defendant-appellee.

ELMORE, Judge.

Tammy Burger (Wife) appeals from the trial court's order entered 12 August 2015 on the issues of equitable distribution, child support, and alimony. We affirm in part and reverse and remand in part.

I. Background

Jeffery C. Burger (Husband) and Wife were married on 3 October 1987, separated on 30 December 2009, and divorced on 16 December 2011. They have two children, born in 1997 and 2001. On 30 September 2010, Wife filed a complaint for equitable distribution, alleging that she was entitled to an unequal distribution of the marital and divisible property in her favor and an equitable distribution of the marital and divisible debt. Husband filed an answer and counterclaims on 17 December 2010, seeking child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. Husband alleged that he was a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2) and that Wife was a supporting spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(5).

Following a number of continuances, the Honorable Jena P. Culler held a bench trial from 11 February 2015 through 13 February 2015 on the issues of equitable distribution, child support, and alimony. In the trial court's 12 August 2015 Order, it found the following pertinent facts:

> 48. The Court has considered the financial needs of the parties, the accustomed standard of living of the parties prior to their separation, the present employment income and other recurring earnings of each party from any source, the income earning abilities of the parties, the separate and marital debt service obligation of the parties, those expenses reasonably necessary to support each of the parties, and each parties' respective legal obligation to support any other person.

. . . .

51. The Court finds that Wife is employed by Wells Fargo, and has a gross monthly income of $15,098.00 and a net monthly income of $10,230.09.

. . . .

55. The Court finds that Husband is unemployed and has been unemployed for several years. Husband has no current monthly income. Husband has cancer of the eye and has to regularly apply pressure to his eye with his hand to relieve pain. While Husband is at a disadvantage for employment prospects due to his condition, the Court finds that he is capable of working and earning minimum wage and that he has a naive indifference to his self support. Therefore, the Court imputes a gross monthly income of $1,247.00, which is based on minimum hourly working forty (40) hours per week.

. . . .

61. The Court finds that Husband is a dependent spouse as that term is defined in N.C.G.S. § 50-16.1A(2), is actually and substantially dependent upon Wife for his maintenance and support, and is substantially in need of maintenance and support from Wife. Husband's resources are inadequate to meet his needs, and Husband is entitled to alimony.

62. The Court finds that Wife is a supporting spouse as that term is defined in N.C.G.S. § 50-16.1A(5). Wife is an able-bodied person who has the means and ability to provide reasonable and adequate support to maintain Husband in the standard of living to which Husband was accustomed before the separation of the parties.

. . . .

64. The Court finds that the appropriate alimony award is $1,750.00 per month.

65. The Court finds that Wife has been consistently employed with Wells Fargo (or its predecessor banks) during all times for which this court is entering an award of alimony and Wife has [the] ability to pay the alimony award set forth herein.

> 66. [Husband] filed his claim for alimony in December 2010 and the Court finds it is appropriate to make this Order effective January 1, 2011.

After concluding that an unequal distribution in favor of Husband would be equitable, the trial court distributed the marital property, marital debt, and divisible debt and ordered both parties to pay child support. Wife timely appeals.

II. Analysis

A. Income and Expenses

[1] On appeal, Wife argues that the trial court erred in determining Husband's income, Husband's expenses, and her income. Wife asserts that while the trial court properly imputed income to Husband for purposes of alimony and child support, Husband has an earning capacity greater than minimum wage and "the evidence at trial support[ed] at a minimum, an imputation of $5,000 gross income per month." Wife also claims that the trial court should have imputed income to Husband based on income he could receive from his mother's trust, arguing that Husband incorrectly thinks the trust is discretionary. Husband contends that the trial court properly imputed only minimum wage income due to his lack of recent work history and his medical condition.[1]

N.C. Gen. Stat. § 50-16.3A(b) (2015) provides, "The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors . . . ."

Wife first argues that the trial court should have imputed gross monthly income of $5,000 to Husband because he has an undergraduate, master's, and law degree, is capable of performing home repair, and in 2010, when Husband was still employed by Strategic Legal Solutions, he listed on a credit card application that his annual income was $60,000. Wife further argues that Husband voluntarily left his employment at Strategic Legal Solutions shortly after the parties separated.

" 'Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order.' " *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations omitted) (quoting *Kowalick*

1. Although Husband initially argues that the trial court erred in finding he was unemployed due to bad faith, Husband did not file a notice of appeal in this case. N.C. R. App. P. 3 (2016).

v. Kowalick, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)). Similarly, in general, "a party's ability to pay child support is determined by that party's actual income at the time the award is made." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985)). To base an alimony or child support obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836. "[T]his showing may be met by a sufficient degree of indifference to the needs of a parent's children." *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836.

Here, the trial court found that Husband was unemployed at the time of the hearing and had been unemployed for several years. Noting that he would be at a disadvantage for employment prospects due to his health, the trial court nonetheless found that Husband is capable of working and earning minimum wage. The court further found that Husband has a naive indifference toward his self-support as well as toward his duty of support for his children, and it imputed gross monthly income of $1,247 based on working forty hours per week earning minimum wage.

While the record evidence shows that Husband is well-educated, it also shows that he has no eyesight in one eye, "has cancer of the eye[,] and has to regularly apply pressure to his eye with his hand to relieve pain." The trial court found that Husband "would have a difficult time finding a job given his presentation of himself[.]" Wife's only attempt to present evidence on Husband's earning potential was based on a credit card application that he had completed, and a job he had maintained, five years prior. Moreover, regarding the trust, the trial court found that "there is no evidence that Husband received any income from the discretionary trust during the marriage or otherwise. While there is evidence that Husband could do more than just call and try to acquire money from the trust, there is no evidence that he received any benefit from the discretionary trust." The trial court stated that it "consider[ed] the fact that Husband did not take steps to further explore possibility of obtaining funds from the trust." Accordingly, the trial court did not abuse its discretion in imputing minimum wage income to Husband.

Wife also argues that the trial court's calculation of Husband's expenses is unsupported by the evidence presented at trial, claiming that his expenses are speculative and hypothetical.

"This Court has long recognized that '[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony

action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.' " *Nicks v. Nicks*, ___ N.C. App. ___, ___, 774 S.E.2d 365, 376 (June 16, 2015) (COA14-848) (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982)). "[T]he parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage." *Barrett v. Barrett*, 140 N.C. App. 369, 372, 536 S.E.2d 642, 645 (2000).

Here, the trial court found that "Husband's monthly-shared family reasonable needs and expenses total $4,142.00 and Husband's monthly individual reasonable needs and expenses total $1,305.00. The specific findings as to these total expenses are attached hereto and incorporated herein by reference as Exhibit 5." Exhibit 5 details and confirms the total expenses listed above. Husband's financial affidavit filed 30 January 2015 supports the expenses contained in Exhibit 5 and the trial court's findings. While Wife argues that the expenses in the financial affidavit are "completely made up," Wife's "argument simply goes to the credibility and weight to be given to the affidavit. [Wife] was free to attack [Husband's] affidavit at trial by cross-examination . . . . Such determinations of credibility are for the trial court, not this Court." *Parsons v. Parsons*, 231 N.C. App. 397, 400, 752 S.E.2d 530, 533 (2013) (citation omitted). The trial court acted within its discretion in calculating Husband's total reasonable needs and expenses based on the record evidence.

Additionally, Wife argues that the trial court's calculation of her income is unsupported by the evidence. Wife claims that the trial court erred in adding her bonus from 2014 to the gross monthly income amount that she submitted to the trial court in her financial affidavit, which raised her gross monthly income from $11,566.08 to $15,098.00. Wife relies on *Williamson v. Williamson*, 217 N.C. App. 388, 391, 719 S.E.2d 625, 627 (2011), in which this Court held that the trial court improperly included the defendant's tax refund as part of her regular income.

"A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income at the time of the award." *Rhew v. Felton*, 178 N.C. App. 475, 484–85, 631 S.E.2d 859, 866 (2006) (citation omitted). "[I]t is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

Wife testified that she received a bonus in 2011, 2012, 2013, and 2014. In Wife's November 2011 financial affidavit, she listed her gross monthly

income as $15,618.55, which included $3,524.33 under "Bonuses." Wife also filed financial affidavits in April 2012 and July 2012, in which she listed on both that her gross monthly income was $15,218.50, which included $3,844.67 under "Bonuses."

Wife filed a revised financial affidavit in January 2015, just prior to trial, in which she listed that her gross monthly income was $11,566.08 and she left the "Bonuses" section blank. Wife attached her last two pay stubs to the financial affidavit, which covered the 14 December 2014 to 10 January 2015 pay periods. When asked why she did not include her bonus in her gross monthly income, Wife testified, "I don't know until I get my bonus what it will be this year."

The evidence established that Wife had consistently received bonuses for the past four years. Wife based her most recent financial affidavit in part on her gross monthly income from December 2014. Wife admitted that her 2014 bonus totaled around $41,000. And in November 2014, when completing a loan application for a new home, Wife listed her total gross monthly income as $15,097, which included $3,478 under "Bonuses."

Unlike in *Williamson* where there was no evidence that the tax refund constituted regular income, 217 N.C. App. at 390–91, 719 S.E.2d at 627, here, the trial court properly determined Wife's income in accordance with the record evidence. Based on the facts presented in this case, the trial court acted within its discretion in including Wife's December 2014 bonus in her average gross monthly income.

As a related issue, Wife makes a blanket assertion that the trial court's findings of fact concerning the parties' income and expenses are unsupported by the evidence and, absent proper findings, the trial court's conclusions of law relating to the support obligations must also fail.

"The review of the trial court's findings are limited to 'whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.' " *Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008) (quotation omitted). For the numerous reasons stated above, the trial court's findings regarding the parties' income and expenses were supported by competent evidence. Likewise, the trial court's conclusions of law, based on those findings, were proper.

B. Effective Date of Alimony Award

[2] Wife next argues that the trial court erred in awarding Husband alimony effective 1 January 2011, claiming that she should not have an alimony obligation for the period of 1 January 2011 through 1 February 2015.

"Our Court reviews a trial court's decision regarding the manner of payment of an alimony award for abuse of discretion." *Rhew*, 178 N.C. App. at 479–80, 631 S.E.2d at 863 (citing *Whitesell v. Whitesell*, 59 N.C. App. 552, 553, 297 S.E.2d 172, 173 (1982)).

In *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 824 (May 21, 2013) (COA12-1229), the defendant, relying on our holding in *Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), argued that N.C. Gen. Stat. § 50-16.3A did not permit the trial court to award alimony "retroactively." This Court rejected the defendant's argument, stating that "while *Brannock* does discuss the changes in North Carolina law regarding alimony, nothing in the opinion references any intent by the General Assembly to eliminate retroactive alimony or to abrogate our rulings in *Austin*[2] and its progeny." *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 824. Accordingly, we upheld the award. *Id.* at ___, 742 S.E.2d at 824.

Here, the trial court awarded Husband alimony in the amount of $1,750.00 per month for ten years, effective 1 January 2011. Wife does not challenge the ten-year duration of the payments but only argues that the trial court erred in making the award retroactive to 1 January 2011. Wife's argument, however, has already been rejected by this Court. *See id.* at ___, 742 S.E.2d at 824. Accordingly, Wife cannot establish that the trial court abused its discretion in making the alimony award effective 1 January 2011.

Wife also argues that the trial court erred because it failed to make findings about the parties' income and expenses for the intervening years between 2011 and 2015. Alimony, however, "is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. In the trial court's findings of fact, it found that Wife's current net monthly income was $10,230.90 and her total monthly reasonable financial needs and expenses were $8,240. Based on the evidence presented and consideration of the statutory factors, the trial court awarded Husband $1,750 per month in alimony. The trial court did not abuse its discretion in considering Wife's current net monthly income in determining the alimony award.

C. Equitable Distribution

[3] Finally, Wife argues that the trial court erred in distributing Wife's Wachovia/Wells Fargo Savings Plan (the Plan) because the trial court

2. *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E.2d 428, 430 (1971).

failed to value the divisible component of the Plan as of the date of distribution. Wife does not otherwise contest the trial court's distribution.

> Our standard of review for alleged errors in a trial court's classification and valuation of divisible and marital property is well-settled:
>
> [w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*. We review the trial court's distribution of property for an abuse of discretion.

Nicks, ___ N.C. App. at ___, 774 S.E.2d at 380 (quoting *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011)).

In making an equitable distribution of the marital assets, the trial court is required to undertake a three-step process: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988) (citation omitted). Under our General Statutes, marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned . . . ." N.C. Gen. Stat. § 50-20(b)(1) (2015). Divisible property includes "[p]assive income from marital property received after the date of separation, including, but not limited to, interest and dividends." N.C. Gen. Stat. § 50-20(b)(4) (2015). "For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and . . . [d]ivisible property and divisible debt shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2015).

Here, the trial court found that the " 'Wachovia/Wells Fargo 401(k)' listed on the Final Pretrial Order is a duplicate entry of the 'Wachovia/Wells Fargo Savings Plan.' " The trial court did not issue any other findings regarding the Plan but listed it as marital property and ordered the following:

> Wife's Wachovia/Wells Fargo Savings Plan shall be divided equally between the parties as of the date of separation.

> Each party is hereby awarded fifty percent (50%) of the balance of the said account as of the date of separation, which was $498,672.00, together with all passive gains and losses accruing on his or her respective share from the date of separation through the date of the division of the said account. . . .

On the Equitable Distribution Pretrial Order, both parties contended that the Plan was marital property and the date of separation value was $498,672.13. Neither party submitted a current value. Similarly, at trial, no testimony concerned the current value of the Plan. Because no evidence was presented on the Plan's current value and no evidence was presented on any passive changes in the Plan's value, the trial court erred in distributing the passive gains and losses without additional findings of fact. *See Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005) ("[W]hen no finding is made regarding the value of an item of distributable property, a trial court's findings are insufficient even if a determination is made with respect to the percentage of a distributable property's value to which each party is entitled."). Accordingly, we reverse that portion of the order on equitable distribution and we remand to the trial court for entry of additional findings.

III. Conclusion

The trial court did not err in its award of alimony, and the trial court's findings of fact support its conclusions of law. The trial court did err in distributing the passive gains and losses from the Plan. We reverse this portion of the equitable distribution award and remand to the trial court.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DAVIS and DIETZ concur.

CAPE HATTERAS ELECTRIC MEMBERSHIP CORPORATION, AN ELECTRIC MEMBERSHIP CORPORATION ORGANIZED AND EXISTING PURSUANT TO N.C. GEN. STAT. CHAPTER 117, PLAINTIFF
v.
GINA L. STEVENSON AND JOSEPH F. NOCE, DEFENDANTS

No. COA15-1102

Filed 16 August 2016

1. Wrongful Interference—civil conspiracy—intentional interference with contract—electric cooperative bylaws—reasonable term or condition required

The business court did not err by granting summary judgment against plaintiff electric cooperative on its claims for civil conspiracy and intentional interference with contract. The cooperative's demand for a 44-foot-wide easement across defendant Stevenson's property in exchange for one dollar was not a reasonable term or condition. Thus, the bylaws did not require Stevenson to agree to that request. Because there was no breach of contract, the cooperative's claims fail as a matter of law.

2. Declaratory Judgments—electric cooperative bylaws—limited to facts of case

The business court did not err by entering a declaratory judgment that plaintiff electric cooperative's bylaws were unenforceable, but clarifying that the declaration was limited to the facts of this case where the request for an easement was not accompanied by reasonable terms and conditions.

Appeal by plaintiff from order entered 9 April 2015 by Judge Gregory P. McGuire in the North Carolina Business Court. Heard in the Court of Appeals 30 March 2016.

Vandeventer Black LLP, by Norman W. Shearin and Ashley P. Holmes, for plaintiff-appellant.

Brooks, Pierce, McClendon, Humphrey & Leonard, LLP, by Julia C. Ambrose and Daniel F. E. Smith, for defendants-appellees.

Patrick Buffkin, for amicus curiae North Carolina Association of Electric Cooperatives, Inc.

DIETZ, Judge.

At its heart, this is a case of straightforward contract interpretation. The plaintiff is an electric cooperative whose bylaws require all members to grant an easement across their land for power lines and other electric services upon request by the cooperative with "reasonable terms and conditions."

Recent storms caused severe erosion near the cooperative's existing transmission lines. So the cooperative sent a letter to Defendant Gina Stevenson, a cooperative member, instructing her to grant a 44-foot-wide easement across her property for the rerouted lines. The letter attached a proposed right-of-way agreement offering her one dollar in consideration for the easement.

Stevenson refused to sign. Then, in what the cooperative alleges was an effort to frustrate the terms of the bylaws, Stevenson conveyed one of her lots to her boyfriend, who was not a member of the cooperative. This forced the cooperative to pursue a condemnation action to secure the easement. The cooperative sued Stevenson and her boyfriend for intentional interference with contract and civil conspiracy, and sought accompanying declaratory relief. The business court entered summary judgment against the cooperative and it then appealed.

We affirm. As explained below, the cooperative's demand for a 44-foot-wide easement across Stevenson's property in exchange for one dollar was not a reasonable term or condition. Thus, the bylaws did not require Stevenson to agree to that request. Because there was no breach of contract, the cooperative's claims fail as a matter of law. We also affirm the business court's entry of declaratory relief, but clarify that the declaration is limited to the facts of this case, where the request for an easement was not accompanied by reasonable terms and conditions.

Facts and Procedural History

Gina Stevenson owns property on Hatteras Island. Electric power to Stevenson's property is provided by the Cape Hatteras Electric Membership Corporation (CHEMC), an electric cooperative chartered by State law. Stevenson is a member of the cooperative.

When members join the cooperative, they agree to be bound by the cooperative's bylaws. The bylaws contain two provisions at issue in this case.

First, the bylaws provide that a member shall grant an easement to the cooperative when necessary to provide electric service to cooperative members, in accordance with reasonable terms and conditions:

> **SECTION 1.08. Member to Grant Easements to Cooperative and to Participate in Required Cooperative Load Management Programs.** Each member shall, upon being requested to do so by the Cooperative, execute and deliver to the Cooperative grants of easement or right-of-way over, on and under such lands owned or leased by or mortgaged to the member, and in accordance with such reasonable terms and conditions, as the Cooperative shall require for the furnishing of electric service to him or other members or for the construction, operation, maintenance or relocation of the Cooperative's electric facilities.

Second, the bylaws provide that the cooperative may shut off a member's electricity when that member fails to comply with her membership obligations:

> **SECTION 2.01. Suspension; Reinstatement.** Upon his failure, after the expiration of the initial time limit prescribed either in a specific notice to him or in the Cooperative's generally publicized applicable rules and regulations, to pay any amounts due the Cooperative or to cease any other noncompliance with his membership obligations, a person's membership shall automatically be suspended; and he shall not during such suspension be entitled to receive electric service from the Cooperative or to cast a vote.

On 21 December 2012, CHEMC sent Stevenson a letter explaining that it needed to reroute its transmission line across Stevenson's property because recent storms had severely eroded the ground near existing lines.

At some point in the month after receiving this letter, Stevenson had an informal discussion with a CHEMC manager about rerouting the transmission lines. Stevenson proposed that the cooperative pay to relocate one of Stevenson's rental homes to a nearby undeveloped lot that she owned. CHEMC did not agree to this proposal.

The following month, on 13 February 2013, CHEMC sent a demand letter to Stevenson attaching a proposed right-of-way agreement. The letter informed Stevenson that "[r]elocation of the transmission line necessitates the granting by you of an easement or right-of-way to the Cooperative." It also stated that "as a member of the Cooperative, you are obligated by its bylaws to grant the easement." The right-of-way

agreement attached to this letter granted a 44-foot-wide easement across Stevenson's property, appearing to come just feet from the front door of one of her rental homes. The agreement stated that Stevenson would grant this easement in exchange for "the sum of One Dollar ($1.00) and other valuable consideration."

The relocation of the transmission lines affected a number of properties, not just those owned by Stevenson, and many residents talked about the cooperative's demands both in person and by email. At some point after Stevenson received the demand letter, CHEMC told the local homeowner's association that it was willing to negotiate with homeowners impacted by the rerouted lines for additional compensation. The record does not contain any direct communications between CHEMC and Stevenson.

On 20 February 2013, Stevenson informed CHEMC by phone that she would not grant the requested easement. A month later, on 26 March 2013, Stevenson deeded her undeveloped lot to her boyfriend, Joseph Noce, who was not a member of the cooperative and thus not a party to the bylaws. At the time he received the property, Noce was aware that the cooperative had demanded that Stevenson grant an easement across that property.

On 10 April 2013, CHEMC sued Stevenson, seeking a declaration of the parties' rights and obligations under Section 1.08 of the bylaws. The Chief Justice designated the action as a mandatory complex business case the following day.

On 15 April 2013, CHEMC petitioned for condemnation of Stevenson's and Noce's property to obtain the necessary easements. Three days after filing these condemnation petitions, CHEMC sent another letter to Stevenson demanding that she grant the requested easement. CHEMC warned Stevenson that if she did not grant the easement, it could shut off her electricity. Then, on 15 May 2013, CHEMC informed Stevenson that it planned to cut off her power before the upcoming Memorial Day weekend if she did not "communicate with [CHEMC] as soon as possible about the powerline easement sought from her."

Two days later, faced with the possibility of having electricity to her rental properties shut off during one of the busiest vacation weekends of the year, Stevenson consented to an order in the condemnation proceeding conveying the requested easements. The only remaining issue in the condemnation action was the amount of compensation to be paid to Stevenson.

On 10 June 2013, CHEMC filed an amended complaint seeking a declaration of the parties' rights and obligations under both Section 1.08 and Section 2.01 of CHEMC's bylaws. CHEMC also added an intentional interference with contract claim against Noce and a civil conspiracy claim against both Stevenson and Noce.

On cross-motions for summary judgment, the North Carolina Business Court entered summary judgment for Stevenson and Noce on all claims. CHEMC timely appealed. Because this case was designated as a complex business case and assigned to the business court on 11 April 2013, this Court has appellate jurisdiction. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, __ N.C. App. __, __, 783 S.E.2d 264, 265–66 (2016).

Analysis

On appeal, CHEMC challenges the business court's entry of summary judgment against it on its two tort claims and also challenges a portion of the court's corresponding declaratory judgment. We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. Rule 56(c). When considering a summary judgment motion, a trial court must view the evidence in the light most favorable to the non-movant. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

I. Summary Judgment on Tort Claims

[1] CHEMC first argues that the business court erred in granting summary judgment against it on its claims for civil conspiracy and intentional interference with contract. As explained below, we reject CHEMC's arguments and affirm the business court.

The theory underlying CHEMC's intentional tort claims is straightforward: the cooperative contends that Stevenson was contractually obligated to immediately grant the requested easement and that, by working together to avoid that contractual obligation, both Stevenson and Noce are liable to the cooperative. The flaw in this theory is that Stevenson was not contractually obligated to grant the easement in the first place.

As CHEMC conceded in the business court (and does not challenge on appeal), Section 1.08 of the bylaws requires a cooperative member to

grant an easement only upon "reasonable terms and conditions." Thus, if the cooperative's demand for an easement is made on *unreasonable* terms and conditions, the member has no obligation to grant the easement. And if there was no obligation to grant the easement, CHEMC's tort claims fail because those claims require CHEMC to prove some improper inducement not to perform a contractual obligation. *See Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 212, 646 S.E.2d 550, 555 (2007) ("An essential element of a claim for tortious interference with a contract is that 'the defendant intentionally induces the third person not to perform the contract.' "); *see also New Bar P'ship v. Martin*, 221 N.C. App. 302, 310, 729 S.E.2d 675, 682 (2012) ("[W]here a plaintiff's underlying claims fail, its claim for civil conspiracy must also fail."). Simply put, the determinative issue in this appeal is whether CHEMC's request for the easement was made on reasonable terms and conditions. We hold that it was not.

In February 2013, CHEMC approached Stevenson and demanded that she immediately grant the cooperative a 44-foot-wide easement across her property on scenic Hatteras Island in exchange for one dollar. The demand letter from CHEMC accompanying the proposed right-of-way agreement was wholly unilateral; it stated that "[r]elocation of the transmission line necessitates the granting by you of an easement or right of way to the Cooperative" and that Stevenson was "obligated" to grant the easement. Neither the letter nor the attached right-of-way agreement indicated that the cooperative intended to provide additional compensation to Stevenson in the future or even that the cooperative would examine the impact of the easement to determine if compensation was appropriate.

We hold, as the business court did, that this unilateral demand was not made in accordance with "reasonable terms and conditions." The amicus asks us to delineate the sort of terms and conditions that are reasonable, and thus might satisfy this contract language in future cases. Amicus contends that these bylaws are "common" among electric cooperatives and guidance is needed. But the parties have not briefed this issue, and we are unwilling to delve into this sort of advisory dicta without an appropriate record and argument from the parties. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931). Moreover, this situation is quite different from one in which parties or amici seek guidance on the meaning of a statute. This is contract language in corporate bylaws. If parties not before the Court want more detail on the meaning of the phrase "reasonable terms and conditions" in those bylaws, they can amend the documents to provide that clarity without waiting on help from the courts.

In sum, we limit this opinion to the facts before us and hold only that a unilateral demand to grant an easement in exchange for one dollar, with no assurances of future compensation or review, is not one made "in accordance with reasonable terms and conditions." As a result, Stevenson was not contractually obligated to grant the easement and CHEMC's tort claims for intentional interference with contract and civil conspiracy fail as a matter of law.

II. Section 2.01 of CHEMC's Bylaws

[2] CHEMC next challenges the business court's declaratory judgment that, as applied to the parties in this case, Section 2.01 of the cooperative's bylaws is unenforceable. For the reasons explained above, we affirm the business court's declaratory judgment with respect to the parties in this case, on the facts of this case. Because CHEMC did not seek an easement from Stevenson on reasonable terms and conditions, Stevenson's refusal to grant the easement was not a breach of the bylaws. We agree with the business court that the cooperative cannot threaten to shut off a member's electricity under Section 2.01 of the bylaws as a means to force that member to grant an easement on unreasonable terms and conditions.

The amicus argues that the business court's declaratory judgment could prevent other electric cooperatives from using similar language in their own bylaws to disconnect power from members who breach the bylaws and refuse to grant an easement even upon reasonable terms and conditions. CHEMC's complaint in this action expressly requested a declaration only with respect to the rights of the parties in this action, and that declaratory judgment is limited to the facts of this case. We interpret the business court's declaratory judgment as limited to circumstances in which the request for the easement is not made in accordance with reasonable terms and conditions—as was the case here—and we affirm it on that basis.

Conclusion

We affirm the judgment of the North Carolina Business Court.

AFFIRMED.

Judges HUNTER, JR. and INMAN concur.

RODNEY MICHAEL DABBONDANZA, JR. &
ANGELLA LYNN DABBONDANZA, PLAINTIFFS
v.
ANNE J. HANSLEY, DEFENDANT

No. COA16-117

Filed 16 August 2016

Real Property—quieting title—improper conveyance of interest in property

The trial court erred in its summary judgment order by quieting title to property in favor of plaintiffs who acquired the property from defendant wife. Although the trial court correctly concluded that, as a matter of law, the property was not encumbered by the 2013 judgment, the 2008 oral directive was not enforceable and the clerk, as a result, lacked authority to convey the husband's interest in the property to the wife pursuant to the 2009 deed. Further, the 2007 equitable distribution order did not affect the priority of the 2013 judgment. The case was remanded with instructions that the trial court enter summary judgment for the husband on the issue that he still owned an interest in the property when the 2013 judgment was docketed.

Appeal by Defendant from judgment entered 2 November 2015 by Judge Alan Z. Thornburg in Rutherford County Superior Court. Heard in the Court of Appeals 6 June 2016.

Law Offices of Kenneth W. Fromknecht, II PA, by Kenneth W. Fromknecht, II, for Plaintiffs-Appellees.

Prince, Youngblood & Massagee, PLLC, by B. B. Massagee, III and Sharon B. Alexander, for Defendant-Appellant.

DILLON, Judge.

Defendant Anne J. Hansley ("Defendant") appeals the trial court's summary judgment order quieting title to property in favor of Plaintiffs Rodney Michael Dabbondanza, Jr., and Angella Lynn Dabbondanza (collectively referred to as "Plaintiffs"). For the following reasons, we reverse.

I. Background

This appeal concerns certain real property in Rutherford County purchased by Plaintiffs in 2015 (the "Property") and whether Defendant's 2013 judgment against a *prior owner* of the Property attached as a lien against the Property.

The Property was acquired by Johnny Ray Watkins ("Husband") prior to 2000. Husband was married to Linda F. Watkins ("Wife") until their divorce sometime thereafter.

In 2007, Judge Laura A. Powell ("Judge Powell") entered an equitable distribution order, pursuant to which Husband was directed to convey his interest in the Property to Wife (the "2007 ED Order"). However, Husband refused to execute a deed conveying his interest in the Property.

In December 2008, Husband and Wife appeared before Judge Powell on a motion hearing in the equitable distribution matter. During the hearing, Judge Powell *orally* directed Robynn Spence, the Clerk of the Superior Court in Rutherford County, (hereinafter the "Clerk"), to execute a deed conveying Husband's interest in the Property to Wife, pursuant to Rule 70 of the North Carolina Rules of Civil Procedure (the "2008 Oral Directive"). Accordingly, the Clerk executed and delivered a deed to Wife (the "2009 Deed"), which was duly recorded in 2009.

In 2013, Defendant obtained a money judgment against Husband, which was docketed in Rutherford County Superior Court (the "2013 Judgment").

In 2014, Judge Powell entered a *written* order, which purported to reduce the 2008 Oral Directive to writing (the "2014 Order"). The 2014 Order was entered *nunc pro tunc*, relating back to the entry of the 2007 ED Order.

In 2015, Wife conveyed the Property to Plaintiffs. Around that same time, Defendant, who had since obtained the 2013 Judgment, directed the Rutherford County Sheriff's Office to execute on the Property. Defendant contended that at the time the 2013 Judgment was docketed, Husband still possessed an interest in the Property, notwithstanding the 2009 Deed.

Plaintiffs commenced this action to quiet title and obtained a temporary injunction staying the execution on the Property. Plaintiffs filed a motion for summary judgment, which the trial court granted, holding

that the 2013 Judgment had not attached to the Property. Defendant filed a timely appeal.

II. Standard of Review

We review a grant of summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Summary judgment is appropriate when "there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Builders Mut. Ins. Co. v. N. Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted) (internal quotation marks omitted).

III. Analysis

The issue on appeal is whether the trial court correctly concluded that, as a matter of law, the Property is not encumbered by the 2013 Judgment. We conclude that the 2008 Oral Directive was not enforceable and that the Clerk, as a result, lacked authority to convey Husband's interest in the Property to Wife pursuant to the 2009 Deed. We further conclude that the 2007 ED Order does not affect the priority of the 2013 Judgment as the 2007 ED Order was not properly recorded. Accordingly, Husband still owned an interest in the Property when the 2013 Judgment was docketed. As such, we reverse the trial court's summary judgment order.

A. Rule 70 Appointment Must Be Entered To Take Effect.

Rule 70 provides that if a judgment directs a party to execute a conveyance of real estate and that party fails to comply, the trial court is then authorized "to direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the [disobedient] party." N.C. Gen. Stat. § 1A-1, Rule 70 (2013). Put simply, if the trial court orders a party to convey property and that party refuses, the trial court may appoint *another person* to convey that property. In the present case, the parties do not dispute that the 2007 ED Order required Husband to convey his interest in the Property to Wife. However, at the time of the 2008 hearing before Judge Powell, Husband had not done so, and his whereabouts were unknown. Judge Powell attempted to direct the conveyance of Husband's interest in the Property to Wife pursuant to Rule 70.

We conclude that a Rule 70 appointment whereby a party executes a deed on behalf of a disobedient party is an "order," as the disobedient party is affected by his or her divestment of ownership in the property. Rule 58 of the North Carolina Rules of Civil Procedure provides that "a *judgment* is entered when it is reduced to writing, signed by a judge,

and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (emphasis added). Our Court has consistently held that Rule 58 applies to *orders* as well as judgments in civil cases, *see*, *e.g.*, *Onslow v. Moore*, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998) (explaining that "Rule 58 applies to judgments and orders, and therefore, an order is entered when the requirements of . . . Rule 58 are satisfied"), and that "an order rendered in open court is not enforceable until it is 'entered,' i.e., until it is reduced to writing, signed by the judge, and filed with the clerk of court," *In re Foreclosure of Goddard & Peterson*, PLLC, No. COA15-591, 2016 N.C. App. LEXIS 711, at *8 (July 5, 2016) (internal quotation marks omitted) (quoting *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998)).

As our Court recently explained, prior to 1994, Rule 58 did not require that an order be in writing, signed, and filed to be deemed "entered"; indeed, orally rendered judgments were considered "entered." *In re O.D.S.*, ___ N.C. App. ___, ___, 786 S.E.2d 410, 413 (2016). However, Rule 58 was amended in 1994 to clarify when a judgment or order was entered and therefore enforceable. *Id.*

The 2008 Oral Directive was not enforceable as it was not written, signed, or filed with the clerk of court, and was therefore not effective to authorize the Clerk to convey Husband's interest in the Property. The 2008 Oral Directive is comparable to an oral incompetency order, which we recently held does not authorize the appointment of a guardian. *In re Thompson*, ___ N.C. App. ___, ___, 754 S.E.2d 168, 172 (2016) (holding that a clerk of court can only appoint a guardian after an incompetency order has been "entered" pursuant to Rule 58).

We note that the 2009 Deed indicates that the Clerk's purported authority to convey Husband's interest derives from the divorce action between Husband and Wife. Rule 58 required the appointment order to be entered before the Clerk was authorized to convey Husband's interest. There was no entered appointment order in Husband and Wife's divorce action. Given the 2009 Deed's reference to the divorce action, a prudent title examiner would conclude that the 2009 Deed was invalid as the referenced divorce action file does not contain an entered appointment order. The 2008 Oral Directive was not enforceable.

B. The 2014 Order Has No Effect on the 2013 Judgment.

We conclude that the 2014 Order did not extinguish the lien created by the 2013 Judgment.

A *nunc pro tunc* order is an entered order with retroactive effect. "*Nunc pro tunc* is defined as *now for then*. . . . It signifies a thing is now done which should have been done on the specified date." *Whitworth v. Whitworth*, 222 N.C. App. 771, 777, 731 S.E.2d 707, 712 (2012) (emphasis added) (citation and internal marks omitted).

Our Supreme Court has held that "in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc*, provided that the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." *Creed v. Marshall*, 160 N.C. 394, 394, 76 S.E. 270, 271 (1912) (emphasis added). Our Supreme Court also has held that *orders* may be entered *nunc pro tunc* in the same manner as judgments. *See State Trust Co. v. Toms*, 244 N.C. 645, 651, 94 S.E.2d 806, 811 (1956). However, these decisions predate the General Assembly's 1994 amendment to Rule 58. Prior to 1994, a trial judge's role in creating a valid order, generally, was *to render* (that is, orally pronounce) the order from the bench, after which the order would then be noted on the record by the clerk of court. *See generally Morris v. Bailey*, 86 N.C. App. 378, 388, 358 S.E.2d 120, 126 (1987) (detailing the obligations of trial courts when issuing orders under the pre-1994 version of Rule 58). However, prior to 1994, a trial judge could not enter a *nunc pro tunc* order if an order had never been rendered in the first place. *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (concluding that a trial court's *nunc pro tunc* order granting a motion to dismiss was ineffective as the trial court did not render its order in open court).

In 1994, the General Assembly amended Rule 58 by requiring trial judges to sign written orders as a precondition to enforcement. In the present case, Judge Powell never signed a written order in 2008 when she rendered her order directing the Clerk to sign the 2009 Deed. We hold that after the 1994 amendment to Rule 58, a judge does not have the authority to enter an order *nunc pro tunc* if that judge did not previously sign a written order. *See Rockingham County DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 752, 689 S.E.2d 913, 917 (2010) (stating that "a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done"). Accordingly, we hold that Judge Powell did not have the authority to enter a *nunc pro tunc* order in this case.[1]

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1. Prior to 1994, a trial judge could enter a *nunc pro tunc* order if he or she rendered an order and the clerk of court neglected to note the original order in the record. By analogy, an argument could be made that after 1994, a trial court judge has the authority to

Assuming, *arguendo*, that Judge Powell had the authority to enter a *nunc pro tunc* order even without a signed written order, the 2014 Order did not extinguish the 2013 Judgment lien. First, as our Supreme Court held, a *nunc pro tunc* order may not be entered if it would prejudice third parties. *Creed*, 160 N.C. at 394, 76 S.E. at 271. Here, Defendant would be prejudiced by a *nunc pro tunc* order. At the time the 2013 Judgment was docketed, Husband still owned an interest in the Property, as the 2009 Deed was invalid. Our Supreme Court has long recognized that a deed is conveyed when it is delivered. *E.g.*, *Williams v. N.C. State Bd. of Ed.*, 284 N.C. 588, 598, 201 S.E.2d 889, 895 (1974). When the 2009 Deed was delivered, the Clerk had no authority to convey Husband's interest; therefore, nothing was conveyed by the 2009 Deed.[2] Validating the 2014 Order would ultimately eliminate the valid 2013 Judgment lien.

C. The 2007 ED Order Does Not Affect the Priority of the 2013 Judgment Lien.

In the 2014 Order, Judge Powell stated that the 2007 ED Order was sufficient *in and of itself* to divest Husband's title in the Property, even without her subsequent order oral directive. Specifically, Rule 70, the source of Judge Powell's authority to direct the Clerk to convey Husband's interest in the Property, also preserves the right of a judge pursuant to N.C. Gen. Stat. § 1-228 to enter a judgment which *itself* serves as the deed of conveyance. *See generally Morris v. White*, 96 N.C. 91, 2 S.E. 254 (1887) (describing the statutory precursor to N.C. Gen Stat. Stat. § 1-228, which permitted a judge to convey property by written decree without having to appoint a third party to do so). N.C. Gen. Stat. § 1-228 provides in part that "[e]very judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance." N.C. Gen. Stat. § 1-228 (2013). This authority extends to judges in equitable distribution matters. N.C. Gen. Stat. § 50-20(g) ("If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228").

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enter a *nunc pro tunc* order if he or she signed a written order, but, due to mistake, accident or neglect of the clerk, the original written order was not filed. However, this issue is not before us.

2. We note that in 2014, Husband executed a deed conveying his interest in the Property to Wife, which was prior to her conveyance of the Property to Plaintiffs. However, when Husband executed this deed, the 2013 Judgment was already docketed and, therefore, attached as a lien on his interest in the Property.

In the present case, Judge Powell did *enter* an equitable distribution order that contained language awarding the Property to Wife in 2007, six years before the 2013 Judgment was docketed. However, even if the 2007 ED Order was sufficient to constitute a conveyance under N.C. Gen. Stat. § 1-228, the 2007 ED Order does not affect the priority of the 2013 Judgment lien because the 2007 ED Order was never recorded. Indeed, N.C. Gen. Stat. § 1-228 states that a judgment "shall be regarded as a deed of conveyance" and, like any other deed, must "be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party." N.C. Gen. Stat. § 1-228. Therefore, we conclude that the entry of the 2007 ED Order has no effect on the priority of the 2013 Judgment lien.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's grant of summary judgment for Plaintiffs. We remand with instructions that the trial court enter summary judgment for Defendant on the issue that Husband still owned an interest in the Property when the 2013 Judgment was docketed.

REVERSED.

Chief Judge McGEE concurs.

Judge HUNTER, JR., concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurring in a separate opinion.

I concur in favor of reversing and remanding the trial court's summary judgment as the record discloses Defendant is entitled to judgment as a matter of law.

North Carolina became an equitable distribution jurisdiction in 1981. *See* S.L. 1981, Ch. 815, An Act for Equitable Distribution of Marital Property. It is clear the Legislature intended for equitable distribution to serve as a basis for property conveyance, making an equitable distribution order an effective means to convey property, much like a deed of conveyance. *See Id.*; N.C. Gen. Stat. § 50-20(g) (1984) ("If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in [N.C. Gen. Stat. §] 1a-1, Rule 70 and [N.C. Gen. Stat. §] 1-228."); *see also Morris v. White*, 96 N.C. 91, 2 S.E. 254 (1887). The comment to Rule 70 makes clear that "a judgment divesting title and vesting it in

other 'has the effect of a conveyance' without further words being added to the effect that the judgment 'shall be regarded as a deed of conveyance.' " N.C. Gen. Stat. § 1A-1, Rule 70, Comment (citing *Morris*, 96 N.C. 91, 2 S.E. 254; *Evans v. Brendle*, 173 N.C. 149, 91 S.E. 723 (1917)).

Like an unrecorded deed of conveyance, an equitable distribution order in itself does not establish lien priority against creditors. The Rules of North Carolina Civil Procedure, Article 11, "Lis Pendens," section 1-116, "Filing of notice of suit" provides the following in relevant part:

> (a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in all of the following cases:
>
> (1) Actions affecting title to real property. . . .
>
> (b) Notice of pending litigation shall contain:
>
> (1) The name of the court in which the action has been commenced or is pending;
>
> (2) The names of the parties to the action;
>
> (3) The nature and purpose of the action; and
>
> (4) A description of the property to be affected thereby. . . .
>
> (d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county.

N.C. Gen. Stat. § 1-116 (2015).

In light of these rules of procedure, prudent practices dictate when marital realty is held solely in an adverse party's name at the time litigation begins one should file a lis pendens with the clerk of court to notify others of the party's claim and establish priority over subsequent lien holders. After judgment conveys property like any deed, one should record the equitable distribution order with the register of deeds. Here, the 2007 equitable distribution order effectively conveyed the property from Husband to Wife, but left unrecorded, it did not establish lien priority over subsequent judgment creditors. Therefore, intervening lien holders had the opportunity to establish their interests through recordation in the race within the courthouse, to the register of deeds office.

GURNEY B. HARRIS, Employee, Plaintiff
v.
SOUTHERN COMMERCIAL GLASS, Employer, AUTO OWNERS INSURANCE, Carrier, Defendants-Appellees
and
SOUTHEASTERN INSTALLATION INC., Employer, CINCINNATI INSURANCE COMPANY, Carrier, Defendants-Appellants

No. COA15-1363

Filed 16 August 2016

1. Workers' Compensation—resolution of factual issues—determination of credibility and weight

The Industrial Commission did not err in a workers' compensation by its resolution of factual issues in the case. The Commission is charged with determination of the credibility and weight to be given to conflicting testimony. The full Commission's findings and conclusions were based largely upon Dr. Cohen's testimony rather than upon plaintiff's testimony regarding his recollection of the degree to which the incident on 1 April 2014 differed from earlier episodes.

2. Workers' Compensation—apportionment of liability—current and previous employers

The Industrial Commission did not err in a workers' compensation case by failing to apportion liability for plaintiff's benefits between defendants and plaintiff's previous employer. *Newcomb* did not hold that, as a matter of law, the Commission is required to apportion liability in every case in which the percentage of contribution of injuries that a claimant suffers while working for two different employers may be determined. Further, the Commission did not make a finding on this issue, but simply noted Dr. Cohen's testimony in response to defendants' hypothetical question.

3. Workers' Compensation—causation and material aggravation—legal standard

Although defendant contended that the Industrial Commission erred in a workers' compensation case by applying an erroneous legal standard regarding material aggravation and causation, defendant's argument lacked merit. *Moore* does not address the distinction posited by defendants, and did not state that its holding applied only to, or was based on the assumption of, a pre-existing non-work-related condition.. Further, defendants inaccurately characterized Dr. Cohen's testimony and his expert opinion as mere speculation.

4. Workers' Compensation—sufficiency of conclusions of law—alternative results

The Commission did not err in a workers' compensation case by its conclusion of law No. 7. Even assuming that this conclusion was erroneous, it did not require reversal, given that the Commission also stated in the alternative the results of its application of the *Parsons* presumption.

Appeal by defendants-appellants from Opinion and Award entered 3 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2016.

Law Office of Michael A. Swann, P.A., by Michael A. Swann, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Viral V. Mehta and Carl M. Short III, for defendants-appellees.

Muller Law Firm, by Tara Davidson Muller, and Anders Newton PLLC, by Jonathan Anders and Ray H. "Tripp" Womble, III, for defendants-appellants.

ZACHARY, Judge.

Southeastern Installation, Inc. (defendant, with Cincinnati Insurance Company, defendants) appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission"), finding defendants solely liable for workers' compensation medical and disability payments to Gurney Harris (plaintiff) that arose after 1 April 2014, as a result of plaintiff's injury on that date. On appeal, defendants argue that the Commission erred by failing to apportion liability for plaintiff's workers' compensation benefits between defendants and plaintiff's previous employer, Southern Commercial Glass, Inc. (appellee, with Auto Owners Insurance Company, appellees). We conclude that the Commission did not err in its Opinion and Award.

I. Background

The parties agree that plaintiff is entitled to workers' compensation medical and disability benefits for injury to his back arising from and occurring in the course of his employment. The controversy between the parties concerns the question of whether the Commission properly determined the liability for plaintiff's workers' compensation benefits.

On 13 July 2010, plaintiff suffered a back injury while working for appellee at a job site in Georgia. Appellees accepted plaintiff's claim as compensable, and plaintiff received workers' compensation medical and disability benefits. After this injury, plaintiff returned to his home in Lexington, North Carolina, and on 30 November 2011, plaintiff and appellees agreed to a change of jurisdiction from Georgia to North Carolina. Upon his return to Lexington, plaintiff consulted his family physician for treatment of low back pain radiating into his left leg. Plaintiff's family doctor recommended an MRI, which showed a disc protrusion on the left at L4-L5. Plaintiff's family doctor referred plaintiff to Dr. Tadhg O'Gara, an orthopedist at Wake Forest Baptist Medical Center, for treatment of back pain. Plaintiff treated conservatively with Dr. O'Gara, undergoing physical therapy and an epidural steroid injection. However, plaintiff continued to experience low back pain and on 7 October 2010, Dr. Ishaq Syed performed a left L4-L5 microdiscectomy surgery on plaintiff.

Dr. Syed reviewed an MRI conducted on 1 February 2011, and after finding no recurrent disc herniation, he referred plaintiff back to Dr. O'Gara. Plaintiff's last appointment with Dr. O'Gara was on 28 June 2011, at which time plaintiff reported having symptoms that "come and go" and that decreased with the use of anti-inflammatory medications. At this visit, Dr. O'Gara assessed plaintiff at maximum medical improvement with a fifteen percent (15%) permanent partial impairment rating to the back and permanent restrictions of lifting up to seventy-five (75) pounds.

At some point after plaintiff's accident in July 2010, appellee terminated plaintiff's employment, although appellees continued to pay plaintiff workers' compensation benefits. In January 2012, plaintiff began working for defendant, at which time plaintiff informed defendant about his July 2010 work-related injury and his resultant workers' compensation claim. Plaintiff told defendant that he had undergone back surgery, that he might need another surgery, and that appellees were paying for all medical treatment related to his July 2010 injury. As of 17 July 2014, the date of the hearing on this matter, plaintiff was still employed by defendant, and appellee was no longer in business.

Dr. Max Cohen, an orthopedic surgeon in Greensboro, North Carolina, has been plaintiff's authorized treating physician since 4 May 2012. When plaintiff first consulted Dr. Cohen, he told Dr. Cohen about his prior injury and surgery, and reported that his post-operative pain, which he rated as a five on a scale of one to ten, was improving. At that meeting, Dr. Cohen noted that plaintiff's symptoms were "fairly mild" and that plaintiff could continue working full time. Plaintiff returned to

Dr. Cohen on 25 July 2012, with complaints of back pain radiating into his left leg. Dr. Cohen ordered an MRI but continued plaintiff's release to work full time. A third MRI, obtained on 13 August 2012, showed evidence of the prior surgery at L4-L5 with recurrent/residual disc material protrusion abutting the traversing left L5 nerve root. Between September 2012 and April 2014, plaintiff was treated with pain medication, steroid injections, and medication patches. During this time, plaintiff experienced several instances of back pain that lasted for a day or more. However, plaintiff continued to work full time, sometimes as much as 70 hours a week, and continued to reject the suggestion of further surgery.

On 1 April 2014, while plaintiff was working in New York City on a job for defendant, he bent over slightly and then was unable to straighten his back. Plaintiff experienced acute pain, and testified that the severity of the pain was such that it was all he could do to walk to his hotel shower and back to bed. Plaintiff remained in bed for several days until he returned to North Carolina. Upon returning to North Carolina, plaintiff consulted with Dr. Cohen on 11 April 2014. Following this visit, Dr. Cohen placed plaintiff out of work, effective 1 April 2014. Plaintiff did not work from 1 April 2014 until the date of the hearing on this matter.

On 30 April 2014, Dr. Cohen requested authorization for plaintiff to undergo L4-L5 fusion surgery. On 5 May 2014, appellees confirmed that the surgery was authorized and that indemnity compensation would be paid from 1 April 2014. The surgery was scheduled for 19 May 2014; however, on 13 May 2014, appellees revoked their authorization and denied payment of compensation on the grounds that plaintiff had suffered a new injury on 1 April 2014, for which appellees were not liable. On 15 May 2014, plaintiff filed a motion seeking an order requiring appellees to pay for plaintiff's surgery. On 28 May 2014, former Deputy Commissioner Victoria Homick denied plaintiff's medical motion, and on 29 May 2014, former Deputy Commissioner Homick ordered that defendants be added as parties.

Appellees and defendants each filed an Industrial Commission Form 61 denying plaintiff's claim for workers' compensation medical benefits related to his surgery. Defendants contended that plaintiff's need for surgery arose from the preexisting medical condition caused by his compensable injury in July 2010, and that appellees should be responsible for plaintiff's workers' compensation benefits. Appellees asserted that plaintiff suffered a new injury on 1 April 2014, and that defendants were liable for workers' compensation benefits related to the new injury. The case was heard on 17 July 2014 before Deputy Commissioner Chrystal Redding Stanback. On 18 March 2015, Deputy Commissioner Stanback issued a

second amended opinion and award, holding that plaintiff did not suffer a compensable injury on 1 April 2014, that plaintiff's need for surgery was caused by his 13 July 2010 injury, and that appellees were solely liable for plaintiff's workers' compensation medical and disability benefits.

Appellees appealed to the Full Commission, which heard the case on 5 August 2015. On 3 September 2015, the Commission, in an opinion and award issued by Commissioner Danny L. McDonald with the concurrence of Industrial Commission Chairman Andrew T. Heath and Commissioner Charlton L. Allen, reversed Deputy Commissioner Stanback's opinion and award. The Commission found that plaintiff suffered an injury by accident as a result of a specific traumatic incident occurring on 1 April 2014; that this accident materially aggravated his back condition; and that defendants were solely liable for plaintiff's workers' compensation benefits. Defendants noted a timely appeal from the Commission's opinion and award to this Court.

II. Standard of Review

It is long established that this Court reviews the opinions and awards of the Industrial Commission in order to determine "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citation omitted). The " '[Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "The Full Commission may refuse to believe certain evidence and may accept or reject the testimony of any witness. Furthermore, '[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence . . . even if there is evidence which would support a finding to the contrary.' " *Freeman v. Rothrock*, 202 N.C. App. 273, 275-76, 689 S.E.2d 569, 572 (2010) (citing *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987), and quoting *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985)). We review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

III. The Full Commission's Resolution of Factual Disputes in this Case

[1] The parties are in agreement on the general factual and procedural history of this case, including the fact that on 1 April 2014, plaintiff experienced back pain after bending slightly in the course of performing his

job duties. The parties disagree sharply, however, as to the proper characterization and legal significance of this incident. The evidence offered by the parties at the hearing and relied upon in support of their appellate arguments reflects this dispute. Therefore, the legal issues raised on appeal are best understood in the context of the Commission's resolution of the evidentiary inconsistencies on this issue, in addition to its interpretation of the applicable legal principles.

Defendants assert that during the years following plaintiff's July 2010 injury, he suffered from recurring episodes of back pain, some of which required him to miss work, and that the incident on 1 April 2014 was no different in nature or degree from the earlier instances of back pain that plaintiff had experienced. Defendants' argument that they are not liable for plaintiff's workers' compensation benefits is premised upon their contention that the competent record evidence does not support a finding or conclusion that plaintiff suffered a new compensable injury by accident on 1 April 2014. In support of their position, defendants cite excerpts from plaintiff's testimony in which plaintiff minimized the significance of the back injury he experienced on 1 April 2014, and on testimony from Dr. Cohen acknowledging that plaintiff had experienced back pain prior to 1 April 2014.

Defendants also place great emphasis on testimony elicited from Dr. Cohen in response to a hypothetical question posed by defense counsel "based on [plaintiff's] testimony." Defendants asked Dr. Cohen to assume, hypothetically, that the Commission found the facts to be as defendants contended, based on plaintiff's testimony that the incident on 1 April 2014 was simply another instance of the "exact same pain" he had previously experienced. Given those facts, defendants asked Dr. Cohen to assign percentages to the relative contribution to plaintiff's need for surgery arising from plaintiff's prior injury and from the injury on 1 April 2014. In response, Dr. Cohen testified that under that hypothetical set of facts, plaintiff's 2010 injury contributed 70% to his condition in 2014, while plaintiff's 1 April 2014 incident contributed 30% to his need for surgery. However, as discussed below, the Commission did not adopt defendants' position in its findings of fact, rendering defendants' hypothetical question of little relevance to our analysis.

In contrast, the appellees' position is that plaintiff experienced an injury by accident as a result of a specific traumatic incident occurring on 1 April 2014. Appellees' argument is supported by Dr. Cohen's testimony, which was based upon his examination of plaintiff on 11 April 2014, his review of an MRI conducted shortly thereafter, and his

experience in reviewing "thousands" of MRIs. Dr. Cohen testified to the following observations:

> 1. When Dr. Cohen saw plaintiff on 11 April 2014, plaintiff presented with a "significant change" in his symptoms. Compared to plaintiff's prior physical examinations, plaintiff now had a "profound weakness" in his left leg.
>
> 2. Prior to 1 April 2014, plaintiff had never needed or asked to be written out of work. Dr. Cohen had no knowledge that plaintiff had ever missed work due to back pain and, if he had, Dr. Cohen had not authorized it.
>
> 3. Dr. Cohen reviewed four MRIs performed in July 2010, February 2011, August 2012, and April 2014. The first three showed the expected results of his back surgery. However, the April 2014 MRI *for the first time* showed a left foraminal and left lateral disc herniation at L4-L5. Dr. Cohen testified that "there has certainly been an injury to cause this."
>
> 4. Although plaintiff's health care providers had discussed the possibility of further surgery with plaintiff several times after July 2010, it was only after the 1 April 2014 incident that plaintiff wanted the surgery. In this regard, plaintiff testified that "after that moment, I was through. I was done. I needed the surgery after that."

Dr. Cohen then testified that his opinion, to a reasonable degree of medical certainty, was that the incident on 1 April 2014 caused "further injury to the L4-5 disc, resulting in a large recurrent disc hernia on the left at L4-5, which ultimately resulted in the need for repeat surgery" and that he could "say with medical certainty that the herniated discs likely resulted from" the 1 April 2014 incident.

The Commission was thus presented with conflicting evidence as to whether, on 1 April 2014, plaintiff suffered a new compensable injury by accident resulting from a specific traumatic incident. The Commission resolved this question in favor of appellees, as evidenced by the following findings of fact:

> 22. While working at a job site for [defendants] in New York on April 1, 2014, plaintiff bent over slightly to slide a door panel[.] . . . Plaintiff testified that he could not get back up once he bent over. Plaintiff informed his supervisor of the occurrence and some co-workers helped plaintiff back to the hotel where they were staying. Plaintiff

testified that he could not work after this event but remained in his hotel for four or five days until the job was completed. Plaintiff testified that the severity of the pain was such that it was all he could do to get to his hotel shower and back to the room.

23. Upon returning to North Carolina, plaintiff contacted Dr. Cohen's office and obtained an appointment for April 11, 2014. At that appointment, plaintiff informed Dr. Cohen that he aggravated his back ten days earlier such that he could not move his back. As noted by Dr. Cohen in his clinical assessment, plaintiff "was bent over and slid a box on the ground and felt his back 'catch.' " Since that event, plaintiff had been unable to return to work. Plaintiff relayed an interest in surgery to Dr. Cohen for the first time, and Dr. Cohen ordered an updated MRI to assess surgical options. Dr. Cohen also excused plaintiff from work pending reevaluation.

24. Compared to the February 2011 MRI, the MRI of April 27, 2014 showed the development of a left L4-L5 foraminal to lateral disc protrusion effacing the left lateral recess, deflecting the traversing nerve roots, and narrowing the left foramen. Dr. Cohen noted plaintiff's pain severely affected his quality of life such that he was unable to work. Dr. Cohen further noted that plaintiff recently developed profound left lower extremity weakness and wanted to pursue surgical options. Dr. Cohen wrote plaintiff out of work pending surgery.

. . .

26. Plaintiff testified that it was his understanding he was out of work due to the pending surgery with Dr. Cohen, not because he could not work. However, Dr. Cohen's medical note of April 30, 2014 states, "presently, [plaintiff] remains disabled from gainful employment."

. . .

28. In a post-hearing deposition, [appellees] tendered Dr. Cohen as a medical expert in the field of orthopedic surgery without objection from the other parties. Dr. Cohen testified that the changes seen on plaintiff's lumbar spine MRI obtained in August 2012 were typical of what he

would expect to see in someone who had undergone a discectomy. Dr. Cohen testified that from the time he began treating plaintiff in 2012 until he presented on April 11, 2014, plaintiff maintained a diagnosis of radiculitis and post-laminectomy syndrome representing the previous microdiscectomy. However, Dr. Cohen testified that when plaintiff returned on April 11, 2014, "there had been a significant change in his symptoms" and "[h]e was in such bad shape that he wanted to entertain pursuing surgery, which was something that he in the past had wanted to avoid." Dr. Cohen testified that plaintiff related his significant symptomatic change to an event at work that aggravated his underlying back condition.

29. Dr. Cohen testified that the updated MRI obtained in April 2014 showed a large, recurrent disc herniation on the left at L4-L5, which he described as "a significant change compared to the previous studies." Dr. Cohen testified that, while there is some degree of speculation as to causation, it was his opinion, to a reasonable degree of medical certainty, that plaintiff suffered further injury to the L4-L5 lumbar spine on April 1, 2014, which resulted in his need for a repeat surgery. He based this opinion on plaintiff's profound increase in symptoms that came on suddenly as a result of the work event of April 1, 2014, along with the material change in plaintiff's lumbar spine seen on the April 2014 MRI as compared to prior studies.

30. Dr. Cohen testified that plaintiff already had an unhealthy disc from his 2010 injury and prior surgery and that medical history set plaintiff up for the subsequent injury he sustained on April 1, 2014. Dr. Cohen testified that he did not envision the work event of April 1, 2014 to have been an extremely strenuous activity, but that it didn't have to be in order to cause the disc herniation plaintiff suffered.

31. Dr. Cohen rendered an opinion, to a reasonable degree of medical certainty, and the Commission so finds, that the work event of April 1, 2014 caused injury to plaintiff's L4-L5 disc and materially aggravated his pre-existing back condition. Dr. Cohen clarified that, although plaintiff was a surgical candidate for a lumbar fusion as early as September 14, 2012, plaintiff's symptoms were still tolerable to him

> at that time and he electively deferred surgery. However, there was a clear difference in plaintiff's symptoms subsequent to April 1, 2014, such that plaintiff could no longer work and wanted to promptly pursue surgery. Dr. Cohen opined that, considering plaintiff's back condition, he would relate seventy percent (70%) of plaintiff's need for back surgery to his July 2010 injury and thirty percent (30%) to the aggravation of that original injury during the April 1, 2014 work event. Dr. Cohen further testified that plaintiff was zero percent (0%) disabled prior to April 1, 2014, as far as wage earning capacity, but plaintiff was one hundred percent (100%) disabled after April 1, 2014.
>
> 32. The preponderance of the evidence in view of the entire record establishes that, on April 1, 2014, plaintiff suffered a "specific traumatic incident" . . . during a judicially cognizable time period, and that specific traumatic incident qualifies as a compensable injury by accident as defined by the North Carolina Workers' Compensation Act and applicable case law. The Commission further finds that plaintiff sustained a material aggravation of his July 2010 back condition as a result of the specific traumatic incident that arose out of and in the course of his employment with [defendants] on April 1, 2014.
>
> . . .
>
> 34. The preponderance of the evidence in view of the entire record establishes that plaintiff became temporarily and totally disabled from work as of April 1, 2014 as a result of his aggravation injury to the back.

As discussed above, the Commission is charged with determination of the credibility and weight to be given to conflicting testimony. In this case, the Full Commission's findings and conclusions were based largely upon Dr. Cohen's testimony rather than upon plaintiff's testimony regarding his recollection of the degree to which the incident on 1 April 2014 differed from earlier episodes.

IV. Apportionment of Liability

[2] Defendants argue first that the Commission erred by failing to apportion liability for plaintiff's workers' compensation benefits between defendants and appellees. Defendants contend that the Commission was required to apportion liability, based upon (1) Dr. Cohen's response

to defendants' hypothetical question and (2) this Court's opinion in *Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 677 S.E.2d 167 (2009). We do not find either of these arguments persuasive.

In *Newcomb*, as in the present case, the plaintiff suffered successive back injuries while working for two different employers. The Commission found that the medical evidence did not establish the degree to which the plaintiff's injuries and disability arose from each accident, and held that the two employers were jointly and severally liable. On appeal, this Court held that the Commission had not abused its discretion based upon the facts of the case, and stated that:

> [H]ad the Full Commission been able to determine what percentage of plaintiff's disability stemmed from his 2003 compensable injury and what percentage stemmed from his 2006 compensable injury, then the Full Commission would have apportioned responsibility for the disability benefits accordingly. Because the Full Commission could not so determine, both employers became responsible for the full amount, resulting in joint and several liability. The Full Commission's opinion and award is supported by reason and shows the exercise of good judgment and consideration of equitable principles.

Newcomb, 196 N.C. App. at 682, 677 S.E.2d at 171. Defendants assert that this statement constitutes a definitive ruling that the Commission "is required" to apportion liability whenever it is possible to determine the respective percentages of causation. However, this Court's holding in *Newcomb* was that the Commission did not abuse its discretion by ruling that the employers were jointly and severally liable where the percentages were not apparent. *Newcomb* did not hold that the Commission would have erred as a matter of law if, in a hypothetical case with different facts, the Commission had failed to apportion liability. Moreover, such a statement would be *dicta*, given that it was not necessary for resolution of the issues presented in *Newcomb*.

Secondly, contrary to defendants' arguments, in the present case the Commission did not assign numerical or percentage values to the relative contributions of plaintiff's 2010 and 2014 injuries to plaintiff's need for surgery or his temporary total disability. The Commission noted Dr. Cohen's testimony, which was given in response to defendants' hypothetical question, that 70% of plaintiff's need for surgery was due to his 2010 injury and only 30% was caused by the incident on 1 April 2014. However, the Commission did not make a finding adopting this testimony as a

fact. "This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence[.]" *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). " '[R]ecitations of the testimony of each witness *do not* constitute findings of *fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.' " *Winders v. Edgecombe Cty. Home Health Care*, 187 N.C. App. 668, 673, 653 S.E.2d 575, 579 (2007) (emphasis in original) (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195, n.1 (1984)). Thus, the Commission's statement that Dr. Cohen had "opined" that he could relate 70% of plaintiff's need for back surgery to his 2010 injury does not constitute a finding by the Commission that it was adopting these percentages as fact.

Moreover, Dr. Cohen's testimony was elicited in response to a question asking Dr. Cohen to assume that the Commission would find the facts to be in accord with plaintiff's testimony. However, the Commission did not find, as defendants contended, that the incident on 1 April 2014 was essentially identical to many prior instances of back pain experienced by plaintiff. Instead, the Commission adopted Dr. Cohen's opinion, which was offered to a reasonable degree of medical certainty, that plaintiff's need for surgery in 2014 arose from a specific injury on 1 April 2014. Defendants never asked Dr. Cohen what percentages he would assign based on Dr. Cohen's own testimony and medical records. Nor did defendants ask for Dr. Cohen's opinion based on the assumption that the Commission would resolve the factual inconsistencies in favor of appellees. Because Dr. Cohen's testimony was premised on an assumption that did not come to pass -- that the Commission would resolve the parties' factual dispute in favor of defendants -- the percentages to which Dr. Cohen testified cannot be applied to the facts as found by the Commission.

We conclude that *Newcomb* did not hold that, as a matter of law, the Commission is required to apportion liability in every case in which the percentage of contribution of injuries that a claimant suffers while working for two different employers may be determined. Further, in this case the Commission did not make a finding on this issue, but simply noted Dr. Cohen's testimony in response to defendants' hypothetical question. Finally, Dr. Cohen's testimony was predicated on the hypothetical assumption that the Commission would find that the 1 April 2014 incident was no different from plaintiff's earlier episodes of back pain.

Given that the Commission found to the contrary, Dr. Cohen's testimony would not support a finding as to the percentages of causation based on plaintiff's having suffered a new injury on 1 April 2014.

V. The Commission's Analysis of Causation and Material Aggravation

[3] Defendants argue next that the Commission "applied erroneous legal standards regarding material aggravation and causation." Specifically, defendants contend that (1) the Commission erred by citing *Moore v. Federal Express*, 162 N.C. App. 292, 590 S.E.2d 461 (2004), in support of its conclusion that the incident on 1 April 2014 materially aggravated plaintiff's prior back injury; (2) the Commission's conclusion that plaintiff's condition was causally related to a new injury was "based on legally incompetent medical testimony"; and (3) the Commission erred in its application of the *Parsons* presumption to the facts of this case. We conclude that defendants' arguments lack merit.

A. Commission's Conclusion on Material Aggravation of Plaintiff's Condition

In Conclusion of Law No. 6, the Commission stated in relevant part that:

> The Commission concludes that plaintiff suffered a specific traumatic incident on April 1, 2014 as a result of the work assigned by [defendants], which aggravated his pre-existing back condition and is, therefore, compensable. N.C. Gen. Stat. § 97-2(6); *Moore v. Fed Express*, 162 N.C. App. at 297, 590 S.E.2d at 465; *Click* [*v. Pilot Freight Carriers*,] 300 N.C. [164,] 167-68, 265 S.E.2d [389,] 391 [(1980)].

Defendants argue that the Commission erred by citing *Moore* in support of this conclusion of law, on the grounds that *Moore* "does not apply to pre-existing, work-related conditions" and that the analysis in *Moore* "assumes that the underlying condition is not related to a compensable event[.]" *Moore*, however, addressed the material aggravation of a prior *work-related* condition. *Moore* does not address the distinction posited by defendants, and did not state that its holding applied only to, or was based on the assumption of, a pre-existing non-work-related condition. Defendants' argument on this issue is without merit.

B. Commission's Conclusions Regarding the 1 April 2014 Incident

Defendants argue next that the Commission "improperly concluded that Plaintiff's condition arose from a new specific traumatic incident or accident on 1 April 2014[.]" We disagree.

Defendants contend that the Commission "erred as a matter of law by using only findings of onset of pain to conclude that a specific traumatic incident occurred." However, as set out above, the Commission's conclusion that plaintiff suffered a specific traumatic incident on 1 April 2014 was based on more than the fact that the incident caused plaintiff to experience pain. The Commission found that "Dr. Cohen rendered an opinion, to a reasonable degree of medical certainty, and the Commission so finds, that the work event of April 1, 2014 caused injury to plaintiff's L4-L5 disc and materially aggravated his pre-existing back condition." Thus, the Commission's conclusion was based on expert medical testimony, and not merely the temporal connection between the incident on 1 April 2014 and the "onset of pain."

Defendants also argue that the Commission improperly relied upon Dr. Cohen's testimony, on the grounds that it was based on speculation. Defendants correctly note that "[a]lthough medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). We conclude, however, that defendants have inaccurately characterized Dr. Cohen's testimony and his expert opinion as mere speculation.

Defendants' argument is based primarily upon selected excerpts from Dr. Cohen's testimony. Defendants contend that Dr. Cohen "actually agree[d] that his testimony was speculative[.]" Our review of Dr. Cohen's deposition, however, indicates that Dr. Cohen testified that, notwithstanding the degree of speculation inherent in any medical diagnosis, he believed to a reasonable degree of medical certainty that plaintiff's condition arose from a new injury on 1 April 2014 as opposed to simply the gradual progression of his back condition arising from his July 2010 injury. The testimony cited by defendants was elicited during defendants' cross-examination of Dr. Cohen, during which defendants pressed Dr. Cohen to concede that it was impossible to state with absolute certainty whether plaintiff's condition arose from the incident on 1 April 2014. As demonstrated in the following excerpt, Dr. Cohen acknowledged that certainty was impossible, but testified that, based on his experience with many patients and having reviewed "thousands" of MRIs, he had reached the conclusion that plaintiff's condition was not simply the result of a gradual deterioration:

> DEFENDANTS' COUNSEL: Now, there was no MRI of the lumbar spine taken between August of 2012 and April of 2014.
>
> DR. COHEN: Correct.

DEFENDANTS' COUNSEL: And the MRI doesn't tell us when the disc further herniated. Correct?

DR. COHEN: Correct.

. . .

DEFENDANTS' COUNSEL: I mean, it doesn't tell us whether there was some acute event or whether it was all progression.

DR. COHEN: Correct.

. . .

DEFENDANTS' COUNSEL: But it's still your testimony that -- well, let me put it this way: Is it your opinion that the disc was completely stable, in the exact same condition from August of 2012 until April 1st of 2014, when it burst out due to this incident, or that there was probably progression in the meantime?

DR. COHEN: Well, I don't know. I'm speculating here, but just from seeing thousands and thousands of patients and MRI scans, . . . I would not expect that degree of herniation that we were seeing on that 2014 MRI scan to be asymptomatic. But again, it possibly could be, but I would not expect it[.] . . . It appears to me that it's more than just a slow progression, but, again, you are correct in saying that I can't say that with certainty, but just my previous experience tells me that there was some acute change in the disc.

On redirect examination, Dr. Cohen reiterated his opinion, to a reasonable degree of medical certainty, that plaintiff's need for surgery arose from a specific incident on 1 April 2014:

APPELLEES' COUNSEL: Now, certainly I believe -- please correct me, but I heard you saying that there's -- on cross-examination, there is a degree of speculation involved in this. Is that correct?

DR. COHEN: Yes.

APPELLEES' COUNSEL: That you certainly aren't with [plaintiff] or any of your patients on a day-to-day basis. Is that correct?

DR. COHEN: Yes.

APPELLEES' COUNSEL: You have to go by what they're telling you on these medical records.

DR. COHEN: Correct.

APPELLEES' COUNSEL: And in this case, we can also go by what [plaintiff] is telling the Court at [the] hearing . . . (Reading) "I couldn't work, couldn't work. It was all I could do to get to the shower and back." Based on this testimony, based on your medical records, based on your recollection, did the April 1, 2014, incident make him surgical (sic)?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it materially aggravate his condition?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it materially increase his pain complaints?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it decrease his range of motion?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did the MRI taken after that April 1, 2014, [incident] have new objective findings?

DR. COHEN: Yes.

APPELLEES' COUNSEL: And were those the nerve impingement you described earlier?

DR. COHEN: The enlargement of the disc, herniation, and the nerve root impingement.

APPELLEES' COUNSEL: These are all your opinions to a reasonable degree of medical certainty?

DR. COHEN: Yes.

We conclude that although Dr. Cohen candidly acknowledged that he could not offer a medical opinion to a degree of absolute certainty

that entirely removed all speculation, Dr. Cohen's opinion, to a *reasonable* degree of medical certainty, was that plaintiff had experienced a new injury on 1 April 2014 that materially aggravated plaintiff's prior back condition. In this regard, we note the Commission's Finding of Fact No. 29, which states that:

> 29. Dr. Cohen testified that the updated MRI obtained in April 2014 showed a large, recurrent disc herniation on the left at L4-L5, which he described as "a significant change compared to the previous studies." Dr. Cohen testified that, while there is some degree of speculation as to causation, it was his opinion, to a reasonable degree of medical certainty, that plaintiff suffered further injury to the L4-L5 lumbar spine on April 1, 2014, which resulted in his need for a repeat surgery. He based this opinion on plaintiff's profound increase in symptoms that came on suddenly as a result of the work event of April 1, 2014, along with the material change in plaintiff's lumbar spine seen on the April 2014 MRI as compared to prior studies.

Based upon our review of the entire transcript of Dr. Cohen's deposition, we conclude that Dr. Cohen's opinion was not based on mere speculation, and that the Commission did not err by relying in part upon Dr. Cohen's testimony for its findings and conclusions.

C. The *Parsons* Presumption

[4] Finally, defendants argue that the Commission erred by stating in Conclusion of Law No. 7 that because plaintiff "sustained a new work-related injury by accident as the result of a specific traumatic incident on April 2, 2014, arising out of his employment with [defendant], application of the *Parsons* presumption is not applicable in this case." We conclude that even assuming that this conclusion was erroneous, it does not require reversal, given that the Commission also stated in the alternative the results of its application of the *Parsons* presumption.

In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997), this Court held that after a workers' compensation claimant meets the initial burden of proving the compensability of an injury, there arises a presumption that further medical treatment is directly related to the compensable injury. " 'The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.' " *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (quoting *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005)). Thus, the issue to

which *Parsons* is generally applied is the compensability of a claimant's injury. In this case, the parties agree that plaintiff is entitled to workers' compensation benefits, and disagree only as to how the liability for these benefits should be determined.

In Conclusion of Law No. 7, the Commission also stated that:

> Assuming *arguendo* that *Parsons* is applicable, the Commission concludes that [appellees] successfully rebutted the *Parsons* presumption based upon the expert medical opinion of Dr. Cohen, and that plaintiff failed to satisfy his burden of proof once it shifted back to him.

Defendants concede that because the Commission applied the *Parsons* presumption despite its conclusion that *Parsons* was not applicable to this case, "a reversal on this issue may not change the outcome for [defendants]." Defendants nonetheless ask this Court to address this issue "to provide clarity for future matters." However, "[a]s this Court has previously pointed out, it is not a proper function of courts '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.' " *Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) (quoting *Adams v. North Carolina Department of Natural and Economic Resources*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978)). Because the Commission stated its ruling applying the *Parsons* presumption, we are not required to determine the merits of its conclusion that *Parsons* did not apply on the facts of this case, and we decline to entertain it as a hypothetical question.

For the reasons discussed above, we conclude that the Industrial Commission did not err and that its Opinion and Award should be

AFFIRMED.

Judge STEPHENS and Judge McCULLOUGH concur.

IN RE E.M.

[249 N.C. App. 44 (2016)]

IN THE MATTER OF E.M.

No. COA16-30

Filed 16 August 2016

Child Abuse, Dependency, and Neglect—permanency planning review—sufficiency of findings of fact

The trial court erred in part in a permanency planning review (PPR) by entering its findings of fact. The court improperly required respondent to pay for supervised visits without making necessary findings, waived further review hearings without making all necessary findings of fact, awarded legal custody to a non-parent without evidence to support its findings that the potential custodians understood the legal significance of the relationship, and awarded custody to a non-parent without stating that it had applied the proper standard of proof. These portions of permanency plan order were vacated.

Appeal by Respondent from order entered 8 October 2015 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 25 July 2016.

Jane Thompson for Petitioner Rowan County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for Respondent-mother.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for Guardian ad Litem.

STEPHENS, Judge.

Respondent, the mother of E.M. ("Eddie"),[1] appeals from a permanency planning review order (1) changing the permanent plan for her son from a concurrent plan of reunification, or custody or guardianship with a relative, to a sole plan of custody or guardianship with a relative and (2) awarding legal custody of Eddie to a paternal cousin and his wife. Because we agree with some of Respondent's arguments and conclude that the order appealed from is flawed in

1. We use pseudonyms to refer to the minors discussed in this opinion in order to protect their privacy and for ease of reading. *See* N.C.R. App. P. 3.1(b).

certain respects, we vacate the permanency planning review order in part and remand for further proceedings.

Factual and Procedural History

On 7 April 2014, the Rowan County Department of Social Services ("DSS") took Eddie and his half-sister, A.M. ("Abby"), into nonsecure custody and filed a petition alleging that Eddie was a dependent and neglected juvenile and that Abby was an abused, dependent, and neglected juvenile.[2] The petition alleged that Eddie's father sexually molested Abby in the home he shared with Respondent and the two children and that Respondent knew of the sexual abuse, but failed to report it to law enforcement or DSS.

At the adjudication hearing on 31 July 2014, the parties entered several stipulations, including that the district court could consider evidence of statements made by Abby regarding the sexual abuse and that the court could adjudicate Abby as an abused juvenile and Eddie as a neglected juvenile. Respondent's stipulations included the following: In mid-February 2014 when Respondent returned from the hospital after giving birth to Eddie, Abby told Respondent that Eddie's father had come into her bedroom at night, made her take off her clothes, have her put on a robe but leave it untied, and "ma[d]e her hump a doll." Abby reported that on another occasion Eddie's father pulled her pants down and "tried sticking [his penis] in [her]." Respondent did not believe Abby's statements and did not report her daughter's abuse at that time. Abby's abuse at the hands of Eddie's father was subsequently revealed in statements Abby gave to a social worker on 3 March 2014. Respondent also stipulated that although she had previously entered into a safety assessment with DSS that Eddie's father not be around her children, Eddie's father was in the home with Abby throughout the early months of 2014 and up until at least 1 April 2014.

Respondent subsequently separated from Eddie's father and, on 29 April 2014, moved into a two-bedroom home which she shared with Eddie's paternal uncle ("Mike"). Respondent denied having a romantic relationship with Mike despite reports from several people that they were involved in such a relationship. On 26 July 2014, police were dispatched to the home to investigate a purported domestic dispute between Mike and Respondent, but no report was filed. However, Respondent's

2. Eddie and Abby are Respondent's children by different fathers. Eddie's father has not appealed, and Abby is not a subject of this appeal. In addition, Respondent has three other children, also not subjects of this appeal. Their father, Respondent's estranged husband, was awarded custody of his children on 31 March 2014.

estranged husband reported to a DSS social worker that, during a visit his three children made to Respondent's home, Mike became upset with Respondent and punched his hand through a glass window, requiring stitches. Respondent told the social worker that she and Mike do not drink alcoholic beverages in the home, but when the social worker and a co-worker visited the home on 9 July 2014, Mike was intoxicated. Although Respondent attempted to intervene, Mike stated he was getting another drink and "as long as he is drunk at home his drinking isn't a problem." Mike did acknowledge that he was on probation for driving while impaired.

On 27 August 2014, the court entered a written order adjudicating Abby as an abused and neglected juvenile and adjudicating Eddie as a neglected juvenile. The court awarded custody of Abby to her father and custody of Eddie to DSS, who placed him in the home of his paternal cousins. The order included the stipulations discussed *supra*, as well as findings of fact that Respondent, *inter alia*, (1) began working through Select Staffing on 29 April 2014 at a boutique earning $7.75 per hour, working nine to forty hours per week; and (2) completed the Women's Empowerment Program for victims of domestic violence at Genesis on 21 July 2014 and attended two individual mental health counseling sessions on 30 July 2014; but (3) "typically [appeared] disheveled" during visits with the social worker and Eddie. The order directed Respondent to maintain safe, sanitary, and stable housing; maintain employment to support herself and Eddie and to provide proof of income; complete parenting classes and show skills learned; submit to random drug screens; and re-engage in mental health treatment if her depression and/or anxiety worsened. The court postponed establishment of a permanent plan to the first permanency planning review ("PPR") hearing.

On 13 November 2014, the court held a PPR hearing and, on 19 December 2014, filed an order establishing a permanent plan of reunification of Eddie with Respondent. The court's findings of fact indicated that, at the time of the hearing, Eddie was living with his paternal cousins, in whose care he was doing extremely well. At the time of the PPR hearing, Respondent had completed all of her treatment recommendations through Genesis, shown initiative by continuing to participate in mental health treatment, and attempted to enroll in various parenting classes. She continued to work through Select Staffing and started a new job on 26 August 2014 earning $9.00 per hour. However, Respondent could not afford to pay her bills based solely on her income. Her highest bi-weekly paycheck was $259.60, representing 40 hours of work plus a half hour of overtime. Pay records from Select Staffing indicated that

Respondent earned approximately $600 per month in income, which the court noted was less than the total required for her to meet all of her household expenses. In addition, Respondent reported continuing to drive her car without insurance since 15 August 2014 because she was unable to pay the premium.

Social workers visited Respondent's home on 14 August, 27 August, and 4 September 2014. Although the social workers advised Respondent and Mike that they could not recommend placement of Eddie with Respondent as long as Mike resided in the home, Mike continued to live there. Upon being informed of this recommendation, Mike became very aggressive and cursed the social workers. He also spoke very aggressively toward Respondent, "telling her to shut up and let him talk." Although Respondent "verbalized her realization that her living arrangements will continue to present a hostile environment" for herself and Eddie, she refused to live separately from Mike. The court found as fact that Respondent's continued willingness to accept disrespectful behavior from Mike also indicated her inability to effectively implement the relationship skills she had learned at Genesis. Respondent had not attempted to obtain more affordable housing for herself and Eddie, but had disposed of unrelated pending criminal charges, completed negative drug screens, and visited with Eddie weekly for a minimum of two hours each visit.

On 12 February 2015, the district court held another PPR hearing and filed an order on 17 March 2015 changing the permanent plan for Eddie to a concurrent plan of reunification and custody or guardianship with a relative or court-approved caretaker. The court's findings of fact indicated that Eddie was continuing to do well in his foster home. Respondent still lived in the same residence and worked through Select Staffing, earning between $131.89 and $487.77 per paycheck. Although Mike reportedly moved out of the residence on 10 December 2014 to an undisclosed address, Respondent continued to care for his three dogs and their two cats. Mike also continued to have weekly visitations with his own child in Respondent's home. Respondent spent a lot of time with Mike and his family during the holidays, even though she had begun dating another man in September 2014. She brought Mike, who was intoxicated, to a visit with Eddie at his foster home on 12 January 2015. Respondent continued to submit negative drug screens, and she completed all of her treatment recommendations.

On 27 August 2015, the court conducted another custody and PPR hearing, and, on 8 October 2015, filed the order under review ("the PPR order"). The findings in this order indicated that Eddie continued

to do well in the home of his paternal cousins. Respondent obtained employment with Pactiv on 14 July 2015 and produced a pay stub stating she earned $998.53 for the period from 2 August to 15 August 2015. Respondent was dating a fellow employee at Pactiv. Although Respondent's new boyfriend told social workers that he did not smoke or drink, a check of criminal records disclosed that he was convicted in 2009 of driving while impaired and driving after consuming alcohol. Respondent also continued to maintain a relationship with Mike. Further findings of fact will be discussed later in this opinion as pertinent to the issues raised by Respondent in her appeal. The court granted legal custody of Eddie to his paternal cousins, granted weekly supervised visitation to Respondent at her expense, and ordered that no further review hearings were necessary. From the PPR order, Respondent filed a written notice of appeal on 30 October 2015.

Discussion

On appeal, Respondent argues that the district court erred in: (1) making numerous findings of fact in the PPR order not supported by clear, cogent, and competent evidence; (2) failing to make the findings of fact required by the provisions of various statutes; (3) requiring her to pay the costs of services for her supervised visits without making the necessary findings of fact; and (4) failing to apply the required standard of proof when finding that Respondent acted inconsistently with her constitutional rights as a parent. We affirm in part, and vacate and remand in part.

Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the [district] court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the . . . court's conclusions, and whether the. . . court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted). "An abuse of discretion occurs when the [district] court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

I. Evidentiary support for findings of fact

Respondent first argues that many of the district court's findings of fact are not supported by clear, cogent, and competent evidence

presented at the custody and PPR hearing. We dismiss Respondent's argument regarding a majority of the challenged factual findings as not preserved for our review, and we conclude that any error in the remaining findings of fact challenged by Respondent was not prejudicial to her.

Respondent contends that a majority of the findings of fact are based upon court reports and documents that were never offered or received into evidence. However, the record indicates that Respondent failed to preserve this issue for appellate review by presenting to the district court "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." *See* N.C.R. App. P. 10(a). The hearing transcript shows that the challenged reports and documents were referred to several times, but that Respondent made no objection or motion to strike or exclude the evidence. Further, even if Respondent had preserved this issue for appellate review, she could not show error because a court holding a PPR hearing is free to consider written reports or other documentary evidence without a formal proffer or admission of the documents into evidence as exhibits.[3] *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 239 (2015).

Here, as Respondent acknowledges, the majority of the findings of fact she challenges are based upon court reports and other documentary exhibits. We hold the district court properly considered the reports and attachments and that they, supplemented by testimony of witnesses, support challenged findings of fact 2, 8-11, 12-17, 19-21, 24, 26-28, 34, 43-44, and 48.

Respondent also challenges portions of finding of fact 49, in which the district court found that Respondent appeared to be active on several internet "adult dating sites." Respondent argues this matter was not relevant to her ability to parent her child. We agree, but note that the inclusion of an erroneous finding of fact is not reversible error where the court's other factual findings support its determination. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (holding that "[w]hen . . . ample other findings of fact support an adjudication of

3. In the preamble to its findings of fact, the district court stated that it considered the sworn testimony of a named social worker, the foster mother, Respondent, and the social worker's written court report dated 15 July 2015 and supplemented on 27 August 2015, "copies of which are attached hereto, the factual statements in the reports are hereby adopted and incorporated, except as modified by reference herein . . . ." The reports were omitted from the record on appeal, but have been attached as appendices to the joint brief filed by DSS and the Guardian *ad Litem*. On our own motion pursuant to N.C.R. App. P. 9(b)(5)(b), we add these reports to the record on appeal.

neglect, erroneous findings unnecessary to the determination do not constitute reversible error") (citation omitted). For the same reason, Respondent cannot show reversible error in finding of fact 52—that DSS had contended reunification was not in Eddie's best interest—which she characterizes as a "mere recitation of a contention or statement of DSS." Respondent does not explain how this recitation, which she does not contend is inaccurate, was in any way necessary to the court's determination given the other factual findings in support of the court's permanent plan, as discussed *infra*.

II. Compliance with statutory provisions

Respondent argues that the PPR order failed to comply with the requirements imposed by several of our State's General Statutes. We address each argument individually below.

A. Compliance with section 7B-906.1(d)(3)

Respondent contends that the district court erred in ceasing reunification efforts because its findings of fact failed to comply with the provisions of section 7B-906.2(b), which became effective 1 October 2015 and "applies to actions filed or pending on or after that date." *See* 2015 N.C. Sess. Laws c. 135, §§ 14, 18. This subsection provides that reunification shall be the primary or secondary permanent plan unless the court makes findings under N.C. Gen. Stat. § 7B-901(c)—which the district court here did not do—or "makes written findings that reunification efforts clearly would be *unsuccessful or would be inconsistent with the juvenile's health or safety*." N.C. Gen. Stat. § 7B-906.2(b) (2015). Prior to 1 October 2015, the provisions of section 7B-906.1(d)(3) applied to PPR orders and required a factual finding that "efforts to reunite the juvenile . . . clearly would be *futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time*." N.C. Gen. Stat. § 7B-906.1(d)(3) (2013).

The PPR order here uses the language from section 7B-906.1(d)(3), but Respondent asserts that the amended statute applies because the PPR order was not filed until 8 October 2015. Alternatively, Respondent argues that even if section7B-906.1(d)(3) applies to the PPR order, the district court's findings of fact do not establish clear futility or an unsafe environment. We conclude that section 7B-906.1(d)(3) applies in this matter and further that the PPR order complies with the requirements of that statute.

We first note that, although the written PPR order was signed and filed on 8 October 2015, after the effective date of section 7B-906.2, the

PPR hearing was conducted and concluded on 27 August 2015, and that the court's ruling—that reunification efforts would be ceased and Eddie's permanent plan would be changed to custody with his paternal cousins—was announced in open court on that date. The question, then, is whether the "action" was still "pending" after the hearing concluded. "Pending" is defined as "[r]emaining undecided [or] awaiting decision[,]" *see Pending*, Black's Law Dictionary (9th ed. 2009), and the district court certainly could, upon reflection, have elected to alter some aspect of the ruling it announced in open court when reducing its ruling to writing in the PPR order. However, the PPR order did not vary in any way from the ruling announced in open court.

Critically, both subsection 7B-906.1(d) and subsection 7B-906.2(b) provide guidance for the district court's action *at a PPR* "hearing[.]" See N.C. Gen. Stat. § 7B-906.1(d) ("At each hearing . . . ."); s*ee also* N.C. Gen. Stat. § 7B-906.2(b) ("At any permanency planning hearing . . . ."). Here, *at the time of the PPR hearing*, the criteria the court was directed to consider were those enumerated in subsection 7B-906.1(d). Respondent's interpretation of the effective date of section 7B-906.2(b) would require us to hold that, in deciding a child's permanent plan, the district court should have considered criteria listed in a statute which was not in effect at the time of the proceeding at which the court heard evidence regarding the permanent plan. Such a holding would be nonsensical. In matters of statutory construction, we are guided by the directive to "effectuate legislative intent . . . while avoiding absurd or illogical interpretations . . . ." *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012).

In turn, the "finding" of futility "is in the nature of a conclusion of law that must be supported by adequate findings of fact." *In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 243 (citation and internal quotation marks omitted). The district court's conclusion of law 4 states that continuation of a plan of reunification with Respondent "would be futile and is inconsistent with the juvenile's need for a safe, stable home within a reasonable period of time." This conclusion of law is supported by the court's findings of fact that: (1) Respondent stipulated that she was aware of the sexual abuse of another of her children by Eddie's father but failed to report it to law enforcement; (2) although Respondent had been participating in a parenting program since March 2015, the parent-educator who worked with her wrote a letter on 10 August 2015 expressing concern about Respondent's ability to protect her child against abuse; (3) the same parent-educator noted that when she and Respondent

discussed the topic of child abuse prevention on 6 August 2015, just days before the PPR hearing, Respondent "slumped down in her chair and appeared agitated"; (4) Respondent told the parent-educator that if she suspected abuse of a child she would "just leave" and stated emphatically that she would not call law enforcement or DSS "because nothing would be done about it"; (5) Respondent knew that placement of Eddie in her home would not be recommended if there were still concerns about her living, parenting, and financial situation and, at the February 2015 review hearing, Respondent was ordered to explore affordable housing options separate from the man with whom she was living at the time, attend visitation with Eddie, maintain employment, submit to random drug screens, and demonstrate skills learned from parenting class, but at the time of the hearing in August 2015, Respondent had moved in with another man upon whom she is dependent for housing and from whom she receives financial support; and (6) Respondent was often observed using her cell phone to text or make calls and watching television instead of interacting with Eddie during visits. In addition, the court found as fact that (7) Eddie often looked to Respondent for comfort during visits but Respondent seldom gave her son comfort; (8) Eddie attempted to talk to Respondent but she did not listen to her son; and (9) Respondent did not follow the parent-educator's recommendations to bring toys and prepare activities for visits with Eddie, to greet Eddie at the beginning of visits, and to end visits with a hug or kiss. These findings of fact support the conclusion of law that continuation of a plan of reunification with Respondent "would be futile and is inconsistent with the juvenile's need for a safe, stable home within a reasonable period of time."

B. Compliance with section 7B-906.1(j)

Respondent next contends that the district court erred by granting custody to a non-parent without verifying that the person receiving custody understood the legal significance of the placement and will have adequate resources to care appropriately for the juvenile as required by N.C. Gen. Stat. § 7B-906.1(j). Specifically, while Respondent acknowledges that the court did find that the paternal cousins who received custody of Eddie "understand the legal significance of custody and have sufficient resources to care appropriately for the juvenile," this finding is not supported by evidence presented at the hearing. We agree in part and disagree in part.

Although a district court is not required to make specific findings of fact, "the statute does require the . . . court to make a determination that the guardian has adequate resources and some evidence of

the guardian's resources is necessary as a practical matter, since the . . . court cannot make any determination of adequacy without evidence . . . ." *In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (citation and internal quotation marks omitted). For example, in *In re P.A.*, we found the utter lack of actual evidence regarding the guardian's resources insufficient to support the district court's determination:

> [The guardian's] unsworn affirmative answer to the . . . court's inquiry as to whether she had the financial and emotional ability to support this child and provide for its need alone is not sufficient evidence, as this is [the guardian's] own opinion of her abilities. No doubt, had the . . . court asked [the] respondent the same question, she also would have said yes, but her answer alone would not have been sufficient evidence of her actual resources or abilities to care for [the child] either. The . . . court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate[]. In this case, there is no evidence at all of what [the guardian] considered to be adequate resources or what her resources were, other than the fact that she had been providing a residence for [the child]. And the evidence indicated that, even in providing a residence, [the guardian] had moved several times and had lived with friends or roommates. The . . . court even seemed to recognize that [the guardian] may at some point lack resources to care for [the child] on her own, as indicated by the question: And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?

In re P.A., __ N.C. App. __, __, 772 S.E.2d 240, 248 (2015) (citation and internal quotation marks omitted).

Likewise, in *In re J.H.*, we found insufficient the district court's finding of fact

> that the grandparents [with whom the child had been in placement for 10 months] had met "[a]ll of his well-being needs[,]" and [a] DSS report stated that they had been "meeting [the child's] medical needs as well, making sure that he has his yearly well-checkups." The GAL's . . . report

> stated that [the child] had "no current financial or material needs[.]"

__ N.C. App. at __, 780 S.E.2d at 240. In both cases, evidence of the guardian's resources was conclusory, indirect, and inferential.

In contrast, here, direct, specific evidence supports the court's finding that the paternal cousins have adequate resources to care appropriately for Eddie. Competent evidence supports the findings of fact that (1) the paternal cousins have their own home, a double-wide mobile home with a yard, where Eddie has been residing for the past sixteen months; (2) Eddie has his own bedroom and play area in the home and a playset and outside toys in the yard; and (3) all of Eddie's medical, dental, vision, and developmental needs are being met such that "Eddie lacks for nothing, as it seems as if he has every riding, educational and interactive toy imaginable." There was detailed evidence regarding Eddie's life with the paternal cousins, including the husband's employment with three employers, namely as a detention officer for the Rowan County Sheriff's Office, as a military policeman on inactive reserve in the National Guard, and as a forklift operator for another entity. His wife cares for Eddie during the week, and, when she works at a retail store on weekends, her mother or mother-in-law cares for Eddie. The paternal cousins have taken Eddie to Disney World in Florida and camping at Stone Mountain in Georgia, and had a future family trip planned to Myrtle Beach. The paternal cousins also gave Eddie a party on his first birthday. This evidence is sufficient to support the district court's determination that the paternal cousins have adequate resources to care for Eddie.

However, no evidence in the record supports the court's finding that either of the custodians understand the legal significance of the placement. As we noted in *J.H.*, a "court cannot make a determination that a potential guardian understands the legal significance of the guardianship unless the . . . court receives evidence to that effect." *Id.* at __, 780 S.E.2d at 240 (citation omitted). Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship. *See In re L.M.*, __ N.C. App. __, __, 767 S.E.2d 430, 433 (2014) (affirming a guardianship order as to one guardian in light of his testimony and that of a social worker). Further, this requirement of sufficient evidence applies to *all* potential guardians. *Id.* For example, in *In re L.M.*, we concluded that the evidence did not support a finding that the other

potential guardian in that matter understood the legal significance of guardianship where she did not testify, sign a guardianship agreement, or otherwise demonstrate that she had accepted responsibility for the child. *Id.*

Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of Eddie. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship. The report submitted by DSS contains no statement that either of the custodians understood the legal significance of guardianship. Accordingly, we must vacate the award of legal custody and remand for further proceedings consistent with this opinion.

C. Compliance with section 7B-906.1(n)

Respondent next contends that the district court erred by releasing the parties and waiving further review hearings without making the findings of fact mandated by N.C. Gen. Stat. § 7B-906.1(n). This statute provides that

> the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following:
>
> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n). Respondent argues the PPR order fails to state the standard of proof it applied in its order or to include findings on each of the factors required by this subsection. We agree.

Although the best practice is for a court to affirmatively state the standard of proof that it applied in making factual determinations, the failure to do so is not prejudicial error if the "record when viewed in its entirety clearly reveals that the court applied the proper evidentiary standard" or where the appellant does not challenge those factual findings as lacking evidentiary support. *In re M.D.*, 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009). Further, the failure to state the burden of proof in the written order is not reversible error if the court states the appropriate standard of proof in open court. *Id.* In addition, the failure to make "written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n) . . . constitutes reversible error." *In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

Here, the district court failed to state the standard of proof it applied in making the factual determinations required under this subsection in the PPR order or in open court, and we cannot say that the "record when viewed in its entirety clearly reveals that the court applied the proper evidentiary standard . . . ." *In re M.D.*, 200 N.C. App. at 39, 682 S.E.2d at 783. Further, while the court found as fact that "[f]urther review hearings are not necessary, as the juvenile has resided with [his paternal cousins] for over one year, and no party is requesting review[,]" the PPR order does not include factual findings on the remaining enumerated criteria. For these reasons, the portion of the order waiving future review hearings must be vacated. *See id.*; *see also In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

D. Compliance with section 7B-906.1(e)(2)

Respondent further contends that the court failed to comply with section 7B-906.1(e)(2) by not establishing rights and responsibilities that remain with Respondent, other than to establish visitation rights. She argues that since the General Assembly provided for visitation privileges in a separate statute—N.C. Gen. Stat. § 7B-905.1—it must have intended for the district court to establish *other* rights and responsibilities in its order.

We do not read the court's order so narrowly. The order provides that the paternal cousins shall "have the care, custody, and control of the juvenile" and "have the authority to consent to any necessary remedial, psychological, medical or surgical treatment for the juvenile." The order further specifies the actions required for Respondent to regain custody

in the future. With regard to visitation, the order specifies that if she wants visitation in addition to weekly visitation supervised by the custodians, she must pay for it. We conclude the order adequately established the rights and responsibilities of the parties.

III. Order to pay costs of supervised visits

Respondent next argues the court erred by requiring her to pay the costs of services for her supervised visits without making any findings of fact regarding the cost and her ability to pay it. We agree. "Without [finding whether a parent is able to pay for supervised visitation once ordered], our appellate courts are unable to determine if the . . . court abused its discretion by requiring as a condition of visitation that visits with the children be at [a] respondent['s] expense." *In re J.C.*, 368 N.C. 89, 89, 772 S.E.2d 465, 465 (2015) (per curiam) (citations omitted). Failure to make this finding requires this Court to vacate the portion of the order requiring that the visitation be at Respondent's expense and to remand for entry of a new order containing the required findings of fact. *Id.* Accordingly, the portion of the PPR order requiring Respondent to pay the cost of visitation is vacated and remanded for further proceedings consistent with this opinion.

IV. Finding of fact regarding actions inconsistent with constitutional rights as parent

Finally, Respondent argues the court erred in that its finding of fact that she acted inconsistently with her constitutional rights as a parent was not based on the required standard of proof, to wit, clear and convincing evidence. We agree.

"[T]he government may take a child away from his or her natural parent *only* upon a showing that the parent is unfit to have custody . . . or where the parent's conduct is inconsistent with her constitutionally-protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted; emphasis added). Because the decision to remove a child from a natural parent's custody "must not be lightly undertaken[,] . . . [the] determination that a parent's conduct is inconsistent with . . . her constitutionally protected status must be supported by clear and convincing evidence." *Id.* at 63, 550 S.E.2d at 503 (citation omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citation omitted). "Clear and convincing" evidence is an intermediate standard of proof, greater than the preponderance of the

evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases. *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). "Absent an indication that the [district] court applied the clear and convincing standard," we must vacate this portion of the PPR order and remand for entry of a new finding of fact that makes clear the standard of proof applied by the district court in determining whether Respondent's actions have been inconsistent with her constitutionally-protected status as Eddie's parent. *See Bennett v. Hawks*, 170 N.C. App. 426, 429, 613 S.E.2d 40, 42 (2005).

Conclusion

In sum, we hold the court erred by (1) requiring Respondent to pay for supervised visits without making necessary findings, (2) waiving further review hearings without making all necessary findings of fact, (3) awarding legal custody to a non-parent without evidence to support its findings that the potential custodians understand the legal significance of the relationship, and (4) awarding custody to a non-parent without stating that it has applied the proper standard of proof. We vacate those portions of the order and remand for further proceedings consistent with this opinion. The PPR order is otherwise affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DAVIS and DIETZ concur.

IN THE MATTER OF M.M., JUVENILE

No. COA16-77

Filed 16 August 2016

1. Appeal and Error—juvenile order—terms of legal custody changed—appeal proper

A juvenile order was properly before the Court of Appeals where there were multiple orders but the order from which the respondent-mother appealed changed the terms of the juvenile's legal custody.

2. Juveniles—multiple orders—no contact order—no new findings

There was no basis in a juvenile order for a "no contact" provision regarding the maternal grandmother where there were no new

findings to support the ruling. The trial court may have mistakenly thought that a provision from a prior order remained in effect.

Appeal by respondent from order entered 14 October 2015 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 25 July 2016.

Christopher L. Carr, Staff Attorney, for Cumberland County Department of Social Services, petitioner-appellee.

Mary McCullers Reece for respondent-mother.

No brief filed for guardian ad litem.

DAVIS, Judge.

A.M. ("Respondent-mother") appeals from the trial court's permanency planning order prohibiting contact between her child, M.M. ("Margo"),[1] and Margo's maternal grandfather (the "maternal grandfather"). After careful review, we vacate in part and remand for further proceedings.

Factual Background

This is Respondent-mother's third appeal in this matter. Margo was first removed from the custody of Respondent-mother and Margo's father[2] on 8 August 2007 based on confirmed drug use by the parents and following multiple incidents of domestic violence in their home. *In re M.M.*, 212 N.C. App. 420, 713 S.E.2d 790, 2011 WL 2206655 (2011) (unpublished). Margo was adjudicated dependent on 17 January 2008 and taken into the custody of the Cumberland County Department of Social Services ("DSS"). Margo was returned to her parents' custody several months later but was removed again in 2010.

On 16 April 2010, the trial court entered a review order in which it ordered that Margo be returned from Michigan, where she had been living with her paternal grandparents, and placed back into DSS custody. After review hearings conducted on 1 July 2010 and 22 July 2010, the trial court entered a permanency planning order on 21 September 2010

1. Pseudonyms and initials are used throughout the opinion to protect the identity of the juvenile and for ease of reading. N.C.R. App. P. 3.1(b).

2. Margo's father is not a party to the present appeal.

granting custody of Margo to her paternal grandparents and allowing visitation and telephone calls with her parents.

Respondent-mother appealed the 21 September 2010 order. This Court reversed, concluding that "the trial court entered its order based solely on the written reports of [DSS] and the guardian ad litem, prior court orders, and documentary evidence." *M.M.*, 2011 WL 2206655 at *3. The trial court did not hear testimony from either Respondent-mother or Margo's father, and DSS did not offer any competent witness testimony. As a result, we held that the trial court's findings of fact were not adequately supported by the evidence. *Id.* On remand, the trial court entered a "corrected" permanency planning order on 11 July 2012 continuing legal and physical custody of Margo with her paternal grandparents.

On 18 December 2012, the trial court entered a permanency planning order granting joint legal and physical custody of Margo to her parents with her father having primary physical custody and Respondent-mother exercising secondary physical custody.[3] However, following another review hearing, the trial court entered a new permanency planning order on 11 February 2013 and a "corrected" order on 24 April 2013 (collectively the "2013 Orders"), which returned custody and guardianship of Margo to the paternal grandparents and purported to transfer jurisdiction over the case to the state of Michigan. Respondent-mother once again appealed.

On 5 November 2013, this Court reversed the 2013 Orders in their entirety. In addition to rejecting the trial court's attempt to transfer jurisdiction, we held that the trial court's findings were inadequate under N.C. Gen. Stat. § 7B-907(b) to support its determination that a permanent plan of guardianship with Margo's paternal grandparents — rather than the previously ordered custody with her parents — would serve Margo's best interests. *See In re M.M.*, 230 N.C. App. 225, 230, 750 S.E.2d 50, 53-54 (2013).

The matter came on for a remand hearing on 10-11 September 2015. Before receiving testimony from Respondent-mother and Margo's paternal grandfather,[4] the trial court ruled that because the 2013 Orders had been reversed, the 18 December 2012 order, which gave joint physical and legal custody of Margo to her parents, remained in effect. The trial

3. The 18 December 2012 order did not expressly contain any "no contact" provisions.

4. Margo's father was not present at the hearing due to illness but was represented by counsel.

court further determined, and the parties agreed, that the only remaining issue before the court was the task of setting a visitation schedule. The trial court proceeded to enter an order on 14 October 2015 reinstating joint legal and physical custody of Margo to her parents and setting out a visitation schedule. The order also directed that there be no contact between Margo and her maternal grandfather. Respondent-mother filed a notice of appeal on 13 November 2015.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address whether Respondent-mother's appeal is properly before us. In her statement of grounds for appellate review, *see* N.C.R. App. P. 28(b)(4), Respondent-mother asserts a right of appeal under N.C. Gen. Stat. § 7B–1001(a)(4), arguing that the 14 October 2015 order "changes custody of the minor child." We agree.

Section 7B-1001(a) of our General Statutes provides that only certain juvenile matters may be appealed. Pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile" is appealable. N.C. Gen. Stat. § 7B–1001(a)(4) (2015); *see In re N.T.S.*, 209 N.C. App. 731, 734, 707 S.E.2d 651, 654 (2011) (noting that "[even] a temporary order [that] change[s] legal custody . . . [is] immediately appealable under subsection (a)(4)."). "Legal custody refers generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citation and quotation marks omitted). Furthermore, our Supreme Court has noted that "lawful custody . . . [includes a parent's] prerogative to determine with whom their children shall associate." *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994) (citation omitted).

The 14 October 2015 order from which Respondent-mother appeals changed the terms of Margo's legal custody as previously established by the 18 December 2012 order. As noted above, the 18 December 2012 order provided that the legal and physical joint custody of Margo was to remain with her parents with her father having primary custody and Respondent-mother having secondary custody. That order did not specifically prohibit contact between Margo and any other individual.

The 14 October 2015 order, however, included among its directives that "the Maternal Grandfather . . . shall not be in the presence of or have ANY contact with [Margo] at any time." Thus, because (1) the

18 December 2012 order did not prohibit contact between Margo and her maternal grandfather; and (2) legal custody includes "the right to control [one's] children's associations," *Petersen*, 337 N.C. at 403, 445 S.E.2d at 904-05, the 14 October 2015 order's prohibition on contact between Margo and her maternal grandfather "change[d Respondent-mother's] legal custody of" Margo. Accordingly, this appeal is properly before us pursuant to N.C. Gen. Stat. § 7B-1001(a)(4).

II. "No Contact" Provision

[2] "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the [trial court's] findings and the findings support the conclusions of law." *In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 245 (2015) (citation omitted). "The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 238 (2015) (citation and internal quotation marks omitted). "Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citation omitted).

On appeal, the only portion of the trial court's 14 October 2015 order Respondent-mother challenges is the "no contact" provision regarding Margo's maternal grandfather. Specifically, Respondent-mother argues there was no competent evidence before the trial court that Margo's maternal grandfather posed a risk to her and that the trial court failed to make any findings regarding why it was in Margo's best interests to prohibit contact with him. We agree.

At the beginning of the 11 September 2015 hearing, the trial court determined that the 18 December 2012 order remained in effect in light of this Court's reversal of the 2013 Orders. At the hearing, the court stated that "the only thing left . . . to do is to grant a proper visitation schedule. . . . I'm not here to look at whether or not there's [been] a change in circumstances but just to hear evidence in regard to a proper visitation schedule." At one point during the hearing, counsel for Margo's father attempted to offer into evidence a letter from Margo's therapist dated 2 September 2015 in which the therapist discussed, among other things, "[Margo's] relationship with her mom and what areas need to be worked on . . . and . . . a history of things[.]" However, the trial court responded that "[the letter] gets into areas or issues that are not concerning the parents, or things of that nature; I'm not inclined to review it because there's already an order that joint custody is established. Right now, [the

hearing is] just based on visitation." Nevertheless, at the conclusion of the hearing, the trial court ordered that Margo's maternal grandfather was "not to be in [her] presence . . . at any time or have any contact with [her]."

However, the trial court's 14 October 2015 order lacks any indication as to the basis upon which the court rested its determination that prohibiting contact with the maternal grandfather was necessary to protect Margo's welfare. There is no mention of the maternal grandfather in either the trial court's findings of fact or conclusions of law, much less any findings that would support the imposition of a "no contact" provision. There was also no competent evidence presented at the hearing tending to show that contact with Margo's maternal grandfather would pose a threat to her well-being or otherwise be contrary to her best interests.

Indeed, DSS concedes that "[Respondent-mother] does correctly point out that there were no findings of fact in the [14 October 2015 order] about the maternal grandfather." Moreover, it acknowledges that "it is true that there was no extensive testimony about the maternal grandfather by any party at the 11 September 2015 hearing."

The trial court may have mistakenly believed that a "no contact" provision from an earlier order remained in effect with regard to Margo's maternal grandfather. However, because that was not, in fact, the case and because the trial court made no new findings of fact that would support such a ruling, we are unable to discern any basis for the "no contact" provision contained in the trial court's 14 October 2015 order.

Conclusion

For the reasons stated above, the portion of the trial court's 14 October 2015 order prohibiting contact between Margo and her maternal grandfather is vacated, and we remand this matter for further proceedings not inconsistent with this opinion.

VACATED IN PART AND REMANDED.

Judges STEPHENS and DIETZ concur.

IN THE MATTER OF DERRICK WOODARD

No. COA15-1116

Filed 16 August 2016

Appeal and Error—meaningful opportunity for appellate review—lack of verbatim transcript—adequate alternative

Respondent was not deprived of the opportunity for meaningful appellate review of an involuntary commitment order and was not entitled to a new hearing based on lack of a verbatim transcript. Respondent was able to obtain an adequate alternative to a verbatim transcript of his involuntary commitment hearing and thus could not show that he was prejudiced by the absence of an actual transcript.

Appeal by respondent from order entered 12 February 2015 by Judge Louis Meyer in Wake County District Court. Heard in the Court of Appeals 30 March 2016.

Roy Cooper, *Attorney General*, *by Andrew L. Hayes*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for respondent-appellant.*

DAVIS, Judge.

Derrick Woodard ("Respondent") appeals from the trial court's order involuntarily committing him to UNC Wakebrook Inpatient Treatment Facility ("UNC Wakebrook") for a period of inpatient treatment. On appeal, Respondent argues that the lack of a verbatim transcript from his commitment hearing has deprived him of the opportunity for meaningful appellate review of the commitment order and entitles him to a new hearing. After careful review, we affirm the trial court's order.

Factual Background

On 2 February 2015, Dr. Edith Gettes filed an affidavit and petition for involuntary commitment in which she alleged Respondent was mentally ill and dangerous to himself and others. A magistrate ordered Respondent to be held for examination that same day. A hearing was held on 12 February 2015 before the Honorable Louis Meyer in Wake County District Court. Following the hearing, the trial court concluded that Respondent was mentally ill and presented a danger to himself and

others. That same day, the trial court entered an order containing the following findings:

> Respondent ('R.') had prior 10-day inpatient admission at UNC Wakebrook in Nov. 2013 after presenting with symptoms of paranoia and delusions. During this admission, R. punched a wall and had his hand X-rayed; however, R. improved with treatment and medication. R. agreed to voluntary 90-day outpatient treatment and medication thereafter, but refused to take medication after initial supply ran out and refused to do follow up outpatient treatment.
>
> During 1st 2 months of 2015, R. made false Facebook postings asserting gang membership that caused 2 males to come to R's home seeking retribution, and R. had physical altercations with his step-sisters and father, and R. was admitted for inpatient treatment at UNC Wakebrook upon petition and magistrate's custody order for involuntary commitment.
>
> During present admission to UNC Wakebrook, R. has been treated by Dr. Br[i]an Robbins, who gave expert psychiatric testimony at 2-12-15 district court hearing that R. is diagnosed as being schizophrenic based on R. having multiple delusions and paranoia (e.g., R. asserted he's a Navy Seal, is being followed by Black Panthers and Secret Service, is Pres. Obama's nephew, has a microchip planted in his head, is a 6-time Olympic gold medalist) and R. having disorganized thinking and disconnect as to why treatment and medication are necessary and helpful for him.
>
> During present admission at UNC Wakebrook, R. threatened physical harm to Dr. Robbins and a nurse for requiring R. to take medication; however, R. has improved with treatment and medication during present inpatient admission. R. is unable, without care, supervision and assistance of others to exercise self-control, judgment and discretion to satisfy his need for medical/psychiatric care, and has exhibited severely impaired insight as to his need for medical/psychiatric care, and there is reas[onable] probab[ility] of R. suffering serious physical debilitation in near future unless he gets adequate inpatient and outpatient treatments. Within relevant past, R. has threatened to inflict serious bodily harm on other persons (including

> threatening serious bodily harm to UNC law enforcement officers on 2/3/15) and there is reasonable probability this conduct would be repeated unless R. gets adequate inpatient and outpatient treatment.

The trial court ordered that Respondent be committed to UNC Wakebrook for a period of inpatient treatment not to exceed 30 days and to Alliance Behavioral Health for a period of outpatient treatment not to exceed 60 days. Respondent entered written notice of appeal on 9 March 2015.

Following the entry of notice of appeal, Respondent's appointed appellate counsel, who did not represent him at the commitment hearing, was informed by the court reporting manager for the Administrative Office of the Courts that no transcript of the hearing could be prepared because the recording equipment in the courtroom had failed to record the hearing and there had not been a court reporter present in the courtroom.

Analysis

The sole issue presented in this appeal is whether Respondent is entitled to a new involuntary commitment hearing because the lack of a verbatim transcript from the underlying hearing denied him his right to meaningful appellate review.[1] An order of involuntary commitment is immediately appealable. N.C. Gen. Stat. § 122C-272 (2015). Pursuant to N.C. Gen. Stat. § 122C-268, the respondent is entitled on appeal to obtain a transcript of the involuntary commitment proceeding, which must be provided at the State's expense if the respondent is indigent. N.C. Gen. Stat. § 122C-268(j) (2015).

This Court has very recently dealt with this same issue. *See In re Shackleford*, __ N.C. App. __, __ S.E.2d __ (filed July 19, 2016) (No. COA15-1266). As we explained in *Shackleford*, "the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and . . . in such cases, the absence of the transcript would itself constitute a basis for appeal." *See id.* at __, __ S.E.2d at __, slip op. at 4. The unavailability of a verbatim transcript does not, however, automatically constitute reversible error. *Id.* at __,

1. We note that although Respondent's commitment period has expired, his appeal is not moot given the "possibility that [R]espondent's commitment in this case might . . . form the basis for a future commitment, along with other obvious collateral legal consequences[.]" *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

__ S.E.2d at __, slip op. at 4. Rather, in order to show that the absence of a verbatim transcript entitles an appellant to a new hearing, he "must demonstrate that the missing recorded evidence resulted in prejudice." *Id.* at __, __ S.E.2d at __, slip op. at 4-5 (citation and quotation marks omitted). Moreover, "[g]eneral allegations of prejudice are insufficient to show reversible error." *Id.* at __, __ S.E.2d at __, slip op. at 5. "[T]he absence of a complete transcript does not prejudice the [appellant] where alternatives are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000), *cert. denied*, 531 U.S. 1083, 148 L.Ed.2d 684 (2001); *see also Shackleford*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 5.

Applying this legal framework, we must first determine whether Respondent made sufficient efforts to reconstruct the hearing in the absence of a transcript. In this regard, Respondent's appellate counsel sent letters to the following persons who were present at the hearing: Judge Meyer; Dr. Brian Robbins ("Dr. Robbins"), Respondent's treating physician at UNC Wakebrook; Lori Callaway ("Callaway"), the deputy clerk; Andrew Hayes ("Hayes"), counsel for the State; Kristen Todd ("Todd"), Respondent's counsel; and Respondent. In these letters, Respondent's appellate counsel requested that each of the recipients provide him with their recollections of the hearing and any notes they possessed regarding the proceeding.

Guided by our decision in *Shackleford*, we believe that Respondent has "satisfied his burden of attempting to reconstruct the record." *Shackleford*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 7 (citations and quotation marks omitted). In *Shackleford*, as here, there was no transcript available from the involuntary commitment hearing because the recording equipment failed to record the proceeding and there had not been a court reporter present. *Id.* at __, __ S.E.2d at __, slip op. at 3. In his effort to reconstruct the record, the respondent's appellate counsel similarly sent letters requesting any notes and recollections from the hearing to the presiding judge, the respondent's treating physician, the deputy clerk, counsel for the inpatient treatment facility at which the respondent was being treated, the respondent's counsel, and the respondent himself. *Id.* at __, __ S.E.2d at __, slip op. at 5-6.

In concluding that the respondent's appellate counsel in *Shackleford* had met his burden of attempting to reconstruct the record, we found our decision in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), to be particularly instructive:

> In *Hobbs*, the court reporter's audiotapes and handwritten notes from the entire evidentiary stage of the defendant's criminal trial were lost in the mail. In an effort to reconstruct the proceedings, the defendant's appellate counsel sent letters to the defendant's trial counsel, the trial judge, and the prosecutor asking for their accounts of the missing testimony. The defendant's trial counsel stated that he had little memory of the charges or the trial, possessed no notes from the trial, and was unable to assist in reconstructing the proceedings. The trial judge stated that she had no notes from the case, and the prosecutor never responded to the inquiry. In light of these efforts, we determined that the appellant [in *Hobbs*] had satisfied his burden of attempting to reconstruct the record.

Shackleford, __ N.C. App. at __, __ S.E.2d at __, slip op. at 6-7 (internal citations omitted).

We explained that because the respondent's appellate counsel in *Shackleford* "took essentially the same steps as the appellant's attorney in *Hobbs*[,] we similarly conclude that [the respondent] has satisfied his burden of attempting to reconstruct the record." *Id.* at __, __ S.E.2d at __, slip op. at 7. The same is true in the present case.

Therefore, we must next determine whether Respondent's reconstruction efforts produced an adequate alternative to a verbatim transcript — that is, one that "would fulfill the same functions as a transcript . . . ." *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817. As explained below, we conclude that an adequate alternative has, in fact, been produced in this case.

Respondent's appellate counsel received responses from each of the recipients of his letters. Callaway replied that she did not have any notes from the hearing. Dr. Robbins stated that he did not have a specific recollection of the hearing and did not keep any notes from it. Respondent reported that he had no detailed recollection of the hearing. Todd provided her notes from the hearing, which consisted of eight pages of handwritten notes. Hayes replied with a brief summary of the hearing testimony based upon his notes from, and memory of, the hearing.

The most significant response came from Judge Meyer, who provided Respondent's appellate counsel with a detailed account of the testimony offered at the hearing in a five-page, single-spaced, typed memorandum. Judge Meyer stated that the document was "based on his memory of testimony at the hearing after reviewing personal notes of

the hearing made by [him] during the hearing and after additional reflection and recollection." The memorandum contained individual sections detailing the testimony of each witness: Kawana Woodard ("Kawana"), Respondent's sister; Donnie Farrington ("Farrington"), Respondent's father; Dr. Robbins; and Respondent. Judge Meyer's memorandum not only provides support for each finding of fact in the trial court's 12 February 2015 order but also contains even greater detail regarding the testimony supporting these findings.[2]

The contrast between the results of the attempted reconstruction of the hearing in this case and that in *Shackleford* is significant. In concluding that the reconstruction efforts in *Shackleford* had failed to produce an adequate alternative to a verbatim transcript, we explained that

> the only independent account of what took place at the hearing consists of five pages of bare-bones handwritten notes that — in addition to not being wholly legible — clearly do not amount to a comprehensive account of what transpired at the hearing. *While these notes could conceivably assist in recreating the hearing if supplemented by other sources providing greater detail*, they are not in and of themselves substantially equivalent to the complete transcript.

Shackleford, __ N.C. App. at __, __ S.E.2d at __, slip op. at 9-10 (internal citation, quotation marks, and brackets omitted and emphasis added).

The present case serves as an example of the precise scenario contemplated in the above-quoted language from *Shackleford*. Here, as in *Shackleford*, Respondent's counsel from the involuntary commitment hearing provided limited handwritten notes referencing witness testimony from the hearing. However, while in *Shackleford* these notes *alone* constituted the product of the respondent's appellate counsel's efforts to reconstruct the proceeding, that is not the case here. Rather, in the present case, these handwritten notes — along with the State's attorney's

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2. While Judge Meyer acknowledged in a prefatory statement that his memorandum was not intended to be a comprehensive account of every aspect of the hearing, in light of the detail contained therein and the obvious care with which the document was prepared, we are satisfied that his memorandum, as supplemented by the notes and summary provided by the two attorneys who participated in the hearing, is sufficient to constitute an adequate alternative to a verbatim transcript. As we have previously explained, "notwithstanding the critical importance of a complete trial transcript for effective appellate advocacy, the unavailability of a verbatim transcript does not automatically constitute error." *Hobbs*, 190 N.C. App. at 186, 660 S.E.2d at 170 (citation, quotation marks, and brackets omitted).

summary of the hearing testimony — supplemented the thorough memorandum provided by Judge Meyer. Thus, this case is materially distinguishable from *Shackleford*.

Together, the materials supplied to Respondent's appellate counsel provide the following account of the hearing: Kawana testified that at the beginning of January 2015 Respondent posted false comments on social media, including statements that "I'm a Navy Seal . . . I've been raped." She also stated that around this time Respondent had been having altercations with his other two sisters, which was not something that occurred when he was taking his medication and complying with his treatment.

Farrington, with whom Respondent lived, testified that two weeks prior to Respondent's pre-hearing inpatient admission, Respondent constantly fought with his sisters and Farrington and falsely posted on Facebook that he was a "known gang member." Respondent admitted to Farrington that he had made posts regarding gang members and said that he had "beat somebody up." Two men came to Farrington's home to confront Respondent about his social media posts concerning gang members, but Farrington told them to leave because Respondent was sick. Farrington also testified that on the coldest day of December 2014, when the temperature was 17 degrees, Respondent walked from his home to Farrington's workplace (a quarter mile away) wearing nothing but shorts and a t-shirt.

Dr. Robbins, who has been a psychiatrist since 2007 and at the time of the hearing was UNC Wakebrook's medical director, was qualified by the trial court as an expert in psychiatry. Dr. Robbins stated that he had been treating Respondent at UNC Wakebrook for the eight days preceding the hearing. He had also treated Respondent at UNC Wakebrook for 10 days in November 2013.

Dr. Robbins testified that Respondent suffered from schizophrenia, a diagnosis he had reached based on Respondent's November 2013 inpatient admission (during which Respondent "presented with paranoia and delusions, punched walls when frustrated with his treatment, and then improved with medication and treatment") as well as his admission immediately preceding the 12 February 2015 hearing. Dr. Robbins made the following observations regarding Respondent's mental condition at the time of the latter admission:

> (a) Respondent having multiple delusions that he is a Navy Seal, that he is being followed by the Black Panthers and the Secret Service, that he is a six time Olympic gold

> medalist, that he has microchips implanted in his head, that [UNC] Wakebrook medical staff are trying to "enlist him," that he is President Obama's nephew, and that he is a PhD. with eight degrees; (b) Respondent throwing away most of his clothes and exhibiting disorganized thinking and a "disconnect" between what his family wants and what he wants; (c) Respondent beating on windows during his current inpatient admission; (d) reports by family members of Respondent's altercations with his sisters and other behavior such as Respondent walking long distances in the freezing cold with very little clothes on; and (e) a family history of schizophrenia, to wit, Respondent's mother suffering from schizophrenia.

Dr. Robbins also testified that after Respondent's November 2013 inpatient admission at UNC Wakebrook, he refused to continue taking his medication, claiming that it was unnecessary because he was not mentally ill. During the inpatient admission immediately preceding the 12 February 2015 commitment hearing, UNC Wakebrook medical staff had to force Respondent to take medication because of his refusal to take it voluntarily.

Dr. Robbins further related Respondent's statement that he had gotten into a physical altercation with his sister. According to Dr. Robbins, Respondent also threatened to kill certain law enforcement officers and threatened to punch both Dr. Robbins and a nurse who was trying to give Respondent medication by means of a forced injection. Dr. Robbins explained that medical staff planned to further increase Respondent's dosage because he was "guarded, irritable, and paranoid" and that although he had "shown some decrease in overt threats and delusions," he was "still exhibiting delusional behavior."

Dr. Robbins testified that, in his professional opinion,

> Respondent's delusions and latent thoughts of behavior threatening to himself and his family would pose a threat of more altercations with his sister and others if he resides at home with his father, that there is a reasonable probability of Respondent repeating such conduct without additional inpatient treatment followed by outpatient treatment, that outpatient treatment alone is insufficient because of Respondent's pattern of refusing to take his prescribed medication and refusing to comply with follow up appointments and other outpatient treatment

> requirements, and that without additional inpatient treatment followed by outpatient treatment Respondent is unable to exercise self-control, judgment and discretion to take care of his medical needs and safety and there is a reasonable probability of Respondent suffering serious physical debilitation without additional inpatient treatment followed by outpatient treatment.

Finally, Dr. Robbins testified as to his recommendation that Respondent undergo 30 days of additional inpatient treatment followed by at least 60 days of outpatient treatment.

Respondent testified that a fight with his sisters had precipitated his most recent inpatient admission. He denied ever claiming that he was a gang member, had been raped, was President Obama's nephew, and had been followed by the Black Panthers or the Secret Service. In addition, Respondent testified that he did not need medication and that it made him bipolar. He further stated that he had threatened Dr. Robbins and the nurse in "self-defense" because he did not want to take any more medication and had stopped taking his medication after his November 2013 admission because of its side effects.

Respondent also denied that he was schizophrenic or mentally ill but admitted he was "just bi-polar at times." He testified that he would not take medication if the dosage was too high because that would adversely affect his ability to get a job. He stated that when he walked to Farrington's workplace on the cold December day, he was wearing a coat over his basketball shorts and t-shirt. Finally, Respondent denied that he had (1) threatened to kill any law enforcement officers or told Dr. Robbins he had done so; or (2) punched or beat on a window at UNC Wakebrook.

We observe that the above-referenced testimony provides support for all of the trial court's findings of fact. While Respondent notes that Judge Meyer's memorandum does not specifically indicate whether any objections were made to evidence presented at the hearing, given that no mention of evidentiary disputes are reflected either in that memorandum or in the accounts provided by the attorneys who were present at the hearing, we are unwilling to deem the reconstructed record inadequate simply because of the theoretical possibility that one or more rulings might have been made by the trial court at the hearing in response to objections by counsel.

As the differing results we have reached in *Shackleford* and the present case aptly demonstrate, the issue of whether an attempted

reconstruction of a proceeding is sufficient to preserve the right to meaningful appellate review does not lend itself to clear, bright-line rules. Rather, such a determination must be made on a case-by-case basis depending on the unique circumstances of each particular case.

Accordingly, we conclude that because Respondent has been able to obtain an adequate alternative to a verbatim transcript of his involuntary commitment hearing, he cannot show he was prejudiced by the absence of an actual transcript. Consequently, he was not deprived of the opportunity for meaningful appellate review of his involuntary commitment hearing.[3]

Conclusion

For the reasons stated above, we affirm the trial court's 12 February 2015 order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

3. We note that appellants who assert on appeal that they have been deprived of the ability to obtain meaningful appellate review due to the unavailability of a verbatim transcript from a trial court proceeding may also argue, in the alternative, specific errors that appear on the face of the order from which appeal is being taken or errors that are discovered as a result of an attempt to reconstruct the proceeding. However, Respondent has not raised any such specific errors in the present case.

KB AIRCRAFT ACQUISITION, LLC, PLAINTIFF
v.
JACK M. BERRY, JR., AND 585 GOFORTH ROAD, LLC, DEFENDANTS

No. COA15-823

Filed 16 August 2016

1. Fraud—debtor's transfer of property—date of transfer

In an action involving a debtor, the fraudulent transfer of real property, and a limitations period, the term "transfer" within the plain meaning of N.C.G.S. § 39-23.9 referred to the date that the transfer actually occurred and not the date the fraudulent nature of the transfer became apparent.

2. Statutes of Limitation and Repose—fraudulent transfer—statute of repose

N.C.G.S. § 39-23.9 functions as a statute of repose because it establishes a finite and fixed time within which the prescribed actions may be brought. It measures the time period in relation to an event separate from the realization of an injury by the claimant.

3. Statutes of Limitation and Repose—fraudulent transfers—equitable remedies—precluded

Equitable remedies were precluded from the statute of repose for fraudulent transfers because the language of N.C.G.S. § 39-23.9 did not include language creating an exception for equitable doctrines.

4. Statutes of Limitation and Repose—fraudulent transfers—action not timely under two statutory subsections

Although plaintiff alleged causes of action under two subsections of N.C.G.S. § 39-23 arising from a fraudulent transfer, all of its claims were barred by the applicable statute of repose because they arose from a transfer occurring more than four years prior to the filing of the complaint and because plaintiff had notice of the transfer more than one year prior to the filing of the complaint.

Appeal by Plaintiff from order entered 6 February 2015 by Judge Richard L. Doughton in Watauga County Superior Court. Heard in the Court of Appeals 28 January 2016.

Smith, Debnam, Narron, Drake, Saintsing, & Myers, L.L.P., by Byron L. Saintsing, for Plaintiff-Appellant.

Brooks, Pierce, McLendon, Humphrey, and Leonard, L.L.P., by John H. Small and Clint S. Morse, for Defendants-Appellees.

INMAN, Judge.

KB Aircraft Acquisition, LLC ("Plaintiff") appeals from an Order and Summary Judgment in favor of Jack M. Berry, Jr. ("Defendant Berry") and 585 Goforth Road, LLC ("Defendant 585") (together, "Defendants") dismissing Plaintiff's claims for fraudulent transfer of property and declaratory relief.

This appeal presents two issues of first impression: (1) the interpretation of the term "transfer" in N.C. Gen. Stat. § 39-23.9 (2015), part of the North Carolina Uniform Voidable Transactions Act; and (2) whether the statute is one of limitations or repose. We hold that the term "transfer" refers to the actual date on which an asset was transferred, rather than the date when its fraudulent nature became apparent to a creditor, and that the statute is one of repose. Accordingly, we hold that Plaintiff's claims are time-barred and affirm the trial court's Order and Summary Judgment.

I. Factual and Procedural History

This dispute arises out of the transfer of real property located in North Carolina by Defendant Berry during a time when Defendant Berry was indebted as a guarantor on a loan to a business he owned.

Plaintiff is a Delaware limited liability company with its principal place of business in New York. Defendant Berry is a resident of Florida. Jurisdiction in North Carolina is proper because the property is located at 585 Goforth Road in Blowing Rock, North Carolina ("the Property").

Defendant Berry became indebted to Plaintiff in 2010 after Plaintiff purchased all rights in a loan from Key Equipment Finance, Inc. ("Key"), made to BerryAir, LLC ("BerryAir"), which was guaranteed by Defendant Berry. At the time Plaintiff purchased the loan, BerryAir and Defendant Berry were in default on their loan obligations.

In 2006, Key, Plaintiff's predecessor in interest, loaned $10,156,500.00 to BerryAir for the purchase of an airplane. Defendant Berry, on behalf of BerryAir, executed a Promissory Note ("the Note") and an Airplane Security Agreement providing Key a security interest in a Bombardier Challenger 601-3A Aircraft purchased by BerryAir with the loan proceeds.

To provide further security for the loan, Defendant Berry signed a Personal Guaranty ("the Guaranty") stating that he "intend[ed] to guarantee at all times the performance and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of all Obligations" of BerryAir under the loan. The Aircraft Security Agreement, in paragraph 2.11(b), provided that within 90 days after the last day of each year, BerryAir was required to provide to Key a copy of the personal financial statement for Defendant Berry regarding his financial condition during the prior year. At the time the loan was made, Defendant Berry's assets, which included the Property, were valued at more than $47 million. The majority of the assets were equity interests in various businesses. The Property, valued at more than $3 million, was Defendant Berry's largest real estate asset.[1]

By October 2008, BerryAir, as the debtor, and Defendant Berry, as the guarantor, had defaulted on the loan and were negotiating with Key to modify the loan repayment terms.

On 10 October 2008, Defendant Berry organized Defendant 585 as a limited liability company in Florida with Defendant Berry and his wife as its only members. Defendant Berry transferred the Property to Defendant 585 by special warranty deed that same day. At the time, according to a personal financial statement later provided by Defendant Berry to Key, the Property was Defendant Berry's most valuable real estate asset and worth $4,250,626.00. No consideration was paid to Defendant Berry in the transfer. The deed stated on its face that "THIS TRANSACTION IS BETWEEN RELATED PARTIES AND THERE IS NO CONSIDERATION BEING PAID." The deed was recorded on 23 October 2008 in Book 1406, Page 196 of the Watauga County Register of Deeds. Neither Defendant Berry nor BerryAir provided actual notice to Key at the time of the transfer.

In November 2008, following negotiations with Key, Defendant Berry executed Amendment No. 1 to the Note on behalf of BerryAir, modifying the payment terms of the Note, along with a Confirmation of Guaranty. Both documents reaffirmed that there had been no interruption in the obligations of BerryAir and Defendant Berry under the terms of the Note and the Guaranty.

Despite the repayment modifications, BerryAir and Defendant Berry continued to default on the terms of the Note and the Guaranty

1. We make note of this information from the record, although it is not material to our analysis, simply to provide additional context to Plaintiff's claims.

throughout 2009 and the early months of 2010. Defendant Berry, on behalf of BerryAir as the debtor and on behalf of himself as the guarantor, continued negotiating with Key to resolve the payment defaults, ultimately entering into a Forbearance Agreement and eventually two Amendments to the Forbearance Agreement. The last of these agreements was signed by Defendant Berry on 24 February 2010, over a year after he had transferred the Property. Each document ratified, reaffirmed, and confirmed all terms, conditions, rights, and obligations contained within the original loan documents, except as modified by the Forbearance Agreement. The final agreement extended the forbearance period until 6 August 2010.

In accordance with the terms of the Note, the Security Agreement, and related Amendments and Forbearance Agreements, Defendant Berry annually provided to Key a copy of his personal financial statements for the preceding year, no later than 90 days after the last day of the respective year. The financial statements were certified by Defendant Berry as true and accurate statements of his financial condition during the time specified.

The record on appeal does not include any of Defendant Berry's personal financial records provided to Key prior to 2008. On or about 7 November 2008, during negotiations for Key to forbear from taking action on the loan default and to modify the repayment terms, Defendant Berry submitted to Key a one-page personal financial statement listing his assets for the years 2004, 2005, 2006, 2007, and as of 30 June 2008. The statement listed the Property, described as "Blowing Rock House," and represented its value as $4,250,626.00. No evidence in the record indicates that Key requested a current personal financial statement or looked any further than the statement provided on or about 7 November 2008.

At some point in 2009,[2] Defendant Berry provided Key with a three-page personal financial statement for the period ending 31 December 2008, along with a one-page attachment. The first page of the statement listed Defendant Berry's real estate assets as being valued at $353,355.00. The attachment, a balance sheet, stated the Defendant Berry owned a 100% interest in Defendant 585 valued at $1,142,100.00. This document was inaccurate in one respect—Defendant Berry owned a 100% interest

2. The statement itself is undated, and the record includes only an undated letter from Defendant Berry's accountant transmitting this statement to Key. According to the loan parties' agreements and course of conduct, however, BerryAir was required to provide the statement in the first 90 days of 2009.

in Defendant 585 jointly with his wife.[3] This statement was also the first document of record provided to Key reflecting that Defendant Berry had transferred the Property and that Defendant Berry had an ownership interest in Defendant 585.

On 28 April 2010, Defendant Berry provided Key with his personal financial statement for the year ending 31 December 2009. The 2009 personal financial statement also reflected that Defendant Berry had transferred the Property, that the Property was owned by Defendant 585, and that Defendant Berry had an ownership interest in Defendant 585.

On or about 30 September 2010, Key sold and assigned to Plaintiff all of its right, title, and interest in and to the Note, the Guaranty, and all related loan documents. Plaintiff notified Defendant Berry of the assignment of his debt in a demand letter dated 4 October 2010.

Soon after demanding payment from BerryAir and Defendant Berry, Plaintiff filed suit against them in Florida for their failure to cure the longstanding default. In December 2010, a month after filing suit and two months after purchasing the loan from Key, Plaintiff conducted a title search on the Property which reflected that Defendant Berry had transferred it in 2008 to Defendant 585.

In July 2013, Plaintiff obtained a judgment for $10,577,895.90 against BerryAir and Defendant Berry in Florida. Plaintiff perfected a judgment lien in North Carolina which is enforceable against any real property owned by Defendant Berry in Watauga County. Plaintiff was unable to enforce the lien against the Property because, although it is in Watauga County, Defendant Berry no longer owned it.[4]

Plaintiff filed suit against Defendants in North Carolina on 2 December 2013, alleging a claim for fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.1 *et seq.* and a claim for declaratory relief. Plaintiff's complaint sought a judgment setting aside the conveyance of the Property to Defendant 585 and, in accordance with the statute, vesting the Property back into Defendant Berry's name and subject to Plaintiff's judgment lien. Defendants moved for summary judgment, arguing that Plaintiff's claims were time barred because they were brought outside the relevant limitations periods allowed by the Uniform Voidable Transactions Act. Following a hearing in January 2015, Judge

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3. The record includes no information regarding how the value of Defendant Berry's ownership interest in Defendant 585 was calculated.

4. Counsel advised this Court during oral argument that Plaintiff foreclosed on the airplane, resulting in a deficiency in excess of $10 million.

Richard L. Doughton entered an Order and Summary Judgment in Defendants' favor. Plaintiff timely appealed.

II. Analysis

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The trial court rules as a matter of law when granting a motion for summary judgment, and is not exercising its discretion. *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980).

> "A movant [for summary judgment] may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim."

McKinnon v. CV Indus., Inc., 213 N.C. App. 328, 332, 713 S.E.2d 495, 499 (2011) (quoting *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995)).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). "By moving for summary judgment, a defendant may force a plaintiff to produce evidence which shows plaintiff's ability to establish a *prima facie* case." *Moore v. F. Douglas Biddy Constr., Inc.*, 161 N.C. App. 87, 92, 587 S.E.2d 479, 483 (2003). When a defendant moves for summary judgment based on a statute of limitations or repose, "the burden is on the plaintiff to show that the action was instituted within the requisite period . . . ." *Marshburn v. Associated Indem. Corp.*, 84 N.C. App. 365, 368, 353 S.E.2d 123, 125 (1987).

B. Interpretation of "Transfer"

[1] The core issue in this appeal is the meaning of the term "transfer" in N.C. Gen. Stat. § 39-23.9, a statute which extinguishes claims for fraudulent transfers brought after a statutorily defined time period. The parties dispute whether the term "transfer" refers to the actual date that the transfer at issue occurred or, rather, the date that the fraudulent nature of the transfer became apparent to the creditor. This issue has not

been addressed since our legislature enacted the Uniform Fraudulent Transfers Act, later renamed the Uniform Voidable Transactions Act ("UVTA"), as Article 3A of Chapter 39 of the North Carolina General Statutes nearly two decades ago.

Section 39-23.9 of the UVTA provides:

> A claim for relief with respect to a voidable transfer or obligation under this Article is extinguished unless action is brought:
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> (1) Under G.S. 39-23.4(a)(1), not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
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> (2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), not later than four years after the transfer was made or the obligation was incurred; or
>
> (3) Under G.S. 39-23.5(b), not later than one year after the transfer was made.

The UVTA defines "Transfer" as follows:

> Every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

N.C. Gen. Stat. § 39-23.1(12) (2015). Starting with the word "every," this definition is all-inclusive. It does not limit its scope to transfers that are fraudulent or that appear to be fraudulent. Likewise, Section 39-23.9 uses the word "transfer" consistently without any modifying or qualifying terms. If the legislature had intended for the date triggering extinguishment of the claim to be anything other than when "the transfer was made," it could have said so in the statute. Additionally, the word "fraudulent" appears nowhere in this statute.

Thus, the plain language of the statute indicates that the limitations period for all claims authorized by the UVTA begins to run at the time of the transfer upon which the claim is based, or from such point as the claimant should reasonably have known of the transfer. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and

definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)).

Our interpretation of the statute is consistent with the legislature's Comment when it was enacted:[5]

> The UFTA's limitations provisions *make some change* to the limitations period previously prescribed under North Carolina law. *Under prior law*, the limitations period applicable to fraudulent conveyances was three years *and the limitations period began to run as of the time when the fraud was known* or should have been discovered by the aggrieved party.
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> . . . [Under the current law], [a]s to claims based on a transfer in which the debtor does not receive reasonably equivalent value, *the limitations period is four years from the date of transfer*.

N.C. Gen. Stat. § 39-23.9, North Carolina Cmt. (1997) (emphasis added) (citation omitted).

In conformity with the plain meaning of the statute, we hold that the term "transfer" within N.C. Gen. Stat. § 39-23.9 refers to the date that the transfer actually occurred, and not the date that the fraudulent nature of the transfer became apparent. The latter interpretation is inconsistent with the plain meaning of the statute.

Plaintiff argues that this case is controlled by *Cowart v. Whitley*, 39 N.C. App. 662, 664, 251 S.E.2d 627, 629 (1979), which held that the limitations period for bringing a fraudulent transfer claim began to run only when the claimant knew or should have known: (1) that the transfer had occurred, and (2) that the transfer was fraudulent. We disagree. *Cowart* involved a claim arising under N.G. Gen. Stat. § 39-15 (1997), the "prior law" referenced in the 1997 Comment to the current statute.

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5. Because we hold that the plain language of Section 39-23.9 is unambiguous, it is not necessary for us to resort to further canons of construction to determine the legislature's intent. However, because this is an issue of first impression, in the interest of completeness, we cite the Comment. North Carolina legislative history, such as its committee notes, is rarely held to be authoritative, but is often cited as some indication of the intent of the legislature. *See Savage v. Zelent*, __ N.C. App. __, __, 777 S.E.2d 801, 806 (2015); *see generally Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993); *Belk v. Belk*, 221 N.C. App. 1, 19, 728 S.E.2d 356, 367 (2012).

In urging this Court to follow *Cowart*, Plaintiff notes that the current N.C. Gen. Stat. § 39-23.10 (2015) provides that "the principles of law and equity" supplement the provisions of the UVTA. This argument is undermined by the introductory phrase in Section 39-23.10, "[u]nless displaced by the provisions of this Article[.]"

Plaintiff also urges this Court to consider the decisions of other jurisdictions that have applied the "discovery-of-the-fraud rule" to fraudulent transfer claims.[6] *See.*, *e.g.*, *Cortez v. Vogt*, 52 Cal. App. 4th 917, 931, 60 Cal. Rptr. 2d 841, 850 (1997) (holding that it would be impracticable to require a creditor to "bring suit to set aside a fraudulent transfer before the claim has matured"). Courts applying the discovery-of-the-fraud rule have reasoned that the statutes providing for relief from fraudulent transfers have no application to transfers that are not fraudulent, that often the event that makes the fraudulent nature of a transfer apparent is the acquisition of a judgment lien by the claimant, and that the claimant should not be "require[d] to maintain an action to annul a fraudulent conveyance before his debt has matured." *Id.* at 930, 60 Cal. Rptr. 2d at 849. *See also Fid. Nat'l Title Ins. Co. of N.Y. v. Howard Sav. Bank*, 436 F.3d 836, 840 (7th Cir. 2006) (holding that the liability of a third party transferee pursuant to the uniform statute "implies that the discovery statute of limitations does not begin to run until the plaintiff has discovered or should have discovered not that money has been transferred illegally but that it has been transferred to someone who is a fraudulent transferee, for otherwise it is not a fraudulent transfer and the owner of the money has no claim against the transferee"). While the policy underlying this reasoning may be sound, in light of the plain language of the North Carolina statute, it must be addressed to our legislature rather than to this Court.

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6. In both its brief on appeal and oral argument, Plaintiff cited *Fed. Deposit Ins. Corp. v. Mingo Tribal Pres. Trust*, __ F. Supp. 2d __, 2015 WL 1646751, 2015 U.S. Dist. LEXIS 49777 (W.D.N.C. 2015). This decision is not binding on this Court. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). In any event, it does not support Plaintiff's argument. The court in *Mingo* noted that the plaintiff's fraudulent transfer claim would not be disposed of at the pleadings stage, "as the Defendants apparently concede." __ F. Supp. 2d at __, 2015 WL 1646751, at *6, 2015 U.S. Dist. LEXIS 49777, at *17. The court referred to N.C. Gen. Stat. § 39-23.9 as a statute of limitations only in passing, with no discussion of the distinction between limitations and repose. *Id.* The court cited *Cowart*, but only for its holding that the recordation of a deed is insufficient to place a creditor on notice of a transfer for purposes of the statute of limitations on a fraudulent transfer claim. *Id.* The court did not mention the common law discovery rule. Instead, with regard to the term "transfer," the court determined that the statutory deadline to file claims ran from the date of the transfer or the date the creditor reasonably should have learned of the transfer. *Id.*

This Court is not the first to conclude that a frustrated claimant's plea for broader relief from a fraudulent transfer must be addressed to the legislative branch. In *National Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, __ So. 3d __, __, 2016 Fla. App. LEXIS 4820, at *18 (Fla. Dist. Ct. App. 2016), the Florida Court of Appeals held that: (1) the Florida statutory period, with language identical to that in N.C. Gen. Stat. § 39-23.9, was triggered by the transfer at issue or the claimant's discovery of the transfer, without regard to whether the transfer was at that time fraudulent or discovered to be so; and (2) that the statute is one of repose rather than one of limitation. Acknowledging the plaintiff's argument that a more flexible time bar would better serve the legislative purpose of deterring fraud and protecting creditors, the Florida court explained that "[w]hen statutory text is unambiguous, 'courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.' " *Id.* at __, 2016 Fla. App. LEXIS at *21 (quoting *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006)). Chief Judge Villanti wrote a separate concurring opinion to express "trepidation" that the statute as written would allow "the judgment debtor, having already actively engaged in fraud, [to] continue[] his or her fraudulent ways so as to hide any evidence that a given transfer was, in fact, fraudulent[,]" and to urge the Florida legislature to consider amending the statute. *Id.* at __, 2016 Fla. App. LEXIS at *39.

At least one state legislature has amended its statute to deviate from the Uniform Act in this respect. Arizona amended its statute in 1990 to provide that some claims based upon a fraudulent transfer are extinguished if not brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the fraudulent nature of the transfer or obligation was or through the exercise of reasonable diligence could have been discovered by the claimant." Ariz. Stat. § 44-1009(1) (2016). It appears that the Arizona legislature did not interpret the term "transfer" any differently than we do with respect to our statute, but added the words "the fraudulent nature of" to the discovery clause of the statute to broaden the protection for creditors.

C. Statute of Limitations or Repose

[2] A second issue of first impression presented in this case is whether N.C. Gen. Stat. § 39-23.9 functions as a statute of limitations or as a statute of repose. The function of Section 39-23.9, the language of the statute, and a comparison of this language to other statutes leads us to hold that it is a statute of repose.

A statute of limitations functions to limit the amount of time that a claimant has to file an action. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994). The limitations period begins to run on the date the cause of action accrues, which is generally "the time of an injury or the discovery of the injury." *Id.* Statutes of limitation are purely procedural bars to the bringing of claims; they "affect only the remedy and not the right to recover." *Id.*

By contrast, statutes of repose function as more rigid stops. The time limitations imposed by statutes of repose are usually not measured from the accrual of the cause of action. *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 856 (1988). Instead, they often run from the " 'defendant's last act giving rise to the claim.' " *Id.* (quoting *Trustee of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985)). While statutes of limitation are classified as affirmative defenses, a statute of repose need not be pled as an affirmative defense. *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 862 (2006). Rather, statutes of repose are more appropriately pled as a condition precedent to the bringing of an action at all. *Id.* This elemental nature makes the time span imposed by a statute of repose " 'so tied up with the underlying right that . . . the limitation clause is treated as a substantive rule of law.' " *Boudreau*, 322 N.C. at 341, 368 S.E.2d at 857 (quoting *Chartener v. Rice*, 270 F. Supp. 432, 436 (E.D.N.Y. 1967)).

" 'A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations.' " *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 709, 104 S.E.2d 858, 860 (1958) (quoting 34 Am. Jur., *Limitation of Actions* § 7). N.C. Gen. Stat. § 39-23, et seq., like the workers compensation statute at issue in *McCrater*, crafted a new civil cause of action related to a wide variety of fraudulent transactions not previously recognized in North Carolina. Furthermore, the "common law" claim for fraudulent conveyance upon which Plaintiff relies was itself a creature of statute, dating back to 1966 and adopted from English Code.[7] N.C. Gen. Stat. § 39-23 (2015), Official Cmt.

Chapter 39, Article 3A of our General Statutes provides for the definition, cause of action, and procedure for which an individual may

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7. The law of fraudulent conveyances as we know it was first codified in 1570 as a number of Statutes of Elizabeth, and was later codified in 1966 by North Carolina, largely verbatim. N.C. Gen. Stat. §§ 39-15, 39-16, 39-19 (1966). For a detailed account of the history of claims against fraudulent conveyances, see E. Cader Howard, *The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act*, 50 N.C. L. Rev. 873 (1971).

bring a claim for relief for a fraudulent transfer. Section 39-23.9 establishes a finite and fixed time within which the prescribed actions may be brought. Because Section 39-23.9 measures the time period in relation to an event separate from the realization of an injury by the claimant, the statute is one of repose.

" 'A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained.' " *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 474, 665 S.E.2d 526, 531 (2008) (quoting *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994)). " 'If the action is not brought within the specified period, the plaintiff literally has no cause of action. The harm that has been done is *damnum absque injuria* – a wrong for which the law affords no redress.' " *Id.* (quoting *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787).

Because statutes of repose do not require an injury to begin running, a statute of repose can extinguish a cause of action before it accrues. *In Colony Hill Condo. I Ass'n. v. Colony Co.*, 70 N.C. App. 390, 391, 320 S.E.2d 273, 274 (1984), condominium owners sued after an allegedly defective prefabricated fireplace in one unit caused a fire which spread throughout the building, allegedly because the developers and builder failed to install firewalls between the units. The fire occurred in December 1979, approximately six years after the condominium was built, and the plaintiffs filed suit two years later, in 1981. *Id.* at 391, 393–94, 320 S.E.2d at 274, 276. This Court held that a six-year statute of repose began running before the plaintiffs even owned their condominiums and precluded any claim relating to the omission of firewalls brought after December 1979—the same month as the fire. The applicable statute, N.C. Gen. Stat. § 1-50(a)(5) (1963), provided that " '[n]o action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction.' " *Colony Hill Condo. I Ass'n.*, 70 N.C. App. at 393, 320 S.E.2d at 275 (quoting 1963 N.C. Sess. Laws c.1030). The Court reasoned that "[a] statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action[,]" and that "[o]nce the time limit on the plaintiffs' cause of action expired, the defendants were effectively 'cleared' of any wrongdoing or obligation." *Id.* at 394, 320 S.E.2d at 276. The Court sympathized "with the plaintiff condominium owners, who [found] that the statute of repose barred their claims even before injury occurred" but

held that "we cannot let our sympathies lead us to construe the statute" to allow plaintiffs' claim. *Id.* The Court also held that a six-year statute of repose precluded any claim concerning the fireplace brought after September 1979 because the statute of repose for product liability, N.C. Gen. Stat. § 1-50(a)(6), provided that " '*[n]o action . . . based upon or arising out of any alleged defect or any failure in relation to a product* shall be brought more than six years after the date of initial purchase for use or consumption.' " *Colony Hill Condo. I Ass'n.*, 70 N.C. App. at 396, 320 S.E.2d at 277 (quoting N.C. Gen. Stat. § 1-50(6)). The fireplace was initially purchased no later than September 1973 by the condominium developer, prior to completion of construction. *Id.* The plaintiffs in *Colony Hill*, like Plaintiff in this case, did not even own their condominiums at the time the limitations period began running.

As with claims for defective construction and product liability, injury from a fraudulent transfer may occur after the date when the limitations period begins to run, because the period is triggered by the transfer of a debtor's property, regardless of whether the creditor had a claim against the debtor at that time. In some cases, injury does not occur until the claimant has obtained an actual money judgment for which there are insufficient funds to satisfy.

The language of Section 39-23.9 is more consistent with one of repose than one of limitations. A claim for relief "is extinguished" if not commenced within the statutorily defined time period. The term "extinguished" denotes elimination of a claim, as opposed to merely barring a remedy. *See Nat'l Auto Serv. Ctrs.*, __ So. 3d at __, 2016 Fla. App. LEXIS 4820, at *28-29, and cases cited therein. As stated above, although other state court decisions are not controlling, their respective analyses may be persuasive when applied to statutes of identical or similar language, particularly with respect to uniform acts. Unif. Fraudulent Transfer Act § 9, 7A-2 U.L.A. 266, 359 cmt. (1999).

[3] Here, Plaintiff contends that even if Section 39-23.9 is a statute of repose, the time period should be extended based upon courts' inherent authority to do equity, specifically equitable tolling when the period of repose is asserted by a defendant who has made a fraudulent transfer. We disagree.

Plaintiff quotes the holding in *Wood v. BD&A Constr. L.L.C.*, 166 N.C. App. 216, 220, 601 S.E.2d 311, 314 (2004), that "[e]quitable estoppel may also defeat a defendant's statute of repose defense." This quotation is taken out of context. *Wood* involved a claim for defective construction governed by a specific statute of repose, N.C. Gen. Stat. § 1-50(a)(5)

(2015). That statute provides that no action to recover damages for defective construction shall be brought more than six years after the last act of the defendant giving rise to the claim or substantial completion of the construction, whichever is later. N.C. Gen. Stat. § 1-50(a)(5)(a). However, unlike Section 39-23.9, the statute of repose at issue in *Wood* also contains an express exception that the limitation period "shall not be asserted as a defense" by any person who has engaged in fraud, willful or wanton negligence, or wrongful concealment. N.C. Gen. Stat. § 1-50(a)(5)(e).

In the absence of a specific statutory exception such as that in Section 1-50(a)(5), " 'equitable doctrines do not toll statutes of repose.' " *Goodman*, 192 N.C. App. at 475, 665 S.E.2d at 532 (quoting *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998)). In *Goodman*, the plaintiff argued that *Wood* required the trial court to apply equitable estoppel to toll the statute of repose for a legal malpractice claim. *Id.* at 474, 665 S.E.2d at 531. In rejecting the argument, we noted that the statute of repose governing legal malpractice claims, N.C. Gen. Stat. § 1-15(c), contains no exception comparable to the statute at issue in *Wood*. *Id.*, 665 S.E.2d at 532. Accordingly, "[t]his Court has consistently refused to apply equitable doctrines to estop a defendant from asserting a statute of repose defense in the legal malpractice context . . . ." *Goodman*, 192 N.C. App. at 474-75, 665 S.E.2d at 532.

We hold that Section 39-23.9 is a statute of repose and includes no language creating an exception for equitable doctrines, thereby precluding equitable remedies such as equitable tolling, and limiting Plaintiff's arguments on appeal to those founded in law.

D. Applying the Statute

[4] Plaintiff's first cause of action alleges fraudulent transfer in violation of two separate subsections of the UVTA: N.C. Gen. Stat. § 39-23.4(a)(1) (2015), which creates a cause of action for transfers or obligations voidable as to present or future creditors, and N.C. Gen. Stat. § 39-23.5(a) (2015), which creates a cause of action for transfers or obligations voidable as to present creditors.

Claims allowed by N.C. Gen. Stat. § 39-23.4(a)(1), regarding transfers voidable as to present or future creditors, are extinguished if not brought within four years after the transfer was made. N.C. Gen. Stat. § 39-23.9(1)-(2). This section also includes a "savings clause" providing that an action is not extinguished if brought within one year after the complaining party discovered the transfer or could have reasonably

discovered it. *Id.* This section applies only to a debtor who acts "[w]ith the intent to hinder, delay, or defraud any creditor . . . ." N.C. Gen. Stat. § 39-23.4(a)(1).

Claims allowed by N.C. Gen. Stat. § 39-23.5(a), regarding transfers voidable as to present creditors, regardless of whether the debtor acted with intent, are extinguished if not brought within four years from when the transfer was made, without a savings clause. N.C. Gen. Stat. § 39-23.9(2).

All of Plaintiff's claims are barred by the applicable statute of repose because they arise from a transfer occurring more than four years prior to the filing of the complaint and because Plaintiff had notice of the transfer more than one year prior to filing the complaint.

It is undisputed that Defendant Berry transferred title in the Property to Defendant 585 on 10 October 2008, when Defendant Berry was indebted to Key. Therefore, Plaintiff's claims derived from Key and arising under Section 39-23.5(a) were extinguished because they were not brought before 10 October 2012. Plaintiff's direct claims arising under Section 39-23.4(a)(1) were extinguished either on that date or at the latest—because of the savings clause—within one year from the date Plaintiff discovered or reasonably could have discovered the transfer.

Plaintiff purchased the loan from its predecessor in interest, Key, in September 2010 and reasonably should have known about the transfer of the Property before that date. Basic due diligence would have revealed that Defendant Berry—the only personal guarantor of the loan who was in default at the time Plaintiff bought the loan—did not have sufficient real estate assets to cover the loan obligation and had transferred his most valuable real estate asset at a time when the loan was in default. A cursory comparison of Defendant Berry's 2008 and 2009 personal financial statements would have revealed the transfer of the Property two years earlier.

Finally, Plaintiff conducted a title search of Defendant Berry's property in December 2010, more than two months after purchasing the loan. The title search report explicitly showed that Defendant Berry had transferred the Property to Defendant 585 two years earlier, in 2008. The latest possible time when Plaintiff knew or reasonably should have known of the transfer of the Property was December 2010. Thus, the extra one year provided by the savings clause in Section 39-23.9(1) for claims arising under Section 39-23.4(a)(1) expired in December 2011, two years before Plaintiff brought the present action.

Plaintiff argues that it retains a cause of action under Section 39-23.4(a)(1) because it learned of the fraudulent nature of the transfer upon receipt of the judgment lien on the Note on 31 July 2013. This argument is unpersuasive.

The deed reported in the December 2010 title search stated on its face that Defendant Berry transferred the Property to a related party for no consideration. Accordingly, the title search put Plaintiff on notice that Defendant Berry had not only transferred the Property, but that he had transferred it in violation of creditors' rights actionable under the UVTA.[8] In other words, the title search should have put Plaintiff on notice of the alleged fraudulent nature of the transfer. Thus, even if we agreed with Plaintiff's interpretation of the one-year "savings clause" in the applicable statute of repose, it could not save Plaintiff's claims, which were brought two years after this discovery.

Plaintiff, in opposing Defendants' motion for summary judgment, had the burden of demonstrating when it reasonably could have discovered the transfer, or at least demonstrating that there was a material issue of fact regarding whether that discovery date was less than one year prior to the filing of the lawsuit. Plaintiff offered no evidence to the trial court and no argument to this Court that could satisfy this burden.

"[A] plaintiff has a duty to exercise reasonable diligence to discover the fraud or misrepresentations that give rise to [its] claim." *Doe v. Roman Catholic Diocese of Charlotte, N.C.*, __ N.C. App. __, __, 775 S.E.2d 918, 922 (2015). " '[W]hen an event occurs to excite the aggrieved party's suspicion or put [it] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud,' " that party is deemed to have inquiry notice of the same. *Id.* at __, 775 S.E.2d at 922 (quoting *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007)). The information contained in Defendant Berry's personal financial statements was enough to cause a reasonable person with an interest in the Property to inquire further into its present status and to ultimately discover the alleged fraudulent nature of the transfer, *i.e.*, that the transfer was made when Defendant Berry was indebted to Key. The deed reflected in the title search was unequivocal evidence of the alleged fraudulent nature of the transfer. Therefore, even if this Court were to

8. Defendants deny the transfer was fraudulent for two reasons: (1) that Defendant Berry was not rendered insolvent as a result of the transfer; and (2) that he transferred the property for estate planning purposes. However, it is not necessary that a defendant admit to the existence of all elements of the claim for the plaintiff to have notice of the claim. The merits of Plaintiff's claims are not before this Court.

agree with Plaintiff's interpretation of the word "transfer," Plaintiff's claims would be time barred.

Plaintiff's claims are time barred by the statute of repose. The statute operates as a condition precedent to Plaintiff's claims, and by bringing a claim outside of the statute of repose, Plaintiff has failed to adequately establish its *prima facie* case. All Plaintiff's claims were brought later than four years from the date of the transfer upon which they are based and later than one year from when Plaintiff knew or reasonably should have known that the transfer had occurred.

III. Conclusion

For the foregoing reasons, we affirm the trial court's Order and Summary Judgment granting Defendants' motion for summary judgment as a matter of law.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

ROBERT KING, ANN KING, MARGARET WHALEY, AND A. WILLIAM KING, PLAINTIFFS
v.
PENDER COUNTY, MARIANNE ORR, AND ROBERT ORR, DEFENDANTS

No. COA16-51

Filed 16 August 2016

Declaratory Judgments—legal right to real property—family cemetery

The trial court did not err by granting plaintiff's request for a declaratory judgment finding that plaintiffs are persons with legal right to the real property notwithstanding the fact that they do not hold a fee or leasehold interest in the real property. Plaintiffs have not abandoned the pertinent family cemetery. Our Supreme Court has long recognized the right of *certain* descendants to enter upon the land of another to visit and maintain the graves of their ancestors.

Appeal by Defendants from judgment entered 26 August 2015 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 6 June 2016.

Shipman & Wright, LLP, by W. Cory Reiss and Gary K. Shipman, for the Plaintiffs-Appellees.

Murchison, Taylor & Gibson, PLLC, by Andrew K. McVey, for the Defendants-Appellants.

DILLON, Judge.

Marianne and Robert Orr ("Defendants") appeal from the trial court's grant of Plaintiffs' request for declaratory judgment. For the following reasons, we affirm.

I. Background

This matter stems from a long-standing dispute concerning a family cemetery located on Defendants' property. This dispute has been the subject of numerous appeals to this Court. A comprehensive factual background of the dispute is discussed in our opinion from the first appeal. *See King v. Orr*, 209 N.C. App. 750, 709 S.E.2d 602 (2011) (unpublished) ("*King I*").

The facts relevant to this appeal are as follows: Robert King, Margaret Whaley, and A. William King ("Plaintiffs") are descendants of the individuals interred in the cemetery (the "King Family Cemetery") located on property now owned by Defendants, who are not related to the King family. In 2012, the Pender County Board of County Commissioners granted consent to Defendants to disinter and relocate the bodies located in the King Family Cemetery pursuant to N.C. Gen. Stat. § 65-106 (2011).[1]

Plaintiffs subsequently filed for a declaratory judgment, requesting that the trial court review the Commissioners' decision. In 2014, the trial court entered a declaratory judgment in favor of Plaintiffs, concluding as a matter of law that the Commissioners' grant of consent was based on an improper interpretation of N.C. Gen. Stat. § 65-106, that it was unreasonable, arbitrary, and irrational, that it violated previous court decisions, and that it constituted an abuse of discretion. In *King v. Pender County*, ___ N.C. App. ___, 775 S.E.2d 695 (2015) (unpublished) ("*King V*"), we reversed the trial court's judgment and remanded the matter to allow the trial court to make a specific finding as to whether the cemetery was "abandoned," in accordance with N.C. Gen. Stat.

1. N.C. Gen. Stat. § 65-106 allows for the disinterment, removal, and reinterment of graves with the consent of the governing body of the municipality or county in which an *abandoned* cemetery is located. *See* N.C. Gen. Stat. § 65-106(a)(4).

§ 65-106(a)(4) and § 65-85, and to modify its findings of fact and conclusions of law, if necessary.

In August 2015, the trial court again entered a declaratory judgment in favor of Plaintiffs, specifically finding that Plaintiffs are "persons 'with legal right to the real property[,]' " and that "the cemetery is not an 'abandoned cemetery.' " Defendants timely appealed.

II. Analysis

We agree with the trial court that Plaintiffs are "person[s] with legal right to the real property" and that they have not "abandoned" the cemetery. Therefore, we affirm the judgment of the trial court.

N.C. Gen. Stat. § 65-106 allows for "any person, firm, or corporation who owns land on which an *abandoned* cemetery is located[,] after first securing the consent of the governing body of the municipality or county in which the abandoned cemetery is located[,]" to "effect the disinterment, removal, and reinterment of graves." N.C. Gen. Stat. § 65-106(a)(4) (emphasis added). That is, landowners have the right to remove graves from their property where the graves have been "abandoned" so long as they follow certain procedures. "Abandoned" is defined in Chapter 65 as: "[c]eased from maintenance or use by the *person with legal right to the real property* with the intent of not again maintaining the real property in the foreseeable future." N.C. Gen. Stat. §65-85(1) (2011) (emphasis added).

When interpreting N.C. Gen. Stat. § 65-106 and § 65-85(1), we must first look to the "plain words of the statute." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Moreover, we are guided by the structure of the statute and certain canons of statutory construction. . . . An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Id.*

Here, we conclude that Plaintiffs are persons "with legal right to the real property," notwithstanding the fact that they do not hold a fee or leasehold interest in the real property. To hold that persons "with legal right" include only those who own the property would render the statute's requirement that the cemetery be "abandoned" almost meaningless: it is the *owner* who seeks consent from the government to remove the graves. Further, it would ignore the provision in the same Chapter providing a mechanism by which descendants can obtain a court order recognizing their right to access the property of another to visit and maintain the graves of their ancestors. *See* N.C. Gen. Stat. § 65-102.

Our Supreme Court has long recognized that persons, other than the holder of the fee and leasehold interest, may have "legal right to real property." For example, the right to hunt or fish on the land of another is considered an interest in real estate subject to our Statute of Frauds, set forth in N.C. Gen. Stat. § 22-2, as is the right to remove timber or extract coal. *See Council v. Sanderlin*, 183 N.C. 253, 257-58, 111 S.E. 365, 367 (1922). Further, our Supreme Court has long recognized the right to use another's land in the form of an easement. *See Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925) (describing appurtenant easements and easements in gross).

And, relevant to the present case, our Supreme Court has long recognized the right of *certain* descendants to enter upon the land of another to visit and maintain the graves of their ancestors, stating as follows:

> Persons having a right to protect private cemeteries or graves therein may erect a fence around the cemetery[,] . . . [and] any member of a family whose dead were buried in a family cemetery might enjoin the removal of a fence or an interference with any portion of the cemetery. However, any one or more of the heirs of persons buried in a private cemetery may prevent an interference with the *rights held in common*.

Rodman v. Mish, 269 N.C. 613, 616, 153 S.E.2d 136, 138 (1967) (internal citations omitted) (emphasis added). This right is rooted in the long-held view that landowners do not have an unfettered right to remove graves that are located on their land, as expressed by our Supreme Court in the 1800s:

> [A landowner] had not the right to remove the dead bodies interred there, or the memorial stones erected by the hand of affection and respect . . . .Causes might arise that would require and justify the removal of dead bodies from one place of interment to another, but such removal should be made, *with the sanction of kindred*, in a proper way, or by legislative sanction.

State v. Wilson, 94 N.C. 1015, 1020 (1886) (emphasis added). In the 1900s, the Court reiterated this view:

> Courts are reluctant to require disturbance and removal of bodies that have once been buried, for courts are sensitive to all those emotions that men and women hold for sacred in the disposition of their dead. . . . The aversion to disturbance of one's remains is illustrated by Shakespeare's choice of his own epitaph:

> Good friend, for Jesu's sake forbear
> To dig the dust enclosed here.
> Blest be the man that spares these stones,
> And curst be he that moves my bones.

Mills v. Carolina Cemetery, 242 N.C. 20, 27, 86 S.E.2d 893, 898 (1955) (internal marks omitted).

More recently, in 1987, our General Assembly enacted N.C. Gen. Stat. § 65-102, providing a procedure by which certain persons may obtain a court order recognizing their right to access the private lands of others in order to maintain graves and cemeteries located thereon.

In the present case, Plaintiffs did obtain an order, pursuant to N.C. Gen. Stat. § 65-102, allowing them access to Defendants' property in order to maintain and visit the King Family Cemetery. And we note that during the course of this dispute, we have held that Plaintiffs have rights "in and to the cemetery." *King I*, 209 N.C. App. 750, 709 S.E.2d 602, 2011 WL 32295 at *3. This conclusion was the basis of our Court's decision in *King I* that Plaintiffs, "as members of a family whose dead were buried in the [King Family Cemetery], are entitled to enjoin the removal of the fence or the interference with any portion of the cemetery." *King V*, ___ N.C. App. ___, 775 S.E.2d 695, 2015 WL 379303 at *3 (citing *King I*, 209 N.C. App. 750, 709 S.E.2d 602, 2011 WL 32295 at *9). This decision was reaffirmed in *King V* when this Court held that "based on [precedent], the binding language in *King I*, and the uncontested fact that [P]laintiffs are members of the King family," Plaintiffs suffered an injury in fact and therefore had standing to bring a declaratory judgment action. *Id.* at *3.

III. Conclusion

Plaintiffs qualify as "person[s] with a legal right" to the King Family Cemetery. This litigation first arose as the result of Plaintiffs' attempts to maintain and protect the King Family Cemetery. The record contains evidence that Plaintiffs have consistently maintained or attempted to maintain the King Family Cemetery throughout the long history of this litigation and that Plaintiffs intend to continue to maintain it in the future. Therefore, because Plaintiffs qualify as "person[s] with legal right" and Plaintiffs have *not* abandoned the King Family Cemetery, we affirm the judgment of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

STATE v. BRIGGS

[249 N.C. App. 95 (2016)]

STATE OF NORTH CAROLINA
v.
ANTRAVIOUS BRIGGS, DEFENDANT[1]

No. COA15-767

Filed 16 August 2016

1. Appeal and Error—no notice of appeal—brief treated as petition for certiorari

Defendant's appellate brief was treated as a petition for a writ of certiorari and the petition was granted where defendant did not give notice of appeal from an amended judgment following the resentencing outside his presence.

2. Sentencing—resentencing—increased term—defendant's presence

The trial court erred by resentencing defendant for attempted second-degree sexual offense outside of defendant's presence. Regardless of whether the change in defendant's sentence was merely the correction of a mistake, the trial court substantially increased the maximum term; such a change can only be made in defendant's presence.

3. Sentencing—prior record level—worksheet—lack of defense objection—stipulation

In a case remanded on other grounds, the trial court did not err when it sentenced defendant as a prior record level II offender where the State showed a prior offense only by a prior record level worksheet that had not been signed by defense counsel. Defense counsel's lack of objection despite the opportunity to do so constituted a stipulation to the prior felony conviction.

Appeal by Defendant from judgment and amended judgment entered 10 November 2014 and 30 January 2015 by Judge Christopher W. Bragg and Judge W. David Lee, respectively, in Union County Superior Court. Heard in the Court of Appeals 28 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

1. Defendant's first name was misspelled in the original indictment, but the trial court granted the State's motion to amend to correct his name. Despite the amendment of the indictment, both the judgment and amended judgment reflect the incorrect spelling of Defendant's first name.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for Defendant-appellant.

INMAN, Judge.

Following a jury trial and conviction for attempted second degree sexual offense, Antravious Q. Briggs ("Defendant") was sentenced to an active term of 73 to 100 months in prison. Defendant gave oral notice of appeal on the day of his sentencing. A few months later, outside of Defendant's presence, the trial court issued an amended judgment resentencing Defendant to a term of 73 to 148 months in prison. Because the trial court resentenced Defendant outside of his presence, resulting in a lengthier prison term, we vacate and remand for resentencing.

I. Background

The State's evidence tended to show the following:

On 23 June 2013, CL[2] was sexually assaulted by Defendant while she was staying with her daughter in Monroe, North Carolina. The night before, CL and her daughter had attended a cookout in the neighborhood that was also attended by Defendant. CL and her daughter went home after attending the cookout and after midnight, CL, who was sleeping on the couch in the living room, heard a knock at the front door. She answered the door and saw Defendant, who pulled her close to him and walked her to the edge of the porch. CL fell down and busted her lip, and while she was lying on the ground on her stomach, Defendant pulled down her pants and attempted to penetrate her anus with his penis about three or four times without success. CL was trying to get up, and told him several times that he was hurting her. Defendant eventually stopped and CL got up. CL hurried into the house. Defendant then left. The attack resulted in rectal bleeding. At some point later, CL found Defendant's wallet at the location where the attack had occurred. CL's daughter called the police, and CL was taken to the hospital in a rescue squad vehicle.

Defendant was charged with second degree sexual offense. At trial, the trial court granted Defendant's motion to dismiss the charge of second degree sexual offense but submitted to the jury the lesser included offense of attempted second degree sexual offense. The jury found Defendant guilty of attempted second degree sexual offense, a Class D felony.

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2. We use initials for CL to protect the privacy of the victim.

At Defendant's sentencing hearing, the State presented a prior record level worksheet showing that Defendant had committed one prior felony: a drug offense in South Carolina. The prior record level worksheet was signed by the prosecutor but was not signed by Defendant or his counsel. The prosecutor explained to the trial court that she had a copy of Defendant's criminal history, but the record does not show whether she provided that document to the trial court. The prosecutor did provide to the trial court a copy of the relevant South Carolina statute and asserted that the offense was "substantially similar" to a Class H or I felony offense in North Carolina. In calculating Defendant's prior record level, the trial court included the prior felony, which added two points, found that Defendant was a prior record level II, and sentenced him to an active term of 73 to 100 months in prison. Defendant gave oral notice of appeal in open court following sentencing.

About one month later, the North Carolina Division of Adult Correction ("DAC") sent notice to the Superior Court of Union County that Defendant's sentence was erroneous because the maximum prison term did not correspond to the minimum prison term. For a Class D felony sexual offense, the correct maximum term that corresponds with a minimum of 73 months is 148 months. N.C. Gen. Stat. § 15A-1340.17(f) (2015). Judge W. David Lee of the Union County Superior Court issued an amended judgment in response to the DAC notice, resentencing Defendant outside of his presence to a term of 73 to 148 months.

II. Analysis

A. Jurisdiction

[1] Defendant did not give notice of appeal from the amended judgment following the resentencing outside of his presence. The State does not address in its brief the jurisdictional concern that Defendant has failed to give timely notice of appeal. We elect to treat Defendant's appellate brief as a petition for writ of certiorari for review of the amended judgment and grant his petition. *See* N.C. R. App. P. 21 (2016); *State v. Jarman*, 140 N.C. App. 198, 201, 535 S.E.2d 875, 878 (2000).

B. Resentencing Outside Defendant's Presence

[2] Defendant asserts that the trial court erred in amending Defendant's sentence outside of his presence. We agree. Defendant had a right to be present at sentencing and the trial court prejudicially erred. We therefore remand for resentencing.

On appeal, this Court reviews *de novo* whether a defendant was improperly sentenced outside his presence. *State v. Arrington*, 215 N.C.

App. 161, 166, 714 S.E.2d 777, 781 (2011). "In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). "It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 799 (2015).

In *Leaks*, the defendant was sentenced in court as a level V offender to a term of 114 to 146 months active imprisonment, but the trial court later entered written judgments, outside of the defendant's presence, sentencing him to 114 to 149 months active imprisonment. *Id.* at __, 771 S.E.2d at 799. The sentence reflected in the written judgments was the one imposed upon the defendant. *Id.* at __, 771 S.E.2d at 799. This Court held that "[b]ecause the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment." *Id.* at __, 771 S.E.2d at 800.

Here, Defendant was sentenced to 73 to 100 months imprisonment at the sentencing hearing following Defendant's trial. He was resentenced over two months later to a term of 73 to 148 months outside of his presence. The amended written judgment shows "a different sentence than that which was imposed in [D]efendant's presence." *Id.* at __, 771 S.E.2d at 800. Therefore, like the Court in *Leaks*, we must vacate Defendant's sentence and remand for resentencing in Defendant's presence.

The State argues that the trial court was simply correcting a mistake in amending the judgment. It asserts that since Defendant was, in fact, present at the sentencing hearing, the trial court's correction of a mistake in the maximum term was not error. We reject this argument. Regardless of whether the change in Defendant's sentence was merely correcting a mistake, the prison term ultimately imposed upon Defendant was imposed outside Defendant's presence and substantially increased the maximum term. Such a change in the sentence "could only be made in . . . Defendant's presence, where he and/or his attorney would have an opportunity to be heard." *State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999).

C. Prior Record Level

[3] Since we are remanding for resentencing, we also address Defendant's other issue related to sentencing. *See State v. Midyette*, 87 N.C. App. 199, 203, 360 S.E.2d 507, 509 (1987) ("Because it is necessary to remand this case for resentencing, we deem it appropriate to briefly discuss defendant's other assignment of error relating to the sentencing hearing.").

Defendant argues that the trial court erred when it sentenced him as a prior record level II offender because there was insufficient evidence to support the prior record level determination. We disagree.

"This Court reviews the calculation of a prior record level *de novo*." *State v. Boyd*, 207 N.C. App. 632, 642, 701 S.E.2d 255, 261 (2010). "This review is appropriate even though no objection, exception, or motion has been made in the trial division." *Id.* (internal quotation marks omitted). For a trial court to calculate a defendant's prior record level, " '[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.' " *Id.*, 701 S.E.2d at 262 (quoting N.C. Gen. Stat. § 15A-1340(f)(2009)).

Under N.C. Gen. Stat. § 15A-1340.14(f) (2015), a prior conviction must be proven by:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

"Our Court has repeatedly held that a prior record level worksheet, standing alone, does not meet the State's burden for establishing prior convictions under N.C.G.S. § 15A-1340.14(f)." *State v. English*, 171 N.C. App. 277, 280, 614 S.E.2d 405, 408 (2005). " '[T]he law requires more than the State's unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.' " *Boyd*, 207 N.C. App. at 643, 701 S.E.2d at 262 (quoting *State v. Jeffrey*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 675 (2004)). "Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so." *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006).

At the sentencing hearing, the State presented only a prior record level worksheet that had not been signed by defense counsel to show Defendant's prior offense. Defense counsel admitted that he and Defendant had "reviewed the sheet[,]" and later stated that "[t]he State is only alleging that prior felony conviction in South Carolina." Defendant

argues that defense counsel's statement that he had reviewed the worksheet did not amount to tacit stipulation, and that defense counsel was careful to only reference *allegations* about the prior conviction. Defendant contends that the State did not meet its burden of proving the prior conviction. Defendant's argument is without merit.

This case is similar to *Hurley*. In *Hurley*, a prior record level worksheet was introduced by the State and defense counsel did not object to it despite knowledge of its contents. *Id.* at 684–85, 637 S.E.2d at 923. Defense counsel asked the trial court for work release for the defendant. *Id.* at 684, 637 S.E.2d at 923. This Court held that, "[w]hile the sentencing worksheet submitted by the State was alone insufficient to establish [the] defendant's prior record level, the conduct of [the] defendant's counsel during the course of the sentencing hearing constituted a stipulation of [the] defendant's prior convictions sufficient to meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f)." *Id.* at 685, 637 S.E.2d at 923.

Here, defense counsel acknowledged reading the prior record level worksheet submitted by the State and did not object to its inclusion of the prior South Carolina conviction. Defense counsel asked that the trial court not sentence Defendant at the top of the presumptive range, acknowledging that the State was alleging the prior conviction as a basis for the sentencing range. Defendant argues that this case is distinguishable from *Hurley* because defense counsel referred to the worksheet's "allegation" of the prior conviction, indicating that "he did not accept that allegation as true." However, regardless of whether defense counsel accepted the allegation as true, he did not object to its inclusion and did not argue that the trial court should sentence Defendant as a prior record level I offender. Here, as in *Hurley*, we hold that defense counsel's lack of objection despite the opportunity to do so constituted a stipulation to Defendant's prior felony conviction. *See id.*

III. Conclusion

For the foregoing reasons, we hold that the trial court prejudicially erred in resentencing Defendant outside of his presence. Defendant's sentence is vacated and the case is remanded for resentencing.

VACATED and REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

STATE v. JESTER

[249 N.C. App. 101 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
LESLIE W. JESTER, DEFENDANT

No. COA16-10

Filed 16 August 2016

1. Sentencing—habitual felon—guilty plea

The trial court erred by sentencing defendant as a habitual felon where the record did not show that his status as a habitual felon was submitted to the jury or that he entered a plea of guilty to the status. The trial court failed to comply with the requirements of N.C.G.S. § 15A-1022.

2. Sentencing—prior record level—worksheet of prior convictions

The trial court did not err by sentencing defendant as a prior record level IV. Defense counsel did not dispute the prosecutor's description of defendant's prior record or raise any objection to the contents of the proffered worksheet, and defense counsel referred to defendant's record during his sentencing argument.

3. Possession of stolen property—obtaining property by false pretenses—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charges of possession of stolen goods and obtaining property by false pretenses. The State presented sufficient evidence of the charges to submit them to the jury.

4. Constitutional Law—effective assistance of counsel—claim dismissed

The Court of Appeals dismissed defendant's argument regarding ineffective assistance of counsel without prejudice to his right to raise the issue in a motion for appropriate relief in the trial court.

Appeal by defendant from judgments entered 20 May 2015 by Judge Reuben F. Young in Columbus County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General M. Denise Stanford, for the State.

Kimberly P. Hoppin for defendant-appellant.

ZACHARY, Judge.

Leslie Jester (defendant) appeals from judgments entered upon his convictions for possession of stolen property, obtaining property by false pretenses, and having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by sentencing him as an habitual felon, by failing to correctly calculate his prior criminal record level, and by denying his motion to dismiss the charges of obtaining property by false pretenses and possession of stolen goods. Defendant also contends that he received ineffective assistance of counsel. We find no error in defendant's convictions for possession of stolen goods and obtaining property by false pretenses, or in the trial court's calculation of defendant's prior criminal record level. We conclude that the trial court erred by sentencing defendant as an habitual felon and vacate and remand for resentencing. We dismiss defendant's claim of ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Factual and Procedural Background

Craig Whaley is the owner of a building where he stored farming equipment and metal tools. On 31 July 2012, Mr. Whaley discovered that a large number of items were missing from the building. The next day Mr. Whaley located his missing property on the premises of Metal Recyclers of Whiteville ("Metal Recyclers"), a business that purchases scrap metal. Mr. Whaley testified that the total value of his property that was found at Metal Recyclers was in excess of $1000.00.

Josh Holcomb, who was employed by Metal Recyclers in July 2012, testified that defendant came to Metal Recyclers on 31 July 2012, with metal items to sell. Metal Recyclers weighed and photographed the items, photographed defendant, copied defendant's driver's license, and took defendant's index finger fingerprint. In addition, defendant signed a document certifying that he was the owner of the items and acknowledging that he was being paid $114.00 for approximately 1200 pounds of steel equipment.

Detective Rene Trevino of the Chadbourn Police Department testified that he was employed as a detective with the Columbus County Sheriff's Department in 2012. On 1 August 2012, Mr. Whaley reported to the Sheriff's Department that he had found stolen property belonging to him at Metal Recyclers. Detective Trevino obtained information identifying defendant as the person who had sold the items to Metal Recyclers. When defendant returned to Metal Recyclers later that day,

he agreed to accompany Detective Trevino to the law enforcement center, where defendant waived his *Miranda* rights and gave a statement. Defendant told Detective Trevino that he had obtained the metal items from a white male. However, defendant was unable to provide the name of this person, did not affirmatively state that he had purchased the items from this man, and did not produce a receipt for any of the items. After speaking with defendant, Detective Trevino arrested defendant on charges of felony larceny and obtaining property by false pretenses.

On 6 February 2013, defendant was indicted for possession of stolen property and obtaining property by false pretenses, and on 13 March 2013, defendant was indicted for having attained the status of an habitual felon. Defendant was tried before a jury at the 18 May 2015 criminal session of Columbus County Superior Court. On 20 May 2015, the jury returned verdicts finding defendant guilty of possession of stolen goods and obtaining property by false pretenses. Based on defendant's stipulation to having the status of an habitual felon, the trial court sentenced defendant to two consecutive prison sentences of 120 to 156 months. Defendant filed *pro se* notices of appeal on 22 May 2015 and 2 June 2015. Defendant's filings were procedurally defective, and on 15 March 2016, defendant's appellate counsel filed a petition for a writ of certiorari in order to obtain review of the merits of defendant's appeal. In our discretion, we grant defendant's petition for certiorari, and proceed to address the issues raised by defendant on appeal.

II. Sentencing Defendant as an Habitual Felon

[1] Defendant argues first that the trial court erred by sentencing him as an habitual felon where the record does not show that his status as an habitual felon was submitted to the jury or that he entered a plea of guilty to having the status of an habitual felon. We agree.

"A court may accept a guilty plea only if it is 'made knowingly and voluntarily.' A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea." *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002) (quoting *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)). This requirement is codified in Chapter 15A of the General Statutes, which provides in relevant part that a trial judge "may not accept a plea of guilty or no contest from the defendant without first addressing him personally" and:

> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation; [and]
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge. . . .

N.C. Gen. Stat. § 15A-1022(a) (2015). Proceedings to determine whether a criminal defendant has the status of an habitual felon "shall be as if the issue of habitual felon were a principal charge." N.C. Gen. Stat. § 14-7.5 (2015). Accordingly, a trial court may not accept a defendant's plea of guilty to having the status of an habitual felon without complying with the requirements of N.C. Gen. Stat. § 15A-1022. *See*, *e.g.*, *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001) (holding that the trial court was required to comply with N.C. Gen. Stat. § 15A-1022 before accepting the defendant's plea to having attained the status of an habitual felon).

In the present case, defendant argues that the trial court erred by sentencing him as an habitual felon without personally addressing him to make the inquiries required by N.C. Gen. Stat. § 15A-1022, having defendant execute a transcript of plea, or otherwise creating a record that defendant's plea was knowingly and voluntarily entered. Defendant cites *Gilmore*, in which we held that a defendant's stipulation, without more, does not establish a plea of guilty. In *Gilmore*, as in the instant case, the defendant stipulated to his status as an habitual felon, based upon his convictions for the predicate offenses. The trial court sentenced the defendant as an habitual felon based on his stipulation, without conducting a colloquy addressing the requirements of N.C. Gen. Stat. § 15A-1022 or having the defendant execute a plea transcript. We held that:

> In this case, the record shows Defendant stipulated to the three prior convictions alleged by the State, pursuant to N.C. Gen. Stat. § 14-7.4. . . .The issue of whether Defendant was an habitual felon, however, was not submitted to

> the jury, and Defendant did not plead guilty to being an habitual felon. Although Defendant did stipulate to his habitual felon status, *such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea*. . . . [*See*] N.C.G.S. § 15A-1022(a) (trial court may not accept guilty plea without first addressing defendant personally and making inquiries of defendant as required by this statute). Accordingly, Defendant's habitual felon conviction is reversed and remanded. (emphasis added).

Gilmore, 142 N.C. App. at 471-72, 542 S.E.2d at 699. In this case, as in *Gilmore*, the defendant stipulated to his status as an habitual felon and to his prior convictions for the predicate felonies, as indicated in the following dialogue between defendant and the trial court:

> THE COURT: All right. Madam Court Reporter, we are back on the record in Mr. Jester's case. And as I understand it, Mr. Williamson, your client is - has agreed to stipulate to his status as a habitual felon. Is that correct?
>
> MR. WILLIAMSON: Your Honor, in an effort to expedite things, . . . [Mr. Jester] is prepared to stipulate and to - take his medicine as we would say.
>
> THE COURT: Is that correct, Mr. Jester?
>
> MR. JESTER: [Nods affirmatively].
>
> THE COURT: Okay. All right. Gentlemen, thank you, very much. We are ready to proceed with sentencing in this case. And Mr. McGee, the Court will hear from the State.
>
> . . .
>
> THE COURT: All right. Thank you, very much. Mr. Jester, you understand, do you not, that you have been indicted as a habitual felon with regard to this case? You understand that?
>
> MR. JESTER: Yes, sir. I do.
>
> THE COURT: You also understand that you are admitting to the convictions that have been recited in the record based on the indictment that has been handed down? You understand that?

MR. JESTER: Yes, sir, Your Honor.

THE COURT: Do you also stipulate, sir, that these convictions are true and accurate?

MR. JESTER: Yes, sir.

THE COURT: Do you also stipulate, sir, that, based on these convictions, that you are indeed of a habitual felon status?

MR. JESTER: Yes, sir, I do.

THE COURT: All right. And you also understand, do you not, sir, that, because of your status as a habitual felon, that your exposure with regard to the offense for which you have just been found guilty of by the jury that your sentence exposure increases with regard to your admitting or stipulating to being a habitual felon?

MR. JESTER: Yes, sir.

THE COURT: All right. And so you are hereby for the record agreeing and thereby stipulating that you are a habitual felon for purposes of sentencing in these two cases. Is that correct?

MR. JESTER: Yes, sir.

THE COURT: Okay. All right. Thank you, very much. You may have a seat. And Mr. McGee, you may proceed.

We conclude that this dialogue failed to comply with any of the requirements of N.C. Gen. Stat. § 15A-1022. Specifically, we note that:

1. Although the trial court personally addressed defendant, the court did not make any of the inquiries required by N.C. Gen. Stat. § 15A-1022.

2. The trial court did not inform defendant that he had a right not to plead guilty to being an habitual felon.

3. The trial court did not inform defendant that by pleading guilty to having the status of an habitual felon, he was waiving his constitutional rights to have the charge determined by a jury and to cross-examine witnesses.

4. The court did not inform defendant of the minimum and maximum sentence that he might receive, or the

felony class under which he would be sentenced as an habitual felon.

5. The court did not determine whether defendant was satisfied with his court-appointed counsel.

6. The trial court did not state on the record that defendant was entering a plea of guilty, did not ask defendant if he was entering a plea of guilty, and did not have defendant execute a transcript of plea under oath.

We conclude that this case is functionally indistinguishable from *Gilmore*, in that the record fails to establish either that defendant entered a plea of guilty to having the status of an habitual felon, or that the trial court complied with the requirements of N.C. Gen. Stat. § 15A-1022. As a result, we vacate defendant's conviction for being an habitual felon and remand for a new sentencing hearing.

In reaching this conclusion, we have considered the State's arguments for a contrary result. The State argues the trial court's "failure to strictly comply with the provisions of N.C. Gen. Stat. § 15A-1022 is not reversible error *per se*, but must be evaluated upon a prejudice analysis." In support of this position, the State directs our attention to cases in which the record showed a relatively minor or technical omission from the requirements of N.C. Gen. Stat. § 15A-1022.

It is true that where the record establishes, whether through a trial court's colloquy with a defendant or through the defendant's execution of a plea transcript, that the defendant was fully informed of his rights as required by N.C. Gen. Stat. § 15A-1022, we have required the defendant to establish that an insignificant or technical error by the trial court was prejudicial. For example, in *State v. McNeill*, 158 N.C. App. 96, 580 S.E.2d 27 (2003), the record established that the defendant signed a plea transcript, was asked under oath by the trial court whether he understood the consequences of his plea of guilty, was informed of his rights, and was told the class of felony applicable to his sentences as well as the maximum number of months to which he could be sentenced for each offense. The defendant argued on appeal that the trial court had failed to comply with N.C. Gen. Stat. § 15A-1022, on the grounds that the court had not specified that if the defendant were sentenced to consecutive terms of imprisonment, he would receive a longer sentence than the maximum for each offense. We held that although the trial court's omission "was neither ideal nor preferable," the defendant had failed to establish prejudice. *McNeill*, 158 N.C. App. at 105, 580 S.E.2d at 32.

In contrast, in *Gilmore* and similar cases, we have held that where there is no record of a valid plea of guilty, either from the trial court's questioning the defendant in accordance with N.C. Gen. Stat. § 15A-1022 or by means of a properly executed plea transcript, the plea must be vacated and the defendant resentenced. In such cases we have not required the defendant to produce evidence that he was prejudiced beyond the prejudice inherent in the court's failure to ensure that the defendant's plea was knowingly and voluntarily entered. The present case, like *Gilmore*, is one in which there is no record that the requirements of N.C. Gen. Stat. § 15A-1022 were met. Thus:

> We acknowledge the State's argument, based on this Court's decision in *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896, (2000), that where a defendant simply alleges technical non-compliance with G.S. § 15A-1022, but fails to show resulting prejudice, vacation of the plea is not required. However, in *Hendricks*, although the record failed to establish that the trial court itself personally addressed defendant as to all statutory factors as required by the statute, the record indicated the trial court did make some of the required inquiries, and further, the transcript of plea between the State and the defendant "covered all the areas omitted by the trial judge." . . . In contrast, *in this case, there is no indication in the record of compliance, even in part, with G.S. § 15A-1022[.] . . . [N]or does the record contain any transcript of plea[.] . . . We believe such an absence constitutes more than mere "technical" non-compliance, and is sufficient to establish prejudice to defendant.*

State v. Glover, 156 N.C. App. 139, 146-47, 575 S.E.2d 835, 839-40 (2003) (emphasis added) (quoting *State v. Hendricks*, 138 N.C. App. 668, 669-70, 531 S.E.2d 896, 898 (2000)). Accordingly, we conclude that defendant is entitled to a new sentencing hearing.

III. Sentencing Defendant as a Prior Record Level IV

[2] Defendant argues next that the trial court erred by sentencing defendant as a prior record level IV, on the grounds that the State failed to present sufficient evidence to support this classification. We disagree.

The Structured Sentencing Act requires that the trial court determine a defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14 before sentencing a defendant for a felony conviction. Prior convictions may be proved by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the Court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2015). This statute also provides that the "State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." Defendant maintains that the State failed to meet this burden because it offered only a worksheet as evidence of defendant's prior criminal record. Defendant's argument is ill-founded.

It is well established that defense counsel may be deemed to have stipulated to the worksheet of a defendant's prior convictions by counsel's failure to dispute or object to the worksheet coupled with counsel's use of the worksheet in his argument:

> [A] worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions. Thus, the question here is whether the comments by defendant's attorney constitute a 'stipulation' to the prior convictions listed on the worksheet submitted by the State.

State v. Eubanks, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) (citing *State v. Hanton*, 140 N.C. App. 679, 689, 540 S.E.2d 376, 382 (2000)).

In this case, during the sentencing hearing, the prosecutor stated the following:

> PROSECUTOR: Judge, in regard to sentencing, Mr. Jester is going to - I'm about to submit the worksheet which shows he's got 19 points for sentencing purposes, Your Honor. He's going to be a level six.
>
> His prior convictions, Judge, prior possession of stolen goods, a second-degree burglary, unauthorized use of a motor vehicle, simple possession of schedule IV controlled substance, assault by strangulation, B and E, three

> separate DWI's, an additional second-degree burglary, as well as a communicating threats. Mr. Jester has a lengthy criminal record, one that consists of similar crimes for which he has been charged with today and convicted of, spanning from 1982 forward to today. . . .

"[C]ounsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005). In *Alexander*, our Supreme Court stated the following:

> Here, defense counsel did not expressly state that he had seen the prior record level worksheet; however, we find it telling that he specifically directed the trial court to refer to the worksheet to establish that defendant had no prior felony convictions. Defense counsel specifically stated that "up until this particular case he had no felony convictions, as you can see from his worksheet." This statement indicates not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it. Defendant, by arguing that his trial counsel did not stipulate to his previous misdemeanor conviction, simply seeks to have his cake and eat it too. If defense counsel's affirmative statement with respect to defendant's lack of previous felony convictions was proper, then so too was the implicit statement that defendant's previous misdemeanor convictions were properly reflected on the worksheet in question.

Similarly, in *State v. Cromartie*, 177 N.C. App. 73, 81, 627 S.E.2d 677, 682-83 (2006), we discussed *Alexander* and held that:

> [T]rial counsel acknowledged the worksheet by making specific reference to it. . . . Then counsel proceeded to use the information contained in the worksheet to minimize defendant's prior record as being 'nonviolent.' Finally, at no time did trial counsel dispute any of the convictions on the worksheet. As our Supreme Court held in *Alexander*, defendant cannot "have his cake and eat it too." Defendant cannot use the worksheet during his sentencing hearing to seek a lesser sentence and then have his appellate counsel disavow this conduct on appeal in order to obtain a new sentencing hearing.

(quoting *Alexander*, 359 N.C. at 830, 616 S.E.2d at 918, and citing *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743). In the instant case, as in *Alexander* and *Cromartie*, defendant's counsel did not dispute the prosecutor's description of defendant's prior record, or raise any objection to the contents of the proffered worksheet. In addition, defense counsel referred to defendant's record during his sentencing argument:

> DEFENSE COUNSEL: Your Honor, if I could just briefly. I forgot to mention this. And this was something with Mr. Jester, his point of contention has always been - and this is his first trial. *You see his record level? He has always stood up and taken accountability for the things he has done.* As such, this is his first trial. He has always, by his contention, admitted and taken responsibility for his actions. This is the first time, and he still contends that he is not guilty of this, but he has always been accountable. *And you can see from his record he hasn't committed any crimes within the - '06 was his last conviction, as far as I can tell. As such, he's been a good boy*, and I would ask Your Honor to take that into consideration.

(emphasis added). We conclude, pursuant to the holdings in *Alexander* and *Cromartie*, that defendant stipulated to the prior record as stated on the worksheet.

Defendant also contends that the trial court erred by assigning points to three out-of-state convictions in defendant's criminal record. N.C. Gen. Stat. § 15A-1340.14(e) (2015) provides in relevant part that:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. . . .

In this case, defendant challenges the trial court's calculation of prior record points assigned to three convictions from South Carolina for DWI, breaking and entering, and second-degree burglary. The

convictions for breaking and entering and for second-degree burglary were treated as Class I felonies and assigned two points each. On appeal, defendant argues that the State was required to offer proof that breaking and entering and second-degree burglary are classified as felonies in South Carolina. As discussed above, we have held that defendant stipulated to the accuracy of the worksheet offered by the prosecutor, which includes the points assigned to the offenses. In *State v. Hinton*, 196 N.C. App. 750, 675 S.E.2d 672 (2009), we held that if a defendant stipulates to his prior record and the prosecutor does not seek to assign a classification higher than the default Class I, the State is not required to prove that the out-of-state offenses correspond to equivalent North Carolina offenses:

> A sentencing worksheet coupled with statements by counsel may constitute a stipulation to the existence of the prior convictions listed therein. In this case, Defendant argues that the trial court's calculation of his prior record level was not supported by sufficient evidence to show that his out-of-state convictions were "substantially similar" to North Carolina offenses. Because Defendant's assertions at trial and failure to object to the sentencing worksheet constituted a stipulation to the existence of his prior convictions, we affirm his sentence. . . .
>
> . . .
>
> According to the statute, the default classification for out-of-state felony convictions is "Class I." Where the State seeks to assign an out-of-state conviction a *more serious* classification than the default Class I status, it is required to prove "by the preponderance of the evidence" that the conviction at issue is "substantially similar" to a corresponding North Carolina felony. However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required.

Hinton, 196 N.C. App. at 751, 754-55, 675 S.E.2d at 673, 675. We hold that because defendant stipulated to his prior record and the prosecutor did not seek to assign a classification more serious than Class I to his out-of-state convictions for second-degree burglary and breaking and entering, the State was not required to offer proof that these offenses were considered felonies in South Carolina or that they were substantially similar to specific North Carolina felonies.

Regarding the South Carolina DWI conviction, defendant argues that in the absence of proof that this offense was substantially similar

to a North Carolina offense, the conviction should have been classified as a Class 3 misdemeanor with no points assigned to defendant's criminal record level. Assuming that defendant is correct, this would have resulted in defendant's having eighteen prior record points instead of nineteen points, and defendant would nonetheless have been classified as a Level VI offender. As a result, defendant has failed to establish prejudice arising from any error in classification of the South Carolina DWI conviction.

Defendant also maintains that the trial court erred by assigning prior record points to two convictions that the record indicated were obtained on the same day. Defendant concedes that this situation is not a factual impossibility, and we again note that defendant stipulated to his prior record. We conclude that the trial court did not err in its calculation of defendant's prior record level and that defendant is not entitled to relief based on this argument.

IV. Denial of Defendant's Motion to Dismiss

[3] Defendant argues next that the trial court erred by denying defendant's motion to dismiss the charges against him, on the grounds that the State failed to present sufficient evidence to submit the charges to the jury. We disagree.

The standard of review regarding motions to dismiss is well settled:

> "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. . . . [I]f 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) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009)).

We first consider defendant's challenge to the evidence of possession of stolen property. N.C. Gen. Stat. § 14-71.1 (2015) provides in relevant part that:

> If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony. . . .

The elements of the crime of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). In this case, defendant challenges the sufficiency only of the evidence that he knew or had reasonable grounds to believe that the metal items were stolen.

"Whether the defendant knew or had reasonable grounds to believe that . . . [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (1987) (citation omitted). "Our Supreme Court has held the legislature intended for the 'reasonable man' standard to apply to the offense of possession of stolen goods." *State v. Weakley*, 176 N.C. App. 642, 652, 627 S.E.2d 315, 321 (2006) (citing *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986)). "The fact that a defendant is willing to sell property for a fraction of its value is sufficient to give rise to an inference that he knew, or had reasonable grounds to believe, that the property was stolen." *Brown*, 85 N.C. App. at 589, 355 S.E.2d at 229.

In this case, the evidence tended to show that defendant was in possession of stolen property valued at more than $1000.00, which he sold for only $114.00. Although defendant told Detective Trevino that he obtained the stolen property from a "white man," he could not provide the man's name. Defendant did not specifically tell Detective Trevino that he *bought* the items from this unidentified man, and did not produce a receipt. We hold that these circumstances were sufficient to allow the jury to determine whether defendant knew or had reasonable grounds to know that the metal items were stolen.

Defendant also challenges the sufficiency of the evidence that he obtained property by false pretenses. N.C. Gen. Stat. § 14-100(a) (2015)

provides in pertinent part that a person is guilty of the felony of obtaining property by false pretenses if he shall "by means of any kind of false pretense . . . obtain or attempt to obtain from any person within this State any . . . property . . . with intent to cheat or defraud any person of such [property]. . . . " Defendant argues that because there was no evidence that he knew or had reasonable grounds to believe that the metal items he sold were stolen, there was no basis for the jury to find that defendant's representation that he was authorized to sell the items was false. For the reasons discussed above, we conclude that there was sufficient evidence that defendant knew or had reasonable grounds to believe that the items were stolen, and that the trial court did not err by denying defendant's motion to dismiss this charge.

V. Ineffective Assistance of Counsel

Finally, defendant argues:

> Should this Court determine that trial counsel's brief comments at the sentencing hearing constitute a stipulation to Mr. Jester's prior record despite insufficient proof and no indication of Mr. Jester's assent, then Mr. Jester contends that he received ineffective assistance of counsel in his counsel's failure to challenge the insufficient proof of his prior convictions.

Defendant is thus arguing that his counsel was ineffective for stipulating to the accuracy of the worksheet setting out his criminal record instead of challenging the proof of his prior convictions. "When raising claims of ineffective assistance of counsel, the 'accepted practice' is to bring these claims in post-conviction proceedings, rather than on direct appeal. . . . To best resolve this issue, an evidentiary hearing available through a motion for appropriate relief is our suggested mechanism." *State v. Dinan*, 233 N.C. App. 694, 700, 757 S.E.2d 481, 486-87 (quoting *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014). We dismiss this issue without prejudice to defendant's right to raise it in a motion for appropriate relief in the trial court.

VI. Conclusion

[4] For the reasons discussed above, we conclude that defendant received a fair trial free of reversible error as to his convictions for possession of stolen property and obtaining property by false pretenses, as well as the calculation of his prior criminal record level. We conclude that the trial court erred in sentencing defendant as an habitual felon

and vacate the judgment and remand for resentencing. We dismiss defendant's claim of ineffective assistance of counsel without prejudice to defendant's right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING, AND DISMISSED WITHOUT PREJUDICE IN PART.

Judge STEPHENS and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
AMANDA GAYLE REED, DEFENDANT

No. COA15-363

Filed 16 August 2016

1. Criminal Law—motion to dismiss—insufficient evidence—defendant's evidence considered

The defendant's evidence is generally not considered on a motion to dismiss because the evidence is viewed in the light most favorable to the State, but defendant's evidence may be considered when it is consistent with the State's evidence. Furthermore, the defendant's evidence must be considered when it rebuts the inference of guilt and is not inconsistent with the State's evidence.

2. Child Abuse, Dependency, and Neglect—creating or allowing a substantial risk of injury—insufficient evidence

The trial court erred by denying defendant's motion to dismiss a charge of misdemeanor child abuse where defendant went to the bathroom for five to ten minutes, leaving her daughter (Mercadiez) playing on a side porch with friends under the supervision of another person in the house, and Mercadiez drowned in their outdoor pool. Considering the State's evidence and the evidence from defendant that was not in conflict with the State's evidence, there was insufficient evidence that defendant created or allowed to be created a substantial risk of physical injury to the child by other than physical means, an essential element of the offense as charged.

3. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—sufficiency of evidence

In a case reversed on other grounds, which included a dissent and an opinion concurring with the dissent on this issue, defendant's motion to dismiss a prosecution for misdemeanor child abuse should have been granted even without State's evidence that was improperly excluded.

4. Juveniles—contributing to the delinquency—fathers' competence to care for young children

Defendant's motion to dismiss a prosecution for contributing to the delinquency of a juvenile should have been granted in a case arising from the drowning of a child in a swimming pool. Defendant was not the only "parent" involved; essentially, the State's theory hinged on the theory that fathers are per se incompetent to care for young children.

5. Evidence—other crimes or bad acts—misuse

In a case that involved the drowning of a child in a swimming pool, reversed on other grounds, with a dissent and a concurring opinion that joined the dissent in some regards, defendant would also have been entitled to a new trial based on the misuse by the State of evidence of another child's death.

Judge DAVIS concurring.

Judge STEPHENS dissenting.

Appeal by defendant from judgment entered on or about 6 October 2014 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Melody R. Hairston, for the State.

The Coxe Law Firm, PLLC, by Matthew C. Coxe, for defendant-appellant.

STROUD, Judge.

Defendant appeals her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile. For the following reasons, we conclude that defendant's convictions must be vacated.

I. Background

The facts of this case, as presented by the State, begin simply enough: defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, tragically managed to fall into their outdoor pool and drown. The complexity of this case arises from the fact that about two years before, defendant was babysitting another child, Sadie Gates, who got out of the house and drowned just outside of her home. Defendant was indicted, tried, and convicted by a jury of misdemeanor child abuse and contributing to the delinquency of a juvenile for Mercadiez's death. Defendant appeals.

II. Defendant's Appeal

Defendant makes three separate arguments on appeal: (1) the trial court erred in denying her motion in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of the evidence did not substantially outweigh the unfair prejudice; (2) the trial court erred in denying defendant's motions to dismiss because there was not substantial evidence of each essential element of the crimes charged; and (3) the State went so far beyond the scope of the appropriate use of the admitted Rule 404(b) evidence in its questioning and arguments to the jury that it amounted to plain error in defendant's trial.

This panel has struggled mightily on this case. While defendant's issues may seem typical for a criminal appeal, unfortunately, an analysis of these issues has turned out to be quite complex, but we have addressed each issue, since we believe that all are interrelated as they appear in this case and all have merit.

III. Motions to Dismiss

Defendant argues that "the trial court erred by denying [her] motions to dismiss all three of the charges at the close of the State's evidence and at the close of all the evidence." (Original in all caps.) The jury found defendant not guilty of involuntary manslaughter, and thus we address only the crimes for which defendant was convicted: misdemeanor child abuse and contributing to the delinquency of a juvenile.

> This Court reviews the trial court's denial of a motion to dismiss *de novo*. On a motion to dismiss for insufficiency of evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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. Clark, 231 N.C. App. 421, 423, 752 S.E.2d 709, 711 (2013) (citations and quotation marks omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014).

A. Misdemeanor Child Abuse

Turning to defendant's conviction for misdemeanor child abuse, North Carolina General Statute § 14-318.2(a) provides,

> Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2013). North Carolina General Statute § 14-318.2(a) is awkwardly worded, and it is not immediately clear what the phrase "by other than accidental means" is modifying, but our Supreme Court has clarified that issue: "This statute provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury." *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). In other words,

> To convict defendant of misdemeanor child abuse, the State needed to prove only one of the following elements: (1) that the parent nonaccidentally inflicted physical

> injury on the child; (2) that the parent nonaccidentally allowed physical injury to be inflicted on the child; or (3) that the parent nonaccidentally created or allowed to be created a substantial risk of physical injury on the child.

State v. Armistead, 54 N.C. App. 358, 360, 283 S.E.2d 162, 164 (1981). Furthermore, "G.S. 14-318.2(a), contemplates active, purposeful conduct" on the part of the defendant. *State v. Hunter*, 48 N.C. App. 656, 660, 270 S.E.2d 120, 122 (1980).

Because this Court is required to consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor" at this point we would normally turn only to the evidence presented in the State's case in chief to determine whether there was "substantial evidence" of "each essential element of the offense charged[.]" *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. But in this case, defendant presented direct evidence which does not conflict with the State's evidence, and although the charges against defendant should have been dismissed even without consideration of her evidence, in this case, consideration of her evidence is more than appropriate; here, it is required. *See generally State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983) ("[O]n a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.").

1. Consideration of Defendant's Evidence

[1] Generally, the defendant's evidence is disregarded when deciding whether the evidence is sufficient to submit the charged offenses to the jury unless that evidence is favorable to the State. *See generally State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) ("The defendant's evidence, unless favorable to the State, is not to be taken into consideration." (citation and quotation marks omitted)). "However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *Id.* (citation and quotation marks omitted). Indeed, our Supreme Court has noted that "[w]e have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence." *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63.

A comparison of the evidence presented by the State and the defendant in *Bates* is helpful to illustrate how defendant's evidence should be used in this situation. *Id.* at 529-32, 308 S.E.2d at 260-61. In *Bates*, the State's evidence was summarized by the Supreme Court as follows:

> The State offered evidence tending to show that at around 11:00 p.m. on 6 January 1982, defendant came to the residence of Mrs. Mary Godwin at 307 Kenleigh Road in Fayetteville, North Carolina. Mrs. Godwin testified that defendant appeared to be severely injured and was pleading for help. She stated that defendant's clothing was covered with blood and dirt. A nurse at Cape Fear Valley Hospital, Mrs. Godwin attempted to render first aid assistance to defendant Bates and immediately called an ambulance and the Cumberland County Sheriff's Department.
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> Deputy John Dean responded to Mrs. Godwin's call. Deputy Everette Scearce arrived shortly thereafter and began to search the area around the Godwin residence. In a field approximately 300 feet from the house, Scearce discovered the body of Roy Lee Warren, Jr., lying beside an automobile. Warren's body was partially covering what appeared to be a lead pipe approximately 18 inches in length. Scearce testified that he remained in the field only a few moments before leaving to call an ambulance for Warren.
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> Conrad Rensch, a crime scene technician with the City/County Bureau of Investigation, testified that he received a call to come to Kenleigh Road at approximately 12:30 a.m. on 7 January. He immediately proceeded to the field and began his investigation of the crime scene. He observed that there were numerous scuff marks in the dirt surrounding the body and he detected spots of blood on the car.
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> Items of personal property belonging to both Bates and Warren were discovered in an area near the edge of the field. These items ranged in distance from approximately 73 feet to 116 feet from Warren's body and were generally located within 25 feet of each other. A watch, keys, wallet, checkbook and calculator were identified as the victim's possessions, while a gauze bandage, gold neck chain and jacket were determined to belong to defendant.

> Rensch noted that there were scuff marks near several of the items and that the ground was covered with blood in some places.
>
> Rensch also testified that he found a .22 caliber revolver in a grassy area not far from the other items. Douglas Branch, a ballistics expert with the State Bureau of Investigation, stated that in his opinion a bullet recovered from the decedent's body was fired from the revolver discovered in the field. Rensch related that there was a large amount of blood near the gun. He did not see scuff marks in that area, but admitted that it was usually difficult to find them in the grass.
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> David Hedgecock is a forensic serologist employed by the S.B.I. Crime Laboratory. He testified that after performing laboratory tests upon blood samples removed from Bates and Warren, he determined that defendant's ABO grouping was type B and the deceased's ABO grouping was type O. Hedgecock stated that the blood removed from the car was type B and therefore consistent with defendant's blood type, but that the bloodstains found on the ground and on the various personal items strewn throughout the field were of both type O and B.
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> The State also presented testimony of Dr. Thomas Bennett, a forensic pathologist. He testified that during the post-mortem examination of the deceased, he located numerous small cuts and abrasions and 32 stab wounds. He further identified two gunshot wounds, one to Warren's right abdomen and another, a grazing wound to the left cheek. Dr. Bennett recovered one bullet from the body in the midline section.
>
> Dr. Bennett testified that in his opinion the gunshot wounds were inflicted at close range, at least within four feet. He further gave his opinion that the gunshot wounds were probably inflicted before the stab wounds.

309 N.C. at 529-31, 308 S.E.2d at 260.

The defendant's evidence was entirely consistent with the State's evidence, but explained what had happened between the defendant and the decedent:

Defendant's evidence, which included his own testimony, tended to show that he and Warren were friends and former co-workers at the Food Town grocery. Defendant Bates testified that a few days prior to 6 January 1982, Warren asked him if he had a gun. Defendant replied that he did not have one, but that his mother did. Defendant asked Warren to meet him in the field on Kenleigh Road and there gave Warren his mother's .22 caliber revolver. Defendant acknowledged that Warren gave him $30.00 for the weapon, although he maintained that he did not ask for any money in exchange for the gun.

Defendant further testified that, on 6 January, he went to the Food Town where Warren worked and asked him to return the pistol because his mother had discovered that it was missing. Warren offered to bring the gun to defendant's home later that evening, but defendant told Warren he would rather meet at the same field on Kenleigh Road so his mother would not see them. Warren agreed and told defendant to watch for him around 7:00 p.m. Defendant stated that he lived near the field and watched for Warren's car from his bedroom window. Warren arrived at the field at around 10:00 p.m. and defendant then walked out to meet him.

Defendant testified that he and the decedent had a disagreement over the gun because Warren refused to return it until defendant gave him $30.00. After Warren consistently refused to relinquish the weapon without payment, defendant said he would have to tell his mother where the gun was. As he rose and turned to get out of the car, defendant testified that Warren stabbed him in the back. Defendant remembered that he stumbled, but after regaining his balance he began to run in the direction of the nearest house. Because defendant had a cast on his leg from a football injury, he did not run to his own home because it was farther away and he was afraid he would not make it.

Defendant testified that Warren fired one or two gunshots and shouted something like, "If you don't stop running, I'll kill you." Defendant stated that he stopped running and Warren caught up with him in the general

> area where most of the items of personal property were later found. Defendant stated, however, that he did not recall seeing any of the decedent's possessions.
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> Defendant testified that Warren approached him and hit him across the forehead with the gun. Defendant fell to the ground, Warren jumped on him and they started to fight. Defendant related that at one point during the tussle, he tried to wrestle the gun from the decedent. He testified that the gun went off while he and Warren were fighting on the ground, although he was unaware that a bullet had struck the decedent.
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> Eventually, defendant was able to break free from Warren and he crawled back toward the car. Defendant testified that he was about to enter the car when Warren grabbed him from behind and pulled him to the ground. Defendant stated that when he opened the door to get into the car, a metal pipe rolled out from the floorboard and onto the ground.
>
> Defendant remembered tussling with Warren beside the car and receiving a second stab wound to the chest. He testified that he pulled the knife from his chest and began to stab the decedent. At some point, Warren fell off of defendant and, shortly thereafter, defendant lost consciousness. He later wakened and made his way to the Godwin residence on Kenleigh Road.

Id. at 531-32, 308 S.E.2d at 260-61.

The jury convicted the defendant in *Bates* of felony murder and robbery with a firearm. *Id.* at 533, 308 S.E.2d at 262. The defendant argued on appeal that his motion to dismiss the charge of robbery with a firearm should have been allowed "for insufficiency of the evidence[,]" *id.*, and the Supreme Court agreed and expressly based its determination upon consideration of the "defendant's uncontroverted testimony[.]" *Id.* at 535, 308 S.E.2d at 262. The Court explained that the

> [d]efendant's uncontroverted testimony refutes a conclusion that he forcibly took these items of personal property from the victim with the intent to steal them.
>
> We have consistently held that on a motion to dismiss, *the court must consider the defendant's evidence which explains or clarifies that offered by the State. The*

court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.

Defendant Bates' testimony in its entirety must be characterized as a clarification of the State's testimonial and physical evidence; it in no way contradicted the prosecution's case.

Defendant's testimony and the physical evidence reveal that a brutal fight took place between Bates and Warren. Blood of both defendant and the deceased was found on the items of personal property, on the hood of the automobile and on the ground. Conrad Rensch testified that there were numerous scuff marks in the dirt surrounding the automobile and in other areas in the clearing. It is also important to note that items of personal property belonging to defendant were also scattered throughout the field. Defendant testified that he never saw decedent's possessions nor was he aware of how they came to be strewn around the area.

When defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the decedent lost these items of personal property during the struggle with defendant. There is simply no substantial evidence of a taking by defendant with the intent to permanently deprive Warren of the property. We therefore hold that defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted.

We further note that defendant was found not guilty of premediated and deliberated murder. He was convicted of felony murder, premised upon the commission of armed robbery. Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support defendant's conviction of felony murder.

Id. at 535, 308 S.E.2d at 262-63 (emphasis added) (citations omitted).

[2] Under the circumstances of this case, as discussed in more detail herein, defendant's motion to dismiss the misdemeanor child abuse charge could only have been properly denied if there was substantial

evidence demonstrating that on 11 May 2013, defendant committed some act or omission that created or allowed to be created a substantial risk of physical injury to Mercadiez. N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. Here, defendant's evidence is entirely consistent with the State's evidence, and thus *must* be considered, according to *Bates*. *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Defendant's evidence can also be "characterized as a clarification of the State's testimonial and physical evidence; it in no way contradicted the prosecution's case." *Id.* at 535, 308 S.E.2d at 263.

The State elicited testimony from Sergeant Michael Kellum of the Jacksonville Police Department ("JPD"), who at the time of the incident was a detective with the JPD's criminal investigative division. Sergeant Kellum explained that he was involved in the investigation of Mercadiez's death and that he spoke with defendant about the events leading up to the drowning two days after it had occurred. Sergeant Kellum testified that defendant told him she had been in the bathroom that afternoon for approximately five to ten minutes and that "when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah's] friends from down the street."[1] Defendant further told Sergeant Kellum that upon leaving the bathroom, she saw Sarah without Mercadiez and asked about Mercadiez's whereabouts. Detective Kellum's testimony regarding the pretrial statements that defendant had made to him was the State's primary evidence concerning the series of events that immediately preceded Mercadiez's drowning. The State did not call as witnesses Mr. Reed or any of the children who were present in the house at the time of the incident.

During defendant's case, Mr. Reed testified at length concerning the events leading up to the drowning, clarifying and elaborating upon the State's evidence. Mr. Reed stated that defendant had asked him, "You got this?" before going to use the bathroom. Mr. Reed explained that he understood defendant's question to mean that she was inquiring as to whether he would supervise the children while she was in the bathroom, and he responded "[Y]es."[2] After defendant had been in the bathroom for "not even a couple minutes[,]" he then heard defendant say, "Can't I [use the bathroom] in peace?"

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1. Pseudonyms will be used to protect the identity of the other minors involved.

2. Mr. Reed also testified that he had been on active duty in the United States Marine Corps for the past 18 years and was attending college to become a social worker. No evidence was offered suggesting that Mr. Reed was in any way an unsuitable caretaker.

Mr. Reed testified that at that point he got up, walked towards the bathroom, and on his way, observed that Mercadiez was still sitting with Sarah on the side porch. Mr. Reed took the two other children from the bathroom into their bedroom to watch a video. Mr. Reed then checked on one of the other children, and as he walked back through the hall he passed defendant leaving the bathroom. Defendant saw Sarah and immediately asked, "[W]here is Mercadiez?" Sarah responded that she "had just put her in the house." Defendant looked at Mr. Reed and said "[H]ey, she's with you." When Mr. Reed responded that Mercadiez was not in fact, with him, defendant and Mr. Reed began to search the house and yard and found Mercadiez in the pool.

While the State's case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez's drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time. Specifically, Detective Kellum testified that Mr. Reed "came out to reach Mercadiez" from the pool. Furthermore, Mr. Josue Garcia, defendant's neighbor who came to perform CPR, testified on behalf of the State that he "saw Mr. Reed with the little girl in his hands" "frantically yelling[,]" and Mr. Reed told him Mercadiez had been in the water from "a couple of minutes" to "seven minutes."[3] Thus, the State's own evidence implied that Mr. Reed was at home during the relevant time period, although it does not specify his exact location or what he was doing at the relevant time; it in no way indicates he was not present. Therefore, the evidence presented by defendant — in the form of Mr. Reed's testimony — is not in conflict with the evidence offered by the State.

In claiming that defendant's evidence regarding Mr. Reed contradicted the State's case-in-chief, the dissent argues that the State's evidence also referenced the general fact that Mr. Reed was present in the home on the day of Mercadiez's death. Even if this were true, however, if *both* the State's and defendant's evidence noted his presence in the home, where is the conflict? The only difference between the State's case regarding Mr. Reed's presence and defendant's evidence on this subject is that the State made no effort to ascertain precisely *where* in the house he was immediately prior to and during the time when defendant left to use the bathroom, whereas defendant's case-in-chief filled in this gap in the State's evidence. Had the State put on evidence placing

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3. The State also stated in its opening statement that the jury would "hear that Will Reed, the defendant's husband, the father of this child, was also in the home at the time that Mercadiez got into the pool and drowned."

Mr. Reed at a specific location in the home that was different from the locations described by him during his testimony, then a conflict would exist. However, because the State did not put on such evidence, no such conflict existed.

In lieu of providing *actual evidence* from defendant's case that *contradicts* the State's evidence, the dissent relies entirely on the fact that upon coming out of the bathroom, defendant questioned Sarah rather than Mr. Reed as to Mercadiez's whereabouts. We fail to see how this is inconsistent with defendant's evidence. The dissent has failed to show any concrete fact offered during defendant's case in chief that conflicts *in any way* with the State's evidence.

Had the State offered evidence that Mr. Reed was in a different part of the house during the time period in question or that defendant had not spoken with him before she went into the bathroom, then the dissent would be correct that defendant's evidence showing that Mr. Reed understood he was responsible for watching Mercadiez while defendant was in the bathroom would conflict with the State's evidence, and therefore, be ineligible for consideration in connection with defendant's motion to dismiss at the close of the evidence. *See generally Nabors*, 365 N.C. at 312, 718 S.E.2d at 627. But because the State offered no evidence at all regarding Mr. Reed, we cannot agree with the dissent's insistence that defendant's evidence confirming his precise whereabouts from the time defendant left to go to the bathroom until the time of Mercadiez's death somehow contradicts the State's evidence.

By choosing not to offer evidence at all from Mr. Reed and to instead essentially restrict its entire case-in-chief to Sergeant Kellum's account of his interview with defendant, the State left the door open for defendant to fill this crucial gap in the events leading to Mercadiez's death by offering testimony from Mr. Reed, which is exactly what defendant did. Given (1) the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant; and (2) the consistency of defendant's evidence with the State's evidence, the dissent has failed to make any coherent argument why Mr. Reed's testimony should be disregarded.

The dissent notes that when defendant left the bathroom and saw Mercadiez's older sister, Sarah, she asked Sarah – rather than Mr. Reed -- about Mercadiez's whereabouts. However, when defendant left to go to the bathroom, Mercadiez had, in fact, been playing with her sister – while Mr. Reed was watching her. Thus, the fact that defendant directed

her question to Sarah is in no way inconsistent with the State's evidence. Indeed, Mr. Reed's testimony included this same exchange between defendant and Sarah.

The dissent also appears to be arguing that defense counsel was required to cross-examine Sergeant Kellum about Mr. Reed's role in these events. But again, the State chose to rely solely upon Sergeant Kellum and not to call Mr. Reed as a witness. The burden of proof is on the State; the defendant has no burden of proof. *See generally State v. Womble*, 292 N.C. 455, 459, 233 S.E.2d 534, 537 (1977) ("[N]o burden is placed upon a defendant to prove or disprove any of the elements of the crime[.]"). And as discussed above, our Supreme Court has consistently held that the defendant's evidence may -- indeed, must -- be considered in connection with a motion to dismiss at the close of all the evidence where it supplements rather than contradicts the State's evidence. *See Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Thus, the fact that defense counsel opted to let the jury hear from Mr. Reed directly on this issue in no way precluded his testimony from being considered in a ruling on the motion to dismiss.

Consistent with the State's evidence, Mr. Reed testified that defendant went to use the bathroom for approximately five to ten minutes and sometime during that period of time, Mercadiez wandered away from the house and drowned in the backyard pool. The State's evidence at trial showed that defendant left Mercadiez for a period of five to ten minutes without defendant's supervision. However, the State did not offer any evidence affirmatively establishing that defendant had failed to secure adult supervision for Mercadiez, but rather only evidence that she herself was not watching Mercadiez. Thus, defendant introduced evidence consistent with that offered by the State; that is, evidence that she was not personally supervising Mercadiez while she was in the bathroom.

Critically, however, defendant's consistent evidence rebutted the inference raised by the State that she had failed to ensure her child was being properly supervised while see went to the bathroom. *See generally id.* at 535, 308 S.E.2d at 263. ("The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence."). The additional evidence introduced in defendant's case-in-chief through Mr. Reed's testimony, including that: (1) before defendant walked to the bathroom, she confirmed that he would be watching the children, and (2) after defendant had entered the bathroom he left Mercadiez unattended, did not in any way contradict the evidence presented by the State during its case. Defendant's

evidence merely clarified where Mr. Reed was in the house and what he was doing during the key events leading up to Mercadiez's death. Consequently, consideration of this evidence is *necessary* in determining whether defendant's motion to dismiss should have been granted. *See id.* at 535, 308 S.E.2d at 262 ("We have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State.").

Turning back to the relevant statute, North Carolina General Statute § 14-318.2(a), while defendant was in the bathroom, her only affirmative act was to say, "Can't I [use the bathroom] in peace?" Defendant did not ask Mr. Reed to do anything, much less request that he stop watching Mercadiez; rather, Mr. Reed unilaterally decided to step in and remove the children from the bathroom while leaving Mercadiez. It cannot be rationally inferred that defendant, simply by making this statement, engaged in conduct that would subject her to criminal liability under North Carolina General Statute § 14-318.2(a). *See* N.C. Gen. Stat. § 14-318.2(a). Accordingly, defendant's consistent evidence rebutted the inference raised by the State's evidence that she "create[d] or allow[ed] to be created a substantial risk of physical injury[.]" *Id.*

Thus, after reviewing the State's evidence and defendant's evidence that is not in conflict therewith, we conclude that there was not substantial evidence that defendant "create[d] or allow[ed] to be created a substantial risk of physical injury . . . to [Mercadiez] by other than accidental means[.]" *Id.* Because an essential element was missing from misdemeanor child abuse, *see id.*, the trial court erred in denying her motion to dismiss the charge. *See Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. We thus vacate defendant's conviction for misdemeanor child abuse.

2. Consideration of Only the State's Evidence

[3] Although, as discussed above, defendant's motion to dismiss should have been granted upon consideration of both the State's evidence and defendant's evidence, the motion should also have been granted even without consideration of defendant's evidence. The dissent takes the position that defendant's evidence should not have been considered, and that defendant's motion should have been denied. We will therefore address why we believe that even without consideration of defendant's evidence, the trial court still erred in denying defendant's motion to dismiss the charge of misdemeanor child abuse. Even assuming *arguendo*, that defendant's evidence did contradict the State's evidence and thus should not be considered, *see generally Bates*, 309 N.C. at 535, 308 S.E.2d at 262, the State still did not present "substantial evidence . . . of

each essential element of the offense charged[.]" *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.[4]

To determine what conduct may fall within the "by other than accidental means" element of North Carolina General Statute § 14-318.2(a), we will examine some cases which have found sufficient purposeful conduct pursuant to North Carolina General Statute § 14-318.2(a). In *State v. Fritsch*, the Supreme Court determined there was sufficient evidence of misdemeanor child abuse, *see* 351 N.C. 373, 382, 526 S.E.2d 451, 457 (2000), where "the victim suffered from cerebral palsy and severe mental retardation, functioning at the level of an infant[,]" and

> [o]n 4 October 1995 the DSS observed that the victim appeared emaciated; that her arms and legs were in a fetal position; that she looked and smelled bad; that she had crusted dirt between her toes and various folds of her skin; that her left foot was swollen; and that she had pressure sores on her right foot, right ear, back, and the back of her head at the hairline. When questioned about the victim's physical condition, defendant responded that the pressure sores were actually ant bites that had not healed. The DSS then told defendant to take the victim to the doctor for a medical evaluation. On or about 19 October 1995, the victim was treated for an ear and upper respiratory infection; and the physical examination was rescheduled. However, defendant missed two scheduled appointments to have the victim physically examined. Despite numerous calls and visits to defendant's home and a mailed certified letter requesting contact, the DSS was unable to contact defendant until 18 December 1995. On 19 December 1995 the DSS stressed to defendant that the victim needed a physical evaluation and that she needed to be back at the Center. On 20 December 1995 the DSS substantiated neglect for lack of proper care and lack of proper medical care of the victim by defendant based on

4. We note that the dissent fails to address an element of each of the crimes at issue. As to North Carolina General Statute § 14-318.2(a) it fails to address that the act must be "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a). As to North Carolina General Statute § 14-316.1, it includes only the first portion of the definition of neglect under North Carolina General Statute § 7B-101(15): "does not receive proper care, supervision, or discipline . . . . " N.C. Gen. Stat. § 7B-101(15). It omits the final phrase "from the juvenile's parent[.]" The dissent concedes that Mr. Reed was present at the house during the relevant time period but still considers his presence to be irrelevant.

> observations made at the Center on 4 October 1995 and defendant's continued failure to take the victim to a doctor for a physical examination. The victim died on 1 January 1996 before case workers were scheduled to visit defendant's home.
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> On 2 January 1996 Dr. John Leonard Almeida, Jr., a pathologist, performed an autopsy of the victim's body. The autopsy revealed that the victim weighed eighteen pounds at her death and that the victim's stomach contained approximately a quart of food. Dr. Almeida opined that the underlying cause of the victim's death was starvation malnutrition.

Id. at 374-76, 526 S.E.2d at 451-54 (quotation marks omitted).

In *State v. Church*, this Court found substantial uncontroverted evidence of misdemeanor child abuse where

> Travis' face was burned while he was under defendant's supervision and no other adults were present . . . . Competent medical evidence at trial was that Travis' facial burn was well-circumscribed, or perfectly round. The burn looked like the child's face had been immersed in a bowl or cup of liquid. There were not any areas that looked as though there had been dripping, running, or motion. Instead, it appeared that something had been placed or held against the child's face. The medical evidence also included an opinion that Travis suffered from battered child syndrome and an opinion that he had been abused.

99 N.C. App. 647, 654-55, 394 S.E.2d 468, 473 (1990).

In *State v. Woods*, this Court concluded there was sufficient evidence that "created or allowed to be created a substantial risk of physical injury, upon or to her child by other than accidental means, in violation of the third distinct offense described in G.S. 14–318.2(a)" where the evidence showed the "defendant's husband had repeatedly abused this child during the several weeks prior to 12 October, and that the defendant was aware of this deplorable and dangerous situation but took no effective action to stop or prevent the abuse until 12 October[,]" though defendant was not actually charged with that offense, 70 N.C. App. 584, 587-88, 321 S.E.2d 4, 7 (1984) (brackets omitted). And in *State v. Armistead*, this Court determined that though some evidence was erroneously admitted there was "ample uncontradicted evidence" that

the "defendant intentionally inflicted some physical injury on his child. The force used was at least sufficient to draw blood and leave visible signs of the injury for several days[,]" and thus defendant was properly convicted of misdemeanor child abuse. 54 N.C. App. 358, 359-60, 283 S.E.2d 162, 164 (1981).

In *State v. Mapp*, this Court determined there was sufficient evidence of misdemeanor child abuse where

> [t]he evidence clearly shows that defendant was the mother of the child and the child was less than 16 years of age. Dr. Ronald Kinney, a physician with a specialization in treating abused children, testified for the State. The doctor stated that the deceased child was the victim of the battered child syndrome; that the term meant that the child had suffered nonaccidental injuries; and that the injuries were caused by the child's custodian.

45 N.C. App. 574, 581-82, 264 S.E.2d 348, 354 (1980) (quotation marks omitted).

Church, *Woods*, *Armistead*, and *Mapp*, all involved evidence of the purposeful physical abuse of a child or at least knowing about such abuse and not taking action to prevent or stop it; they have little in common with this case. *See Church*, 99 N.C. App. at 655, 394 S.E.2d at 473; *Woods*, 70 N.C. App. at 587, 321 S.E.2d at 7; *Armistead*, 54 N.C. App. at 360, 283 S.E.2d at 164; *Mapp*, 45 N.C. App. at 582, 264 S.E.2d at 354. *Fristch* is also distinguishable because it involved a child dying of "starvation malnutrition" over the course of months of improper care against the advice of DSS. 351 N.C. at 374-76, 526 S.E.2d at 452-54. While the defendant's conduct in *Fristch*, *see id.*, may not rise to the level of intentionally beating a child, it is certainly a form of purposeful, long-term abuse.

Therefore, this case is most apposite to *State v. Watkins*, ___ N.C. App. ___, 785 S.E.2d 175 (2016). Because *Watkins* is the only precedential case that bears any similarities to this case, we repeat the facts verbatim:

> At approximately 1:30 p.m. on 28 January 2014, Defendant drove with her 19–month–old son, James, to the Madison County Sheriff's Office to leave money for Grady Dockery ("Dockery"), an inmate in the jail. The temperature at the time was 18 degrees, and it was windy with accompanying sleet and snow flurries.

> After parking her SUV, Defendant left James buckled into his car seat in the backseat of the vehicle and went into the Sheriff's Office. While inside, Defendant got into an argument with employees in the front lobby. Detective John Clark ("Detective Clark") was familiar with Defendant based on prior complaints that had been made about Defendant letting her toddler run loose in the lobby and into adjacent offices while she visited inmates in the jail. Detective Clark entered the lobby and told Defendant that by order of Chief Deputy Michael Garrison she was not supposed to be on the property and that she needed to leave.
>
> Defendant and Detective Clark argued for several seconds, and then he escorted her to her vehicle in the parking lot. Defendant was inside the building for at least six-and-a-half minutes. Detective Clark testified that from where Defendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.
>
> When Detective Clark was within 10 feet of Defendant's vehicle, he noticed a small child sitting alone in the backseat. Defendant acknowledged that the child was hers. Detective Clark observed that the vehicle was not running and that the driver's side rear window was rolled more than halfway down. He testified that it was very, very cold and windy and the snow was blowing. He stated that snow was blowing onto his head, making him so cold I wanted to get back inside. He noticed that the child, who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, Detective Clark told Defendant to turn on the vehicle and get some heat on that child.

Id. at ___, 785 S.E.2d at 176 (quotation marks omitted).

In *Watkins*, a jury convicted the defendant of misdemeanor child abuse, and she appealed arguing the trial court should have allowed her motion to dismiss. *See id.* at ___, 785 S.E.2d at 177. This Court's opinion in *Watkins* focuses heavily on whether there was a "substantial risk of physical injury[;]" but the ultimate determination was that

> [g]iven the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm

> being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant created a substantial risk of physical injury to him by other than accidental means.

Id. at ___, 785 S.E.2d at 178.

While foreseeability is not an element of misdemeanor child abuse, it is difficult to engage in an analysis of when behavior crosses the line from "accident" to "nonaccidental" without consideration of it; furthermore, an "accidental cause" is "not foreseen[.]" Black's Law Dictionary 15 (5th ed. 1979). In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, defendant engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the "accidental" threshold as "physical injury" in this case is very foreseeable, whether by hypothermia or abduction. *Id.* at ___, 785 S.E.2d at 178. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

Turning to this case, the State's evidence never crossed the threshold from "accidental" to "nonaccidental."[5] The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. This Court in *Watkins* deemed it to be "a close one," but the actions of the defendant in *Watkins* are far more active and purposeful in creating the dangerous situation than defendant's actions here. *See id.* at ___, 785 S.E.2d at 178. If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or

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5. The statistics cited by the dissent come from the CDC's statistics labelled as "*Unintentional* Drowning" and certainly they are disturbing; yet they are irrelevant to this case. (Emphasis added). These "Unintentional Drownings" arise in many different types of situations, including some with supervision by parents, lifeguards, or others. Most importantly, most "*unintentional* drownings" would likely also be described as "accidental drownings," and the issue here is whether the acts were "by *other than* accidental means." N.C. Gen. Stat. § 7B-101(15) (emphasis added).

different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.[6] The State did not present substantial evidence that defendant's conduct caused injury to Mercadiez "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Therefore, the trial court also erred in failing to allow defendant's motion to dismiss the charge of misdemeanor child abuse even without consideration of defendant's evidence.

B. Contributing to the Delinquency of a Juvenile

[4] Defendant was also convicted of contributing to the delinquency of a juvenile pursuant to North Carolina General Statute § 14-316.1. North Carolina General Statute § 14-316.1 provides:

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty[.]

N.C. Gen. Stat. § 14-316.1 (2013). Based on the facts of this case, the jury was instructed only on the issue of neglect. North Carolina General Statute § 7B-101 defines a "[n]eglected juvenile" as one "who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15) (2013).

Thus, North Carolina General Statute § 14-316.1

> requires two different standards of proof. First, the State must show, beyond a reasonable doubt, that Defendant knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated neglected. Second, adjudication of neglect requires the State to show, by clear and convincing evidence, that a juvenile is neglected.

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6. We agree with the dissent that the State's theory was that *defendant*, and only defendant, failed to personally supervise Mercadiez, but the State failed to address one element of the crime, since it failed to show that defendant also left Mercadiez without supervision from her *other parent* to prove neglect under North Carolina General Statute § 7B-101(15). *See* N.C. Gen. Stat. § 7B-101(15).

State v. Stevens, 228 N.C. App. 352, 356, 745 S.E.2d 64, 67, *disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013). Thus, we must consider whether defendant "knowingly or willfully cause[d], encourage[d], or aid[ed the] juvenile . . . to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated[,]" N.C. Gen. Stat. § 14-316.1, neglected, and under these facts the neglect alleged was that Mercadiez did "not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15).

The flaw in the State's case is that defendant was not the only "parent" involved. *Id.* Essentially, the State's theory at trial was that it did not matter that Mr. Reed was present; in other words, the State's theory hinges on the theory that fathers are *per se* incompetent to care for young children. However, Mr. Reed was a "parent[,]" and thus he had an equal duty to supervise and care for Mercadiez. *Id.* The evidence does not show that defendant "knowingly or willfully" left Mercadiez "in a place or condition[,]" N.C. Gen. Stat. § 14-316.1, where she would "not receive proper care [or] supervision" from a "parent[.]" N.C. Gen. Stat. § 7B-101(15). There is no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when she went to the bathroom.

Furthermore and once again, even assuming *arguendo* that defendant's direct evidence of Mr. Reed's express agreement to watch Mercadiez while defendant went to the bathroom should not be considered, the State's evidence alone supports an inference that Mr. Reed was present and competent during the relevant time periods, and thus the evidence still does not show that defendant "knowingly or willfully" left Mercadiez "in a place or condition[,]" N.C. Gen. Stat. § 14-316.1, where she would "not receive proper care [or] supervision" from a "parent[.]" N.C. Gen. Stat. § 7B-101(15). Therefore, defendant's motion to dismiss should have been granted. *See generally Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.

IV. Misuse of 404(b) Evidence

[5] Although we have already determined that defendant's motions to dismiss should have been granted, either with or without consideration of defendant's evidence, there are two other issues which defendant has raised on appeal and which are addressed by the dissent: (1) the trial court erred in denying defendant's motion in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of

the evidence did not substantially outweigh the unfair prejudice, and (2) the State went so far beyond the scope of the allowed purposes of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial. Considering the extent of the evidence regarding Sadie Gates's death and the use of the evidence, we believe we should address these issues as well. As noted below, evidence of Sadie's death was stressed as much or more than that of Mercadiez, and thus without substantive consideration of that evidence by the jury, it is difficult to understand how the defendant was convicted. For the reasons stated below, even if defendant did not prevail on the motions to dismiss, she would be entitled to a new trial based on the misuse of the evidence of Sadie's death by the State.

Before her trial began, defendant filed a motion to exclude the evidence regarding the death of Sadie. The State argued that the evidence was proper under North Carolina Rule of Evidence Rule 404(b). Rule 404(b) allows for the admission of prior "crimes, wrongs, or acts" to show "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). Ultimately, the trial court found in its order that the evidence of Sadie's death could be used *solely* as evidence under Rule 404(b) because

> [t]here are sufficient similarities between the two events [Sadie's and Mercadiez's deaths] to support the State's contention that the former incident is evidence that shows (1) knowledge on the part of the defendant of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) *absence of accident*; and (3) explains the context of her statements at the scene and later to law enforcement.

(Emphasis added).

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The three reasons enumerated by the trial court are proper reasons to allow in the evidence of Sadie's death pursuant to the plain language of Rule 404(b).[7] *See* N.C. Gen. Stat. § 8C-1, Rule 404(b).

As to North Carolina Rule of Evidence 403, this rule precludes evidence unless "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). " 'Unfair prejudice' within its context [of Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." N.C. Gen. Stat. § 8C-1, Rule 403 Commentary (2013). It is difficult to fathom evidence more likely to lead to an emotional decision than the death of a child; however, though this Court under *de novo* review may have come to an alternate conclusion, as our review is abuse of discretion, *see Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159, we cannot say that "the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and quotation marks omitted). Therefore, the trial court did not err in allowing in the evidence regarding Sadie's death.

But that does not end our analysis. Defendant also argues that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial. Because defendant's argument hinges on the admission of evidence during the trial, it is appropriate for plain error review. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663

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7. While the jury instructions in this case were not raised as an issue on appeal, we will briefly note the conflict within these instructions. In accordance with the Rule 404(b) order, the jury was instructed they could not use the evidence regarding Sadie as substantive evidence, but that they could use it for evidence of "absence of accident[.]" While the trial court did not err in the traditional sense by instructing the jury pursuant to the language of Rule 404(b), in this particular case the language of Rule 404(b) mirrored the element of misdemeanor child abuse which was most highly contested — "by other than accidental means" — which was an element the jury must find to convict defendant of misdemeanor child abuse. N.C. Gen. Stat. § 14-318.2(a). Thus the instructions told the jury that they could use the evidence of Sadie's death to show "absence of accident[,]" but the jury was also instructed that the evidence could not be used for the elements which included "by other than accidental means[.]" *Id.* The confusion arises because typically, the 404(b) evidence is used to show that the defendant acted intentionally, but here, the State was not seeking to show that defendant intentionally killed Mercadiez. There is no way that the jury could have understood this fine legal distinction between "absence of accident" and "by other than accidental means." *Id.* But the jury instructions were not raised or argued as an issue on appeal so we do not address it, other than noting how it compounded the problems with the use of the evidence of Sadie's death.

("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003).

> 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. Sessoms, 226 N.C. App. 381, 382, 741 S.E.2d 449, 451 (2013) (citation omitted).

After a thorough review of the transcript, we believe that the State used the evidence of Sadie's death far beyond the bounds allowed by the trial court's order. By our count, the State mentioned Sadie to the jury by name 12 times in its opening; by comparison, Mercadiez, the actual child this case was about, was mentioned 15. Even more concerning, during the State's direct examination Mercadiez is mentioned 33 times, while Sadie is mentioned 28.[8] Lastly, during closing, the State mentions Mercadiez 15 times to the jury and Sadie 12 times, with the State asserting that the "bottom line" hinged on Sadie:

> So the bottom line is this. It does not matter how she got into the pool. She got into the pool and drowned, and the defendant, Amanda Reed, was not watching her. She failed to supervise her and ensure her safety. She failed to supervise her daughter, *just like she failed to supervise Sadie Gates.*

(Emphasis added.)

Turning solely to the legal questions before us, here, the State mentioned Sadie Gates almost as many times to the jury as the child who had actually died in this case. While Mercadiez was often being discussed by pronouns -- as was Sadie, for that matter -- and we have not counted those, it is clear what the jury must have gathered from hearing Sadie's

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8. If we include all references in questioning or testimony during the State's case in chief by both the State and defendant rebutting the State's inferences, Sadie was mentioned 32 times and Mercadiez 45 times.

name more than 52 times, as compared to 63 for Mercadiez, only to finally be left with Sadie's tragic death as their "bottom line[.]" The State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court. This case is the "exceptional case" where "a fundamental error occurred at trial" establishing "prejudice that, after examination of the entire record . . . had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness" of this case. *Id.* Therefore, on this issue, defendant would be entitled to a new trial, but as noted above, we have reversed defendant's convictions based upon her motions to dismiss.

We are not, as the dissent suggests, relying solely upon the number of references to Sadie, nor are we taking a single statement out of context. The State repeatedly suggested that the jury rely improperly upon Sadie's death to find defendant guilty. Here are some other examples:

> *Had the defendant not been responsible for Sadie Gates's death, had she not been warned of the dangers of leaving a child unsupervised by Julie Dorn, then you would not be sitting here today, deciding this case.* Will Reed can come in here and try to take the blame, and they can try to put it on a sibling. They can talk about how good a parent Amanda Reed is, and they can show all the appropriate emotions and responses for a parent that has lost a child, but she cannot avoid responsibility any longer. She cannot continue to shift the blame. *It did happen again. Another child left under her care and her supervision, another child that drowned and died.*
>
> . . . .
>
> . . . Two children, two, under her care, left unsupervised by her, who got out of the house and into the water and drowned. Her inactions, her lack of supervision, without question, demonstrate a grossly negligent omission. Sadie Lavina Gates, born 2/23/2009. Date of death: 9/27/2010. Cause of death: drowning. Place of injury: pond. Location: 3390 Burgaw Highway. Sadie Gates.
>
> Mercadiez Kohlinda Reed, born 9/14/2011. Date of death: 5/11/2013. Cause of death: drowning. Place of injury: residence. Location: 313 Forest Grove Avenue, Jacksonville.
>
> . . . .

> . . . Two children, the same age, both girls, left unsupervised, out of the house, drowned in water. You know what the common denominator is that everyone has overlooked, what's not on either one of those death certificates right there in front of you? What's the common denominator? Her. Amanda Reed is the common denominator. She is the one. And just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not Will Reed, but her. She is the person that can and should be held criminally responsible for her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.
>
> . . . .
>
> In the beginning, I told you there were six questions: who? What? Where? When? How and why? I want to talk about the one question [defendant's counsel] didn't talk about. Why. Isn't that what the case is all about? *Why? You know why. You know why. Sadie Gates's death was caused by the defendant's lack of supervision and care. Mercadiez Reed's death was caused by the same lack of supervision and care.*

(Emphasis added.)

We have considered the totality of the evidence and arguments, and the specter of Sadie's death permeated the entirety of the State's case-in-chief. Although some portions of the State's argument were, as noted by the dissent, within the proper scope of use of the evidence, others, as we have cited above, were not. By referencing only the portions of the State's argument that stayed within the Rule 404(b) bounds, the dissent takes the use of the evidence out of context. Considering the argument as a whole, the prosecution clearly used the evidence of Sadie's death far beyond the purposes for which the trial court admitted the evidence and essentially argued that defendant has a propensity to leave two-year-old girls unattended, resulting in death by drowning; this is the use forbidden by Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 404(b).

V. Conclusion

In certain cases, "we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad law.' " *Hackos v. Goodman*, *Allen & Filetti*, *PLLC*, 228 N.C. App. 33, 43, 745 S.E.2d 336, 343 (2013) (citation

and quotation marks omitted). Here, the death of Mercadiez was tragic, as was Sadie's death, but the law does not support the charges against defendant with an appropriate consideration of the actual evidence in *this* case. The trial court erred in denying defendant's motion to dismiss both charges, and defendant's convictions are vacated.

VACATED.

Judge DAVIS concurs with separate opinion.

Judge STEPHENS dissents.

DAVIS, Judge, concurring.

I concur in the result reached by the majority and in the bulk of its analysis. However, I write separately to note the areas of the majority's opinion as to which I disagree.

With regard to the trial court's denial of Defendant's motion to dismiss at the close of the evidence, I agree with the majority that because the evidence introduced during Defendant's case-in-chief did not in any way contradict the State's evidence, the trial court was required to consider Defendant's evidence in ruling on the motion to dismiss. For the reasons discussed by the majority, this evidence establishes that Defendant did not leave Mercadiez without adult supervision for the limited time period during which Defendant was not personally supervising Mercadiez because she had left to use the bathroom.

However, I do not join the majority's alternative analysis in which it determines that even if Defendant's evidence is *not* considered, Defendant would still be entitled to have her convictions vacated. To the contrary, I agree with the dissent that based exclusively on the State's evidence, the denial of Defendant's motions to dismiss would have been proper.

Furthermore, I part company with the majority on the appropriate definition of the phrase "by other than accidental means" in N.C. Gen. Stat. §14-318.2(a). In my view, the manner in which the majority interprets this phrase would prevent a defendant from *ever* being convicted of N.C. Gen. Stat. §14-318.2(a) on a theory of negligence, a result that cannot be squared with the plain language of this statutory provision or with our Court's recent decision in *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016).

Finally, while the issue is technically moot in light of our holding that Defendant's convictions must be vacated, I also agree with the section of the majority's analysis addressing whether — in the absence of our decision to vacate her convictions — Defendant would be entitled to a new trial due to the extent to which the State's arguments improperly focused on *Sadie's* death. Even assuming *arguendo* that the trial court did not err in deeming evidence of Sadie's death admissible pursuant to Rule 404(b) and not unduly prejudicial under the balancing test of Rule 403, this evidence was admitted for limited purposes by the trial court. However, in my view, the manner in which the Rule 404(b) evidence was actually used by the State in its arguments grossly exceeded these limited purposes for which the evidence was originally admitted. As the majority's analysis explains, it is difficult — if not impossible — to read the transcript and conclude that Defendant received a fair trial.

STEPHENS, Judge, dissenting.

Applying our well-established standard of review to the trial court's denial of defendant's motion to dismiss, I conclude that the State offered sufficient evidence of defendant's failure to properly supervise Mercadiez to submit the case to the jury. Further, I would find no error in the admission of Rule 404(b) evidence or in the trial court's failure to intervene *ex mero motu* in the State's closing argument. For the reasons discussed below, I would hold that defendant received a trial free from error. Accordingly, I respectfully dissent.

I. Relationship between the State's and the defense's evidence on supervision

I agree with the majority opinion that, in ruling on a defendant's motion to dismiss, the "defendant's evidence may be considered on a motion to dismiss where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it*." *State v. Reese*, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987) (citations omitted; emphasis added), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997); *see also State v. Barnett*, 141 N.C. App. 378, 382-83, 540 S.E.2d 423, 427 (2000) (holding that "the trial court is not to consider [a] defendant's evidence rebutting the inference of guilt except to the extent that it explains, clarifies or is not inconsistent with the State's evidence") (citation and internal quotation marks omitted), *affirmed per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001). I reach a different result from the majority because, in my view, defendant's evidence regarding

the events immediately before Mercadiez drowned *was contradictory* to the State's evidence on the same point.

The majority opinion notes that, "[w]hile the State's case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez's drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time." I fully agree.[1] The uncontradicted evidence was that Mr. Reed was *in the home* at the time of Mercadiez's drowning, just as the uncontradicted evidence was that defendant herself was also *in the home* at the time. The critical issue regarding defendant's criminal responsibility for the death of her daughter, however, is not what adults were *in the home* at the time Mercadiez found her way into the pool, but rather, what adult, if any, was *supervising* Mercadiez. On that critical issue, the State's evidence showed that defendant left her 19-month-old baby in the care of nine-year-old Sarah. I simply do not agree with the majority's assertion that the acknowledged presence of Mr. Reed *somewhere* inside a multi-room house, without any evidence that he could hear or see Mercadiez as she played *outside* on the side porch with other children, was in any way relevant to the question of who was *supervising* Mercadiez when she wandered away to her death. The majority further contends that Mr. Reed's testimony for the defense—*that he was in the living room when defendant went to the bathroom and that defendant specifically asked him to supervise Mercadiez*—was not inconsistent with, and merely clarified, the State's evidence. A careful reading of the trial transcript belies this characterization of the evidence presented by the State and the defense.

The only evidence offered by the State about what happened in the minutes leading up to the drowning came from Sergeant Michael Kellum of the Jacksonville Police Department ("JPD"). After testifying in detail about the Reeds' home and its appearance after Mercadiez's death, Kellum briefly discussed the interview he conducted with defendant.

> Q Did you ask [defendant] to explain to you what she had been doing in the moments leading up to this incident?
>
> A Yes, sir.

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1. I disagree, however, with the majority's apparent assertion that the *only* way to establish a conflict between the State's evidence and defendant's evidence would have been for the State to offer evidence placing Mr. Reed in a different location inside the house from the location Mr. Reed described.

Q What did she tell you?

A That she was in the bathroom.

Q Did she tell you how long she had been in the bathroom?

A Yes. She estimated, I believe, it was five to ten minutes.

[*discussion of which bathroom defendant used*]

Q What happened then, or what did she explain to you happened then?

A She said that she came out of the bathroom and she saw the oldest daughter, or the older daughter, playing in that—or in the house, and she had earlier seen the infant, Mercadiez, with—playing with the older daughter. So she asked the older daughter where Mercadiez was, and she—the daughter indicated that she had brought her inside and put her inside the living room, earlier. And she—according to her interview, she immediately started looking for the child, inside the house, going room to room, trying to find the house—or trying to find the child, and then went out the front door and around the house, trying to find the child, until she went out the master bedroom door overlooking the pool, and saw the baby floating in the pool.

[*discussion of how Mercadiez was retrieved from the pool and 911 was called*]

Q You said she indicated that she had been in the bathroom for five to ten minutes.

A Yes, sir.

Q Did you ask her about that?

A No. She provided that, previously. During the interview, she had provided that she had begun menstruating and was—that's why she was in the bathroom.

[*discussion of the time defendant spent in the bathroom*]

Q Okay. And I guess she acknowledged to you that Mercadiez was not with her, at that time?

A That's correct.

Q And based on what [defendant]—did [defendant] explain to you where Mercadiez was, at that time?

> A She had—when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah's] friends from down the street.
>
> Q And those are minors,[2] as well, right?
>
> A Yes, sir.
>
> Q Did she acknowledge to you that [Sarah] told her when she brought Mercadiez back into the house?
>
> A She—once she came out of the bathroom and asked [Sarah] what—she saw [Sarah] without Mercadiez, asked [Sarah] where Mercadiez was. [Sarah] said she had put her in the living room.

In sum, on direct examination, the State's evidence was that: (1) Mercadiez was playing outside with Sarah and other children when (2) defendant went to the bathroom where (3) she remained for five to ten minutes because she was menstruating and, when she came out of the bathroom, (4) defendant encountered Sarah inside the house without Mercadiez and (5) asked Sarah where her youngest sister was.[3] Kellum did not offer *any testimony* about what Mr. Reed was doing, where he was in the house, or whether defendant asked him to watch Mercadiez when she went to the bathroom.

On cross-examination of Kellum, defendant had the opportunity to clarify the critical question of what happened in the moments before defendant went to the bathroom. However, defendant's trial counsel did not ask Kellum whether defendant mentioned asking her husband to watch Mercadiez when she went to the bathroom nor did he ask

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2. Sarah was nine years old at the time.

3. This account of his interview with defendant is substantially similar to Kellum's testimony at a pretrial hearing on the admission of Rule 404(b) evidence:

> Q And based on your conversations with [defendant], what was your understanding about where [defendant] was and what she was doing immediately prior to this incident?
>
> A She indicated that she was in the bathroom and that a couple of the girls were—some of the other kids in the house were trying to talk to her through the bathroom door. She came—once she came out of the bathroom, she indicated that she saw [Sarah], which was one of the other children in the house, and that was when they realized [Mercadiez] was missing. She asked [Sarah] where the child was, and then the search began to find the child.

whether Mr. Reed mentioned being asked to watch Mercadiez during Mr. Reed's interview with Kellum. Defendant's trial counsel did not even ask whether Mr. Reed or defendant had mentioned Mr. Reed's presence in the living room at the time defendant went to the bathroom.[4] Indeed, the *only* questions defense counsel asked about Kellum's interviews with defendant and Mr. Reed sought to clarify how Mercadiez got outside onto the side porch:

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4. I find the majority opinion's characterization of the direct examination of Kellum as "the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant[,]" an unsupported assumption regarding the prosecution's motive. Certainly, the State was focused on proving its case against defendant, but it is equally as reasonable to assume that the prosecutor (and Kellum) were likely very surprised that defendant's trial counsel elected not to ask Kellum on cross-examination whether, during Kellum's interviews with the Reeds, defendant or Mr. Reed mentioned that defendant asked Mr. Reed to watch Mercadiez when defendant went to the bathroom. The failure of defense counsel to undertake this line of inquiry is difficult to understand in that, at a pretrial hearing regarding the admissibility of Rule 404(b) evidence, defendant's trial counsel cross-examined Kellum about the interview and Kellum testified:

> According to her statement that she made on the day she was interviewed in the office, she indicated to [Mr. Reed] that she needed to use the restroom; her stomach was bothering her and she was beginning her menstrual cycle. She went to the bathroom, . . . which is near the den/kitchen area. She said that the kids . . . began talking to her through the door, and [Mr. Reed] shooed them away from the door back to their rooms. When she walked out of the bathroom, she saw [Sarah] in the kitchen and asked where the daughter was, or where [Mercadiez] was, and [Sarah] indicated that she had brought [Mercadiez] into the house 15 minutes prior.

At the same hearing, Kellum described his interview with Mr. Reed on cross-examination as follows:

> Q You interviewed Mr. Reed the night of this incident at the hospital, correct?
>
> A I did.
>
> Q Mr. Reed, would you say, told you the same or consistent story regarding his whereabouts that day, where the child was on the night of the accident, as he did three days later?
>
> A Yes, sir. It was quite a bit more limited due to his obvious grief, but, yes, there were little or no inconsistencies.
>
> Q And Mr. Reed also indicated that [defendant] left the child with him in the living room when she went to the bathroom, right?
>
> A He indicated she used the bathroom.

Of course, none of this testimony from the pretrial hearing was evidence at trial, and thus, it was not part of the trial court's consideration when ruling on defendant's motion to dismiss.

Q Well, as you remember this interview, did [defendant and Mr. Reed] tell you the same thing about what happened that day?

A Yes, sir.

[*discussion of when the interviews took place]*

Q And in response to some of [the prosecutor's] questions, you indicated that their belief was that the child went from the side porch, through the locked gate.

A Yes, sir.

Q And that the child had been out there with her older sister, [Sarah].

A Yes, sir.

[*discussion of the ages of the other children in the home that day*]

Q Okay. Do you remember how they told you Mercadiez got outside?

A That she had—[Sarah] was playing with them and had taken her outside, I believe.

[*discussion of the layout of the Reeds' home*]

Q During your interview with Mr. Reed, you discussed how Mercadiez got outside.

A We discussed the movements of the family that day, yes, sir.

Q Okay. And per your recollection, what did he tell you about that?

[THE STATE]: Objection.

THE COURT: Sustained.

Q You talked to [defendant] about it.

A About the movements of the children during the day? Yes, sir.

Q Did she give you any indication of how the child got outside?

> A No, sir, not that I recall. The children were in and out, playing, all during the day. . . .

I am not, as the majority opinion suggests, "arguing that defense counsel was *required* to cross-examine . . . Kellum about Mr. Reed's role in these events." (Emphasis added). I am simply observing that the State presented its version of the events leading up to Mercadiez's drowning, and I fully agree with the majority's observation that, in doing so, "the State chose to rely solely upon . . . Kellum and not to call Mr. Reed as a witness." Defendant had no duty whatsoever to cross-examine Kellum on any point *unless* she wished to elicit evidence contradictory to the State's version of how Mercadiez came to be unsupervised and find her way tragically into the backyard pool. To recap, the State's evidence about the critical minutes before the drowning was that defendant reported leaving Mercadiez outside on the side porch with Mercadiez's nine-year-old sister, Sarah, while defendant went to the bathroom for five to ten minutes. In addition, Kellum testified that defendant told him she realized Mercadiez was missing when she saw Sarah inside without the toddler and that defendant immediately asked *Sarah* where Mercadiez was. According to Kellum's account of the interview, defendant did not mention asking Mr. Reed to watch Mercadiez, seeing Mr. Reed when she left the bathroom, or asking Mr. Reed where Mercadiez was, as might be expected if defendant had left Mercadiez in Mr. Reed's care. Therefore, I reject defendant's argument that the State offered no evidence of a lack of supervision by defendant.

Mr. Reed was the only witness to testify for the defense, and, as noted *supra*, his testimony "may be considered . . . [only] where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it.*" *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (citations omitted; emphasis added). Mr. Reed's account of the events during the critical time period was as follows:

> A . . . I went back over here and continuously, you know, helped her with the laundry, and then I went out and sat down on the—once the laundry was done, I sat on the couch—well, when she was finishing up, I sat on the couch.
>
> . . . .
>
> Q From there, you could see out the door [onto the side porch]?

A From there, you can see out the door.

Q Did you see Mercadiez?

A Yes.

Q You had your eye on her from sitting right there?

A Yep.

Q And after you sat down, tell me what happened from there.

A I sat down from there, and that's when [defendant] said, you know, I have to use the bathroom, you got this? And I said, yes.

Q You got this?

A You got this.

Q What does that mean?

A To me, it means you got what's going on in the house, everything that's going on.

Q Referring to the children?

A Referring to the children, whatever.

Q And [defendant] left?

A To go use the bathroom, yes.

[*discussion of which bathroom defendant was using*]

Q Tell me what happened, from there.

A Like anything, I was sitting there. I said, yes. She left to go to the bathroom. I was sitting—not even a couple minutes later, I mean, I heard—

[*discussion of why defendant was going to the bathroom*]

Q And I'm sorry, I just wanted—if you will, so she goes to the bathroom.

A Right. While she was in the bathroom, like anything, and then I was sitting over here, and Mercadiez is up front in the yard with—the side porch with [Sarah], I heard, "Can't I [use the bathroom] in peace?"

Q And that was [defendant]?

A That was [defendant], yes.

Q What was that about?

A While she was in the bathroom, the two younger [children were] in there, bothering her. And from there, like anything, I mean, just when I heard that, I got up. When I was walking by, walking by this area right here, I got up, walked around, was walking right through here, that's when I looked over to the front door, which is this way, and I saw Mercadiez sitting down on the porch with [Sarah], playing in the flower—the flower pot that was in the picture, she was playing in the flower pot.

Q Where did you go from there?

A I went into the—the bathroom where she was located, where [defendant] was located, and grabbed the two girls from there.

[*discussion of which two girls were bothering defendant*]

Q And at that point, [defendant] was sitting on the toilet?

A Yes, she was sitting on the toilet.

Q And what did you do with those two little girls?

[*discussion of Mr. Reed setting up a movie for the two girls*]

A I checked on [another child], and then I walked back up through the hallway. When I was walking up through the hallway, [defendant] got done using the bathroom and came out.

Q So you essentially met her in the hallway?

A Met her in the hallway, yes.

Q She's in front of you. Which way did she go?

A She went through the—through the hallway, into the kitchen.

[*discussion of how close defendant and Mr. Reed were in the hallway*]

> A When I got into the kitchen, like anything, well, she walked up, and she walked towards the middle of the counter right there, by the middle of the counter, and then [Sarah] walked in. And when [Sarah] walked in, the first thing [defendant] said is, "where is Mercadiez?"

Thus, Mr. Reed's account was that (1) he was with defendant in the living room already supervising Mercadiez when defendant announced that she was going to the bathroom and asked Mr. Reed to watch the toddler; (2) he heard defendant call out in frustration because two other children were in the bathroom bothering her; (3) he left the living room for several minutes to settle the other children in front of a movie; and (4) he met defendant in the hallway as she left the bathroom.[5] Mr. Reed's version of events is plainly not consistent with the State's evidence that defendant left Mercadiez outside on the side porch with Sarah while defendant went to the bathroom for five to ten minutes and that, when defendant returned to the living room, she was surprised to encounter Sarah inside without Mercadiez. Accordingly, in considering the merits of defendant's motion to dismiss for insufficiency of the evidence, neither the trial court nor this Court should consider Mr. Reed's testimony regarding the events immediately preceding the drowning.

I find *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983), the primary case relied upon in the majority opinion, easily distinguishable. The defendant in *Bates*, having been convicted of felony murder and robbery with a dangerous weapon as a result of an admitted altercation with another man, argued on appeal that "the trial court erred in denying his motion to dismiss the armed robbery charge[, which was also the predicate felony supporting his felony murder conviction] for insufficiency of the evidence." *Id.* at 533, 308 S.E.2d at 262. "Specifically, [the] defendant argue[d] that the State ha[d] not shown by substantial evidence a taking of the victim's property with the intent to permanently deprive him of its use." *Id.* at 534, 308 S.E.2d at 262. As noted in the majority opinion, the State's evidence concerned the scene of the crime, including the condition of the victim's and the defendant's bodies, and the location of the victim's and the defendant's personal possessions. *Id.* at 534-35, 308 S.E.2d at 262-63. There were no witnesses to the fight, but the defendant testified about the events which led up to the altercation and his account of how the victim was killed. *Id.* at 535,

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5. This is the "*actual evidence from defendant's case*[,]" as quoted above and summarized here, that, in my view, "*contradicts the State's evidence*[,]" quoted at length and summarized on the third through sixth pages of this dissent. (Emphasis added).

308 S.E.2d at 263. Importantly, both the "[d]efendant's testimony and the physical evidence reveal[ed] that a brutal fight took place between" the defendant and victim. *Id.* On the only point of dispute—whether the defendant had robbed the victim—"[t]he State relie[d solely] on the fact that the deceased's property was found some distance from his body to establish a taking by [the] defendant[,]" while the "[d]efendant testified that he never saw [the victim's] possessions nor was he aware of how they came to be strewn around the area." *Id.* at 534, 535, 308 S.E.2d at 262, 263. Our Supreme Court, in holding the evidence was insufficient to survive the defendant's motion to dismiss, observed that, "[w]hen [the] defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the [victim] lost these items of personal property during the struggle with [the] defendant." *Id.* at 535, 308 S.E.2d at 263. In other words, there were *not* two possible accounts of the crime presented. Instead, the State's evidence was entirely a description of the physical crime scene—the "what" of the altercation—while the defendant's evidence concerned the "how" and "why" of the fight. The State's evidence would have supported an inference of robbery, but the defendant's evidence provided an explanation that rebutted the inference of robbery by permitting an innocent inference from the State's crime scene evidence.

Here, in contrast, the State and defendant each presented a distinct "story" of how Mercadiez came to be unsupervised such that she could wander away and drown. The State's evidence was that defendant was watching Mercadiez play outside on the side porch with her sister when defendant left the living room and spent several minutes in the bathroom where she could not supervise Mercadiez and that the toddler was not with her older sister when defendant returned from the bathroom. Defendant's evidence was that her husband was already watching Mercadiez when defendant asked him to supervise the toddler while she went to the bathroom for several minutes only to find Mercadiez missing when defendant and her husband both returned to the living room.[6] Unlike in *Bates*, the question here is not whether an inference permitted by the State's evidence is rebutted by the clarifying evidence of the defendant which supports a more likely inference. It is whether the jury believed the State's theory of the case, to wit, that defendant left Mercadiez unsupervised when she went to the bathroom, or whether they believed defendant's account that she left her child in the care of

6. In my opinion, these contrasts between the State's and defendant's evidence are a "coherent argument [about] why Mr. Reed's testimony should be disregarded."

her husband. Simply put, both versions of the moments before the tragic drowning cannot be true. Thus, the State's evidence is inconsistent with defendant's evidence and could not be considered by the trial court or by this Court in evaluating the sufficiency of the evidence against defendant. *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (stating that a defendant's evidence "may be considered . . . [only] where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it*" (citations omitted; emphasis added)). However, in order to fully address defendant's argument that the trial court erred in denying her motion to dismiss, her contentions that the trial court erred in admitting certain Rule 404(b) evidence must also be considered.

II. Admission of Rule 404(b) evidence

I agree with the ultimate determination in the majority opinion that the trial court did not err in admitting, pursuant to Rules 403 and 404(b) of the North Carolina Rules of Evidence, evidence regarding the previous drowning of another toddler left in defendant's care. However, because a more thorough discussion of the evidence and the basis for its admission is helpful in understanding why (1) defendant's motion to dismiss was properly denied and (2) the trial court did not err in failing to intervene *ex mero motu* in the State's closing argument, I write separately on this issue.

As noted by the majority, during the investigation of Mercadiez's death, JPD officers learned about the 22 September 2010 death of 19-month-old Sadie Gates, who had wandered away and drowned in a rain-filled creek while in defendant's care. Defendant was convicted of involuntary manslaughter in connection with that incident and was still on probation at the time of Mercadiez's death. In addition, investigators received a report from a neighbor of the Reeds regarding an incident that occurred about a month before Mercadiez's death. The neighbor had been driving past the Reeds' home and noticed two children, one a toddler and the other about three or four years old, playing at the edge of the curb next to the street. Concerned for the children's safety, the neighbor stopped her car and knocked on defendant's door, which was answered by a five- or six-year-old child. When defendant eventually came to the door, the neighbor pointed out the unsupervised young children in the yard, and defendant went to retrieve them.

In June 2014, the State filed a motion *in limine* regarding the admissibility of the neighbor's report of unsupervised young children in defendant's yard and the 2010 drowning of Sadie Gates. In July 2014,

defendant filed her own motion *in limine*, arguing that the admission of evidence of those events was barred by Rule 404(b). Following a hearing, on 23 September 2014, the trial court entered an order denying defendant's motion *in limine* to exclude evidence of the 2010 drowning. The court deferred ruling on the admissibility of the neighbor's testimony until trial, ultimately allowing the neighbor to testify about the unsupervised children seen in defendant's yard about a month before Mercadiez drowned.

On appeal, defendant argues that the trial court erred in admitting testimony under Rules 403 and 404(b) about the 2010 drowning of Sadie Gates.[7] I disagree.

As our Supreme Court has observed:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). . . .
>
> Rule 404(b) is a clear general rule of *inclusion*. The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. . . .
>
> Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not

7. Although the subsection caption of defendant's brief alleges that the trial court erred in denying her motion *in limine* and admitting evidence regarding both the 2010 drowning *and* the incident when defendant's children were left unsupervised in her front yard, defendant only presents an argument regarding the evidence of Sadie Gates' drowning. Accordingly, defendant's assertion that the trial court erred in admitting evidence about the unsupervised children is deemed abandoned on appeal. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

> require that the similarities rise to the level of the unique and bizarre.

State v. Beckelheimer, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012) (citations and internal quotation marks omitted; italics added; emphasis in original).

Here, the trial court summarized the similarities between the 2010 and 2013 drownings in its seven-page order as follows:

> There are sufficient similarities between the two events to support the [S]tate's contention that the former incident is evidence that shows (1) knowledge on the part of [defendant] of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) absence of accident; and (3) explains the context of her statements at the scene and later to law enforcement.
>
> Both events arose out of the supervision of children who were nineteen months old. [Defendant] was babysitting Sadie Gates who had been left with [defendant] on September 22, 2010 by her mother. A creek which had become swollen due to rainfall was located within 25 yards of [defendant's] home. In places the water was five feet deep. Any barrier to keep the child away from this hazard had become ineffective. The property did not have a fence between the house and the creek. At the probable time of the incident [defendant] was engaged in caring for another child or watching a television program with her estranged husband who was in the home. The time period that the child was not being attended to by [defendant] had been estimated to be between five and fifteen minutes. The child was able to get out of the house through an unsecured door and off of a porch with ineffective child barriers.
>
> In the May [11], 2013 case, the victim was [defendant's] nineteen[-]month[-]old daughter, Mercadiez Reed. She was able to leave the home through an unsecured door and gain access to an above ground swimming pool that was about four feet deep. [Defendant's] husband and her children were in or about the home when the victim wandered out of the house. [Defendant] told law enforcement officers that she was in the bathroom for about five to ten

> minutes when the child probably left the home to go outside. She advised law enforcement that she did not watch the children in the pool because she was uncomfortable due to the previous incident.

Defendant contends that the thirteen findings of fact in the order were "inadequate and incomplete" and thus failed to support the trial court's conclusions of law that the 2010 and 2013 drownings were sufficiently similar to permit admission of the 2010 evidence under Rule 404(b). Specifically, defendant contends that the 2010 drowning of Sadie Gates lacked any similarity to the 2013 drowning of Mercadiez on "the most important issue, supervision[.]"[8] Defendant misperceives the requirements for admission of prior bad acts under Rule 404(b) and the purpose for which the State sought to offer the evidence here.

Defendant notes that while she admitted leaving the victim of the 2010 drowning completely unsupervised, there was voir dire testimony at the pretrial hearing that she left Mercadiez in the same room as Mr. Reed before Mercadiez's drowning.[9] I would conclude that this difference pales in comparison to the numerous similarities between these tragic events. As the trial court noted, both incidents involved (1) 19-month-old children (2) who were being supervised by defendant (3) in her home (4) while her husband and other children were present (5) who drowned (6) in nearby bodies of water (7) after getting out of defendant's home, and (8) when defendant had stepped away from the child's immediate presence for a period of approximately five to ten minutes. Further, the evidence was not offered to *prove* that defendant failed to supervise Mercadiez, but rather, *inter alia*, to show defendant's *knowledge* "of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water[.]" Whether defendant's husband was with Mercadiez when defendant left the room before her daughter escaped from the house and drowned is irrelevant to the issue of defendant's *knowledge* of the possible consequences of leaving a toddler with unsupervised access to an open source of water. Defendant's knowledge of such danger, in turn, was highly relevant to the jury's determination of her (1) culpable negligence, an element of involuntary manslaughter; (2) reckless disregard for human life, an

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8. On appeal, defendant does not argue that the two incidents lacked temporal proximity. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

9. As noted *supra*, unlike at the trial itself, the defense elicited testimony from Kellum about Mr. Reed's presence in the living room when defendant went to the bathroom on cross-examination at the pretrial hearing.

element of felonious child abuse; and (3) willfully or knowingly allowing a child to be in a situation where the child could be adjudicated neglected, an element of contributing to the neglect of a juvenile. *See, e.g.*, *State v. Fritsch*, 351 N.C. 373, 379-80, 526 S.E.2d 451, 456 (2000), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000); *see also* N.C. Gen. Stat. § 14-316.1 (2015) (defining contributing to delinquency by a parent as "knowingly or willfully caus[ing] . . . any juvenile . . . to be in a place or condition . . . whereby the juvenile could be adjudicated . . . neglected"). For these reasons, I agree with the majority that the trial court properly concluded that evidence of the 2010 drowning was admissible under Rule 404(b).

Nonetheless, North Carolina's Rules of Evidence provide that even relevant

> evidence may . . . be excluded under Rule 403 if the trial court determines its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 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. Whaley, 362 N.C. 156, 159-60, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted).

Defendant's appellate argument regarding Rule 403 is simply that evidence of the 2010 drowning was so lacking in probative value that it was outweighed by the obvious prejudice of evidence that another toddler had previously drowned while in defendant's care. While I agree that it was prejudicial, as explained *supra*, the evidence of the 2010 drowning was also highly probative of the issues before the jury in this case. The trial court noted in its order that it had performed the required Rule 403 balancing test in regard to the 2010 drowning and determined that the probative value of the evidence was not outweighed by unfair prejudice.

My conclusion that this was a reasoned decision is further supported by the trial court's decision to defer ruling until trial on admission of the neighbor's testimony about unsupervised children in defendant's yard and its ruling that evidence about defendant's possible drug use on the date of the 2010 drowning was inadmissible under Rule 403. I see no abuse of discretion in the admission of evidence about the 2010

drowning, and, accordingly, I agree with the statement in the majority opinion that this argument by defendant lacks merit.

III. Motion to dismiss for insufficiency of the evidence

I would also overrule defendant's arguments that the evidence at trial was insufficient to support her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile by neglect.

Taken together the State's evidence at trial shows that defendant knew (1) how quickly unsupervised toddlers in general could wander away into dangerous situations, (2) that two of her young children, including a toddler who appears to have been Mercadiez, had wandered unsupervised to the edge of the street only the month before, (3) that some of defendant's older children were in the habit of leaving gates open which allowed younger children to wander, (4) how attractive and dangerous open water sources like her backyard pool could be for toddlers, and (5) that defendant had previously been held *criminally responsible* in the death of a toddler she was babysitting after that child was left unsupervised inside defendant's home for five to fifteen minutes, managed to get outside, and wandered into a creek where she drowned. Despite this knowledge, defendant still chose to (6) leave toddler Mercadiez outside on a side porch (7) supervised only by other children (8) while defendant spent five to ten minutes in a bathroom where she could not see or hear her youngest child.

Regarding her conviction for misdemeanor child abuse, I agree with the assertion in the majority opinion that the most factually analogous case to defendant's is *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016). In *Watkins*, the defendant appealed from the denial of her motion to dismiss a charge of misdemeanor child abuse. *Id.* at __, 785 S.E.2d at 176. The defendant was charged after her son "James, who was under two years old, was left alone and helpless—outside of [the d]efendant's line of sight[10] —for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind." *Id.* at __, 785 S.E.2d at 178.

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10. The evidence was conflicting on this point. The "[d]efendant testified that from where she was standing in the Sheriff's Office she 'could look directly into my car and see my kid[,]' " while the detective who was the primary witness for the State "testified that from where [the d]efendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door." *Id.* at __, 785 S.E.2d at 176, 177.

> Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that [the d]efendant "created a substantial risk of physical injury" to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).
>
> [The d]efendant acknowledges that her actions "may not have been advisable[] under the circumstances" but argues nevertheless that "this was not a case of child abuse." However, the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror could have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury. *See State v. Franklin*, 327 N.C. 162, 170, 393 S.E.2d 781, 786-87 (1990) ("Although we concede that this is a close question . . . the State's case was sufficient to take the case to the jury."); *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988) (upholding trial court's denial of motion to dismiss even though issue presented was "a very close question").

Id. (emphasis omitted). Mercadiez and James were each left unsupervised by their mothers for a similarly short length of time—five to ten and six minutes, respectively. However, the actual danger to which Mercadiez, who was awake and mobile, was exposed during that time was significantly greater than that faced by James, who was sleeping and confined. While leaving her toddler partially exposed to cold and snowy weather for six minutes was certainly a poor decision by James's mother, it was unlikely to result in death and did not result in any actual injury to him. Indeed, the law enforcement officer who spotted James sleeping in his mother's car did not feel the need to check the child's well-being before the defendant left the scene.[11]

As for the other risk suggested by this Court in *Watkins*, I would note that the best available statistics indicate that drownings are far more common than nonfamily abductions. In 2015, the National Center

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11. The detective testified that he "noticed that [James], who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, [the detective] told [the d]efendant to turn on the vehicle and 'get some heat on that child.' " *Id.* at __, 785 S.E.2d at 176.

for Missing and Exploited Children[12] "assisted law enforcement with more than 13,700 cases of missing children[,]" approximately 1% of which were nonfamily abductions. *See* The National Center for Missing & Exploited Children, http://www.missingkids.com/KeyFacts (last visited July 6, 2016). The resulting estimate of 137 nonfamily child abductions annually is dwarfed by the approximately 700 children under age 15 who drown in non-boating-related incidents each year. *See* Centers for Disease Control and Prevention, http://www.cdc.gov/homeandrecreationalsafety/water-safety/waterinjuries-factsheet.html (last visited July 6, 2016) ("From 2005-2014, there were an average of 3,536 fatal unintentional drownings (non-boating related) annually in the United States . . . . About one in five people who die from drowning are children 14 and younger.").[13] Indeed, "[d]rowning is responsible for more deaths among children [ages] 1-4 than any other cause except congenital anomalies (birth defects)." *Id.* For children ages 1-4 years, home swimming pools are the most common location for drownings. *Id.* In addition, "[f]or every child [age 14 and under] who dies from drowning, another five receive emergency department care for nonfatal submersion injuries." *Id.* Thus, I take issue with the majority opinion's characterization of Mercadiez's drowning as "the exceedingly rare situation that resulted in a tragic accident."[14] The primary distinction I see between this case and *Watkins* is that Mercadiez was exposed to far greater risk when she was left unsupervised and subsequently drowned.[15]

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12. The National Center for Missing & Exploited Children opened in 1984 to serve as the nation's clearinghouse on issues related to missing and sexually exploited children. Today NCMEC is authorized by Congress to perform 22 programs and services to assist law enforcement, families and the professionals who serve them." The National Center for Missing & Exploited Children, http://www.missingkids.com/About (last visited July 6, 2016).

13. The Centers for Disease Control and Prevention is part of the Department of Health and Human Services. *See* http://www.cdc.gov/about/organization/cio.htm (last visited July 6, 2016).

14. I would further note the defendant in *Watkins* was prosecuted even though her child suffered no harm at all, and, apparently, slept peacefully through the six-minute period when he was subjected to substantial *risk* of physical injury. *See Watkins*, __ N.C. App. at __, 785 S.E.2d at 176.

15. The majority opinion dismisses as "irrelevant" these statistics regarding unintentional drownings, asserting that "most *unintentional* drownings would likely also be described as 'accidental drownings,' and the issue here is whether the acts were by *other than* accidental means." (Internal quotation marks omitted). However, section 14-318.2, our misdemeanor child abuse statute, makes it a crime for the parent of a child under age 16 to "*allow*[] *to be created a substantial risk of physical injury*, upon or to such child *by other than accidental means* . . . ." N.C. Gen. Stat. § 14-318.2(a) (2015) (emphasis added). Thus, it is the *creation* of the risk, rather than any actual harm that may befall a

I find wholly unpersuasive the argument that *Watkins* and defendant's case are distinguishable on the basis of (1) the purposeful action of the parent in each case and (2) the foreseeability of the potential harm to the unattended child:

> In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, [the] defendant engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the "accidental" threshold as "physical injury" in this case is very foreseeable, whether by hypothermia or abduction. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

(Citation omitted).

First, I do not understand how a parent who left her sleeping child in a car for six minutes while she went into a sheriff's office "engaged in the purposeful conduct of leaving her child in [those] circumstances[,]" but a parent who left her child playing outside near a swimming pool for five to ten minutes while she went into a bathroom did not. Both cases appear to me to involve "the purposeful conduct of leaving [a] child in the circumstances" which the State argued were dangerous. If evidence that a defendant left her sleeping toddler strapped in his car seat alone in a car parked in front of a sheriff's office in cold weather for six minutes was sufficient for "a reasonable juror [to find] that [the d]efendant created a substantial risk of physical injury to him by other than accidental means[,]" *see Watkins*, __ N.C. App. at __, 785 S.E.2d at 178 (internal quotation marks omitted), I have no trouble concluding that evidence that a defendant who left her toddler outside without adult supervision for five to ten minutes at a home with an outdoor swimming pool and a pool security gate often left open by other children in the family was likewise sufficient to withstand a motion to dismiss.

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child, that must be "by other than accidental means . . . ." *Id.* Here, the State's evidence was that defendant decided to leave Mercadiez playing outside without adult supervision while defendant went into a bathroom for five to ten minutes. That decision to walk out of eyesight and earshot of her toddler, which created the risk to Mercadiez, was not an accident, but a conscious, intentional choice. As for the CDC's statistics, I would assume that an *unintentional* drowning refers to any drowning that is not *intentional*, *i.e.*, the result of either suicide or homicide.

Second, regarding foreseeability, I believe that, in addition to being aware of the dangers of child abduction and hypothermia, "[f]rom a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child" outside without supervision near a backyard swimming pool. Further, *even if most parents are not aware* of the grave danger of drowning for unsupervised young children, *defendant was undeniably aware* of the risk, given that she was still on probation for her conviction of involuntary manslaughter in connection with Sadie Gate's death at the time of Mercadiez's drowning. As noted *supra*, defendant was also aware that the gate to the backyard pool was often left open by other children in the home and that two of her younger children had recently been able to wander to the edge of the street while they were at home and in defendant's care.

Finally, I take issue with the assertion in the majority opinion that, if we do not find error in the trial court's denial of defendant's motion to dismiss, "any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because [hers] is the exceedingly rare situation that resulted in a tragic accident."[16] Defendant left her toddler outside on a side porch without adult supervision, not for a moment, but for five to ten minutes. Further, the evidence in this case is that defendant knew the risk of a young child drowning when left unsupervised, knew her own young children had a tendency to wander in the yard, and knew her swimming pool was not always securely enclosed, yet still left Mercadiez outside unsupervised for five to ten minutes.

As noted in the majority opinion, defendant's conviction for contributing to the delinquency of a minor was based upon the theory that she "knowingly or willfully cause[d Mercadiez] . . . to be in a place or condition" where she "could be adjudicated . . . neglected as defined by G.S. 7B-101[,]" *see* N.C. Gen. Stat. § 14-316.1, to wit, that Mercadiez did "not receive proper care, *supervision*, or discipline[,]" *see* N.C. Gen. Stat. § 7B-101(15) (2015) (emphasis added), from defendant in the moments before she wandered unsupervised into the backyard pool and drowned. For all of the reasons discussed *supra*, I can hardly conceive of a more textbook definition of failure to properly supervise one's toddler than to leave her outside without supervision for five to ten minutes at a home with a backyard swimming pool and a security gate that is often left ajar.

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16. *See* footnote 14, *supra*.

Further, I reject the assertion in the majority opinion that the State's theory of the case was "that fathers are *per se* incompetent to care for young children" and that the evidence was insufficient because the State produced "no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when [defendant] went to the bathroom." The State's theory of the case had nothing to do with fathers in general nor with Mr. Reed in particular. Rather, as is clearly shown by the evidence it presented, the State's theory was that *defendant* left Mercadiez outside with Sarah and her young friends while *defendant* spent five to ten minutes in a bathroom where *defendant* could not see Mercadiez, even though *defendant* was aware that young children left unsupervised could quickly wander into danger such as the family's backyard pool. As discussed in section I of this dissent, when ruling on defendant's motion to dismiss, the trial court could not consider Mr. Reed's testimony that defendant left Mercadiez with him when she went to the bathroom, and, thus, Mr. Reed's competence to supervise Mercadiez was simply irrelevant.

In sum, taken in the light most favorable to the State, I conclude that there was substantial evidence that defendant knowingly "create[d] or allow[ed] to be created a substantial risk of physical injury" to Mercadiez, *see* N.C. Gen. Stat. § 14-318.2(a), and allowed Mercadiez to be in a situation where she was not properly supervised. *See* N.C. Gen. Stat. § 14-316.1. While this "evidence [may] not rule out every hypothesis of innocence[,] . . . a reasonable inference of defendant's guilt may be drawn from the circumstances, and, thus, it was for the jury to decide whether the facts, taken singly or in combination, satisf[ied it] beyond a reasonable doubt that the defendant [was] actually guilty." *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation, internal quotation marks, and emphasis omitted). Accordingly, I would hold that the trial court did not err in denying defendant's motion to dismiss.

IV. Failure to intervene ex mero motu during the State's closing argument[17]

In a related argument, defendant contends that the trial court should have intervened *ex mero motu* to strike the prosecutor's comment during

17. Although the caption of this portion of defendant's brief states that "THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE STATE TO ARGUE N.C.G.S. 8C-404(b) EVIDENCE OUTSIDE ITS BASIS FOR ADMISSION[,]" the text of the argument cites only case law regarding "improper closing arguments that fail to provoke [a] timely objection[,]" correctly noting the proper standard of review as stated in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002).

closing argument that "just as she was responsible for the death of Sadie Gates, so, too, is [defendant] responsible for the death of Mercadiez Reed."[18] Specifically, defendant contends that, with this remark, the State was urging the jury to ignore the trial court's Rule 404(b) instruction regarding the purpose for which evidence of the 2010 drowning was received. I am not persuaded.

As an initial matter, I address the proper appellate standard of review for defendant's argument regarding the State's closing remarks to the jury. The majority opinion frames defendant's argument as "that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial[.]" Asserting that this argument "hinges on the admission of evidence during the trial," the majority applies plain error review. While plain error review may be applied to unpreserved evidentiary issues, as discussed in section II of this dissent *supra*, defendant *did object* to the admission of evidence regarding Sadie Gates' drowning under Rules of Evidence 403 and 404(b). *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 158-59 (discussing the appropriate standard of review applied to appellate arguments under Rule 403—abuse of discretion—and Rule 404(b)—*de novo*). More importantly, as noted in footnotes 17 and 18 and discussed further below, defendant's sole argument is that the trial court erred in failing to intervene *ex mero motu* to a single remark made during the State's closing argument. Plain error review is not appropriate for such appellate arguments. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003) ("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *disc. review denied and appeal dismissed*, 357 N.C. 255, 583 S.E.2d 289 (2003).

Instead, the correct

> standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of

18. This statement is the only portion of the State's closing argument cited by defendant in her brief. Defendant does quote one other statement made by the State, but notes that it occurred during a hearing on defendant's pretrial motions and thus the jury did not hear it. Accordingly, we need not consider its propriety.

> propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). "[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697 (1996), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Further, such "*comments must be viewed in the context in which they were made* and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998) (emphasis added).

In addition to applying an incorrect standard of review, the majority opinion mischaracterizes defendant's argument on appeal regarding the State's reference to the death of Sadie Gates in its closing argument to the jury. In support of her contention of gross impropriety in the State's closing argument, defendant argues that:

> The State's . . . argument in essence encouraged the jury *to ignore the trial court's instructions regarding the 404(b) evidence*, and the basis upon which it was received, i.e., defendant's knowledge of not supervising a minor child, and to find the defendant guilty because it had happened to another child in [defendant's] care. . . . To suggest to the jury that it ignore a judge's instructions is grossly improper. Knowing the extent of the dispute as to whether the 404(b) [evidence] should have been allowed into evidence, the court upon hearing the State's argument should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant's part, and she was therefore guilty again, as the State was encouraging the jury to so find. "Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed."

(Emphasis added). Thus, defendant's argument is simple and straightforward: that when the challenged remark—"Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the

death of Mercadiez Reed"—was made, the trial judge, *ex mero motu*, "should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant's part . . . ."

The majority opinion does not directly address defendant's argument, instead undertaking a review of the State's opening statement and direct examination of its witnesses, in addition to portions of its closing argument not challenged by defendant, and focusing on the number of times the State mentioned Sadie's and Mercadiez's names during the trial. In support of its conclusion that "the State used the evidence of Sadie's death far beyond the bounds allowed by the trial court's order[,]" the majority suggests that, because Sadie's name was used almost as frequently as Mercadiez's name was across the State's opening statement, case-in-chief, and closing argument, "[t]he State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court." The majority opinion cites no authority for the proposition that the frequency of reference to evidence admitted under Rule 404(b) throughout a trial is a pertinent consideration in assessing the alleged gross impropriety of a single comment made during a closing argument, or, indeed, on any legal issue. I would simply note that, in considering the appropriate use of Rule 404(b) evidence and in determining whether a prosecutor's remark was so grossly improper that a trial court erred in failing to intervene *ex mero motu*, precedent requires that we consider the *purpose* and *nature* of statements rather than their *frequency*. *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159; *see also Jones*, 355 N.C. at 133, 558 S.E.2d at 107-08.

I believe an analysis of defendant's actual argument on appeal can lead only to a conclusion that the State, far from making a grossly improper argument, specifically cautioned the jury against letting its emotions get in the way of a proper consideration of the evidence before it. A review of the challenged remark *in context* reveals that, while the court did not interrupt the prosecutor to remind the jury of the limited purposes for which the Sadie Gates evidence could be considered, the *prosecutor* did give the jury an explicit reminder, essentially repeating the limiting instruction given by the trial court:

> And just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not [Mr.] Reed, but her. She is the person that can and should be held criminally responsible for

> her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.
>
> *Because of Sadie Gates's death, she had knowledge of the dangers of failing to supervise a child. She knew that if you didn't watch a child, bad things can happen and the child can die. Sadie's death gave her direct, firsthand knowledge of that, and also put a greater responsibility on her to ensure that no child under her care is left unsupervised, in a dangerous situation.*
>
> Now, *you're not here to decide her responsibility for Sadie Gates's death, and that evidence has not been presented to you to anger or inflame you, or prove that she's a bad parent. It's been offered to you, and should be considered by you, for the limited purpose of showing that she had direct knowledge of the dangers of failing to supervise a child who has access to water.* It is important, because it shows her conduct rose to the level of gross carelessness or recklessness that amounted to the heedless indifference of safety and rights of others.

(Emphasis added).[19] In my view, when read in context, the comment defendant challenges can *only* be interpreted as part of the State's argument that the 2010 drowning death of Sadie Gates was evidence of defendant's *knowledge* of the dangers of leaving a toddler near an accessible source of water, which as noted *supra* was offered to prove essential elements of both felonious child abuse and involuntary manslaughter. In light of the State's emphasis on the knowledge the 2010 drowning gave defendant about the danger of open water sources to very young children and *its explicit reminder of the limited purpose for which the jury could consider that evidence*, the challenged remark was not improper, let alone "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *See Jones*, 355 N.C. at 133, 558 S.E.2d at 107. I would overrule this argument.

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19. The majority asserts that, "[b]y referencing only the portion of the State's closing argument that stayed within the Rule 404(b) bounds, it is the dissent [that] is taking the use of the evidence out of context." To the contrary, I focus on this portion of the State's closing statement because it includes the remark actually challenged by defendant and the context necessary to address her appellate argument. *See, e.g.*, *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

V. Conclusion

I would hold that the trial court did not err in denying defendant's motions to dismiss, admitting evidence of Sadie Gates' drowning, or failing to intervene *ex mero motu* in the State's closing argument.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD, DEFENDANT

No. COA 15-670

Filed 16 August 2016

Constitutional Law—effective assistance of counsel—failure to raise issue during prior appeal

On appeal from the trial court's denial of defendant's motion for appropriate relief, the Court of Appeals held that the evidence presented at defendant's trial was insufficient to support his conviction for robbery with a dangerous weapon and that if this issue had been raised during defendant's prior appeal, there was a reasonable probability that his conviction would have been overturned. Defendant therefore received ineffective assistance of counsel in his first appeal and the trial court erred by denying his motion for appropriate relief.

Judge DIETZ concurring.

Judge TYSON dissenting.

Appeal by defendant from order entered 15 January 2015 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.

N.C. Prisoner Legal Services, Inc., by Reid Cater, for defendant-appellant.

STROUD, Judge.

Defendant Paris Jujuan Todd appeals the trial court's denial of his motion for appropriate relief ("MAR"). On appeal, defendant argues that the trial court erred in denying his MAR because the evidence presented at trial was insufficient to support a conviction and had this been raised during his prior appeal, there is a reasonable probability that defendant's conviction would have been overturned. After reviewing the evidence presented below, we agree, and conclude that the trial court should have granted defendant's MAR. Accordingly, we reverse the trial court's denial of defendant's MAR and remand to the trial court to enter a ruling granting defendant's MAR and vacating his conviction.

Facts

Defendant was convicted of robbery with a dangerous weapon on 14 June 2012 and defendant appealed that conviction to this Court. In his first appeal, defendant raised two issues: "(1) the trial court erred when it denied defendant's motion for a continuance made on the first day of trial, and alternatively, (2) he received ineffective assistance of counsel." *State v. Todd*, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 4460143, *1, 2013 N.C. App. LEXIS 875, *1 (2013) (unpublished) ("*Todd I*"). This Court found no error, and the Supreme Court denied defendant's petition for discretionary review. *State v. Todd*, 367 N.C. 322, 755 S.E.2d 612 (2014).

On 21 October 2014, defendant filed an MAR with the trial court. In the MAR, defendant moved that his convictions be vacated and a new trial granted, arguing that he "received ineffective assistance of appellate counsel in that counsel failed to argue that his case should have been dismissed for lack of evidence." In addition, defendant's MAR requested "post-conviction discovery from the State under N.C. Gen. Stat. § 15A-1415(f)." On 15 January 2015, the trial court summarily denied defendant's MAR without a hearing. In its order denying defendant's MAR, the trial court noted as follows:

> A review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal.
>
> The Appellate Court was clearly aware of the nature of the fingerprint evidence and determined that such was sufficient to support the Defendant's conviction. Otherwise, the Court was obligated to reverse the conviction upon the Court's own motion.

On 12 March 2015, defendant filed a petition for certiorari of the trial court's order denying his MAR, which this Court allowed on 27 March 2015.

Discussion

I. Denial of MAR

a. Standard of review

"Our review of a trial court's ruling on a defendant's MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (internal quotation marks omitted). "The trial court's findings of fact are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Thomsen*, __ N.C. App. __, __, 776 S.E.2d 41, 48 (quotation marks omitted), *disc. review denied*, __ N.C. __, 778 S.E.2d 83 (2015).

In the trial court's order denying defendant's MAR, which is the order at issue in this appeal, there are no findings of fact, and the trial court determined, as a matter of law, that the issues raised by defendant had been considered by this Court in his first appeal and that based upon this Court's opinion, the evidence was sufficient to support the conviction and thus his appellate counsel was not ineffective. We will therefore review this conclusion *de novo*.

b. "Law of the case" doctrine

Defendant argues that the evidence presented was insufficient to support his conviction, and that the "trial court erred by not granting [defendant's] motion to dismiss, and had this been raised on appeal, there is a reasonable probability that [his] conviction would have been overturned." Before we consider this issue, however, we must determine whether the trial court was correct in its determination that the issues raised by the MAR had already been determined by this Court in defendant's first appeal.

In this case, the trial court determined:

> A review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was

> sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal.
>
> The Appellate Court was clearly aware of the nature of the fingerprint evidence and determined that such was sufficient to support the Defendant's conviction. Otherwise, the Court was obligated to reverse the conviction upon the Court's own motion.

Although it did not use the term, the trial court was recognizing the "law of the case" doctrine in its statement regarding this Court's prior review of defendant's case.

> The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine expresses the practice of courts generally to refuse to reopen what has been decided, but it does not limit courts' power. Thus, the doctrine may describe an appellate court's decision not to depart from a ruling that it made in a prior appeal in the same case.

Musacchio v. United States, __ U.S. __, __, 193 L. Ed. 2d 639, 648-49, 136 S. Ct. 709, 716 (2016) (citations, quotation marks, and brackets omitted). Based upon the law of the case doctrine, if this Court's prior opinion addressed the sufficiency of the evidence to support defendant's conviction, neither we nor the trial court would be able to review it again and would be bound by that prior ruling.

Yet for the law of the case doctrine to apply, the issue presented must have been both raised and decided in the prior opinion.

> [T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.
>
> In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.

> On the subject of *obiter dicta*, . . . if the statement in the opinion was superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial. Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial.
>
> True, where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal. In short, a point actually presented and expressly decided does not lose its value as a precedent in settling the law of the case because decision may have been rested on some other ground.
>
> The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court.

Hayes v. City of Wilmington, 243 N.C. 525, 536-37, 91 S.E.2d 673, 682-83 (1956) (citations, quotation marks, and ellipses omitted).

Thus, "the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not." *Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009), *aff'd*, 364 N.C. 416, 700 S.E.2d 223 (2010). *See also Goetz v. N. Carolina Dep't of Health & Human Servs.*, 203 N.C. App. 421, 432, 692 S.E.2d 395, 402-03 (2010) ("The law of the case doctrine . . . generally prohibits reconsideration of issues which have been decided

by the same court, or a higher court, in a prior appeal in the same case." (quotation marks omitted)).

As noted above, the trial court found that issues raised by defendant's MAR were barred by the law of the case doctrine. But for an issue to be barred, it must have been "actually presented and necessarily involved in determining the case" in the first appeal, so we must consider if it was both presented and "necessarily involved" in this court's prior ruling. In the first appeal, defendant raised two issues: (1) "that the trial court committed prejudicial error in denying defendant's motion for a continuance after defense counsel was served with essential discovery material on 11 June 2012, the day before trial[,]" and (2) "that, if the motion for a continuance was properly denied, he is entitled to a new trial because he was denied effective assistance of counsel." *Todd I*, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 446013, at *2, *4, 2013 N.C. App. LEXIS 875, at *4, *11.

Defendant's arguments in the first appeal focused entirely upon his claim that his motion to continue should have been granted so that he could retain an expert witness to review the fingerprint evidence which had been provided to his counsel only a day before trial. This Court noted that defendant's counsel had been "notified of the State's intention to use fingerprint evidence as early as 18 January 2012" and the case was tried in June 2012. *Id.*, 2013 WL 4460143, at *2, 2013 N.C. App. LEXIS 875, at *4. This Court stated that

> because defense counsel knew the fingerprints would be provided at some point before trial, she had ample opportunity to retain a forensic expert for when the fingerprints eventually arrived. Despite knowing this, in her motion for a continuance counsel only stated that "it does not appear to be clear to me that [the latent fingerprint] might be a perfect match, and I'm asking for a continuance in the fact I need somebody with more expertise than myself to review this."
>
> Moreover, the failure to identify an expert witness also evidences a lack of specificity regarding the reasons for requesting the continuance. Defense counsel failed to show (1) which expert would be called; (2) what testimony would be elicited by the expert; and (3) how defendant's case would have been stronger with expert testimony. In addition to counsel's aforesaid statement, she went on to state that "[i]f you are uninclined to continue the case

> . . . I would ask that you at least give me today to *try* to find an expert witness that could *potentially* testify in this case." (Emphasis added.) This vague assertion resembles an "intangible hope" that helpful evidence may surface.

Id., 2013 WL 4460143, at *3-4, 2013 N.C. App. LEXIS 875, at *9-10 (citations omitted).

In the prior appeal, defendant argued only that he lost an opportunity to have an expert review the evidence in an attempt to demonstrate that the State's forensic evidence was flawed. In his MAR, defendant's argument assumes that the State's evidence was correct and the fingerprint on the backpack was actually his but contends that even if the fingerprint is his, "there was not sufficient evidence to show that [defendant]'s fingerprint could only have been impressed at the time of the crime." Our Supreme Court has noted that

> Fingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is *substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed. What constitutes substantial evidence is a question of law for the court.
>
> Circumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed include statements by the defendant that he had never been on the premises, statements by prosecuting witnesses that they had never seen the defendant before or given him permission to enter the premises, fingerprints impressed in blood.

State v. Irick, 291 N.C. 480, 491-92, 231 S.E.2d 833, 841 (1977) (citations and quotation marks omitted). Thus, defendant did not raise, and this Court's prior opinion did not expressly address, the issue of sufficiency of the evidence to support defendant's conviction.

The trial court, however, went a bit further than the law of the case doctrine allows, as it seems to have based its determination upon the fact that this Court was "clearly aware of the nature of the fingerprint evidence" and must have decided that it was sufficient to support defendant's conviction or this Court was "obligated to reverse the conviction upon the Court's own motion." We are unable to find any case law supporting any "obligation" or even any authority for this Court to *sua sponte* address sufficiency of the evidence to support a conviction. To the contrary, it is well-established that

> Appellate review is limited to those questions clearly defined and presented to the reviewing court in the parties' briefs, in which arguments and authorities upon which the parties rely in support of their respective positions are to be presented. It is not the role of the appellate courts to create an appeal for an appellant, nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein.

First Charter Bank v. Am. Children's Home, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) (citations, quotation marks, and ellipses omitted).

The State's brief acknowledges as much, stating: "Assuming this part of the trial court's order is erroneous, it is also immaterial. Omission of this paragraph does not impair the ruling which, as explained above, is otherwise correct." But if we omit this paragraph, we are left only with the first paragraph, which stated that "[a] review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal." We have already determined that the issue of sufficiency of the evidence was not determined in the first appeal so the issue is not barred by the law of the case doctrine and the trial court's ruling is not "otherwise correct." We must therefore consider the issues raised in defendant's MAR.

c. Sufficiency of evidence to support conviction

Defendant argues that the trial court erred in denying his MAR because he received ineffective assistance of appellate counsel. He contends that if the issue of sufficiency of the evidence to support his conviction had been raised in the first appeal, there is a reasonable probability that his conviction would have been reversed.

> On a motion for nonsuit the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom.
>
> . . . . The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the

> circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.
>
> On the other hand, if the evidence raises merely a suspicion or conjecture as to either the commission of the offense, or defendant's identity as perpetrator, the motion for nonsuit should be allowed.

Irick, 291 N.C. at 491, 231 S.E.2d at 840-41 (citations and quotation marks omitted).

This Court summarized the facts from which defendant's conviction arose in our prior opinion:

> Shortly before midnight on 23 December 2011, the Raleigh Police Department responded to a report of an armed robbery at 325 Buck Jones Road. Upon arrival, George Major (the "victim") informed police that, as he was walking home from work, an unknown African-American male approached him from behind, placed his hand on his shoulder, told him to get on the ground if he did not want to be hurt, and then forced him to the ground on his stomach. Once victim was on the ground, a second unknown African-American male approached and held victim's hands while the original assailant went through victim's pockets and felt around victim's clear plastic backpack. As the assailants prepared to flee, they ordered victim to remain facedown on the ground until he counted to 200 because they "didn't want to shoot [him]." Victim complied until he could no longer hear the assailants' footsteps. The assailants took victim's wallet containing an identification card, credit cards, and a small velvet drawstring bag containing change.
>
> During the police investigation, Stacey Sneider of the City-County Identification Bureau was dispatched to assist in processing the backpack for fingerprints. During her analysis, Sneider collected two fingerprints from the backpack, one of which was later determined to be the defendant's right middle finger. As a result, a warrant was issued for defendant's arrest.
>
> On 18 January 2012, Officer Potter of the Raleigh Police Department stopped defendant for illegal tint on

> his car's windows near the scene of the robbery. During the stop, Officer Potter came across defendant's outstanding warrant and arrested defendant.

Todd I, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 4460143, at *1, 2013 N.C. App. LEXIS 875, at *1-3.

Our prior opinion noted only the fingerprint evidence's existence because of the limited issues presented on appeal. In this appeal, we focus on whether "there is *substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 492, 231 S.E.2d at 841 (quotation marks omitted). Defendant argues that the fingerprint evidence here "stood alone" since the single, partial fingerprint was the only evidence that connected defendant to this crime. The question of whether there is "substantial evidence" is a question of law and thus we consider this issue de novo. *Id.*

We first note that many of the cases cited by the State regarding fingerprint evidence address evidence found at the "scene" of the crime, usually a building of some sort, *Irick*, 291 N.C. at 486, 231 S.E.2d at 838 (defendant's fingerprint found on victim's window sill); *State v. Jackson*, 284 N.C. 321, 334, 200 S.E.2d 626, 634 (1973) (testimony offered that latent fingerprint on window matched defendant's fingerprint on file); or upon an item stolen from the victim, *State v. Blackmon*, 208 N.C. App. 397, 402, 702 S.E.2d 833, 837 (2010) (defendant's fingerprint found on computer tower in front lawn); *State v. Boykin*, 78 N.C. App. 572, 575, 337 S.E.2d 678, 680 (1985) (defendant's fingerprint found on stolen radio). In this instance, however, the backpack was not stolen and none of the items removed from it were ever recovered. In addition, the backpack is not a stationary crime "scene" but rather is a moveable object which Mr. Major had owned for about six months prior to the crime and wore regularly on the way to and from work, riding on a public bus, and which he left unattended on a coatrack while he worked in a local restaurant. Defendant's single partial fingerprint, as well as other unidentified fingerprints, were found on the *exterior* of the backpack, on the outside surface, not the surface which would be against the back of the wearer.

The circumstances of the crime alone provide no evidence which might show that "the fingerprint[ ] could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 492, 231 S.E.2d at 841 (quotation marks omitted). The State's evidence showed that on 23 December 2011, officers responded to the scene of the crime

immediately upon Mr. Major's call. He was unable to give any detailed physical description of his assailants and could tell only that they were African American men. He was able to discern that the hands of the man holding his wrists were "rough-skinned, callused hands" and that one man's jacket sleeves were tan and the other man's sleeves were dark blue or black. He was able to clearly hear the men's voices. The officers used a canine to see if they could pick up a track for the two assailants, and Officer Martinez testified that he thought the dog had picked up a track, but it ended in a parking lot off Portree Road, north of where the incident occurred. They did not find either assailant that night.

After fingerprints were lifted from the backpack, they were compared to those in a database, which generated several potential matches, and ultimately it was determined that one partial fingerprint matched Defendant's right middle finger. Detective Codrington, who had investigated the incident, received information of the match on the fingerprint from the backpack in January. He then showed a picture of defendant to Mr. Major to see if he was "a friend of his" but Mr. Major did not recognize him. On 12 January 2012, he obtained the arrest warrant for defendant based upon the fingerprint.

On 18 January 2012, Officer Potter of the Raleigh Police Department stopped defendant's vehicle in the Westcliff Court neighborhood off of Buck Jones Road for illegally tinted windows. Defendant was driving down a dead-end road before he was stopped. The place where defendant's car was stopped was "approximately about a few hundred yards" from the location on Buck Jones Road where Mr. Major had been robbed on 23 December 2011. After checking his license, Officer Potter asked defendant "what he was doing in the area" and he was "kind of hesitant about if he lived there or if he was visiting. Said he was stopping by to see a friend, wouldn't provide any information as to exactly where the friend was as far as which apartment." Another officer arrived to confirm the percentage of tint on the windows, which was "15 percent which is illegal" so he began to write a citation. Upon checking on defendant's license, Officer Potter discovered the outstanding warrant for defendant's arrest and then arrested him. When Officer Potter told defendant that he was under arrest for robbery, defendant's response was that "he seemed more preoccupied with us getting away from the vehicle. It wasn't like shocking as far as a warrant." He seemed "very nervous" but wanted "to try and hurry up to get transported wherever." Defendant's car was secured in accordance with protocol at the scene where he was arrested, but it was not searched.

Officer Potter transported defendant to Detective Codrington's office. When Detective Codrington entered the interrogation room where defendant was waiting, he noted that defendant was sleeping and he thought that "a reasonable person would have been a little more upset being charged about something that they didn't do and not sleeping in the interrogation room." Detective Codrington read defendant his *Miranda* rights; defendant agreed to talk to him and the interview was videotaped. Detective Codrington described defendant as a "pretty well-educated, well-spoken individual." Defendant "denied any involvement in the robbery." He asked defendant where he lived, and he said he was "back and forth between his mom's house in Apex" and "his sister's grandmother's house close to downtown." Detective Codrington asked defendant where he was picked up, and defendant said "Westcliff" and then that " 'I used to be over there but,' and then trailed off." Neither the Westcliff Court address which was "the closest residence we could in that area kind of associate him with" or any of the residences where defendant mentioned staying was ever searched. Defendant was unable to tell Detective Codrington where he was on the night of 23 December 2011. Detective Codrington asked defendant how his fingerprint might have gotten on the backpack, and he said "maybe a friend of his had gotten robbed or something and now the bag was in the victim's possession, something around that."

Detective Codrington also testified that Westcliff Court, where defendant was stopped, was "about 300 yards from the scene of the crime" and described this fact as important to him because it was "very, very close as far as the proximity, and it would explain and kind of explained to me from the direction that the person ran from after, explains that sort of in the direction of Westcliff Court and Little Sue's Mini-mart which everybody cuts behind." Detective Codrington also talked to defendant's mother and from his investigation, he determined that "all information that I could gather at that point kind of led me to him living at 448 Westcliff Court."

Detective Codrington described the area around the scene of the incident, noting that Westcliff was an apartment complex and there were also private residences nearby on Buck Jones Road. The canine unit had lost the trail on the night of 23 December on Portree Place, a "little private street from the townhouse they sort of plopped in the middle." Portree Place is a loop or "half moon" with a group of private townhomes as well as "two other separate buildings . . . right next to those townhomes." In regard to where the canine stopped tracking, Detective Codrington noted that "[a]ll the canine therefore is looking at recently,

recently traveled properties, so if it gets into an apartment complex, typically if a bunch of people just happen to walk past that place, the canine track will stop because it's confusing the dog. So highly traveled properties aren't good for initial canine searches as opposed to when they have somebody, like somebody's scent on somebody's property where they're following." He described the layout of the buildings as "like old Army housing" with a "common area that you walk in. There's no doors on that side. You just kind of walk into the common area, and then once you get into the building, it's either five or six units on each side of the hall, and then upstairs, the same way, so it didn't track to a specific door or anything."

We are unable to find any evidence, much less substantial evidence, of "[c]ircumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed[.]" *Id.* The State notes several prior cases which have identified some of the circumstances which may be sufficient. In *State v. Miller*, 289 N.C. 1, 6, 220 S.E.2d 572, 575 (1975), our Supreme Court referenced false statements by the defendant that he had never been on the premises. In this case, however, there are no premises involved. In *Jackson*, our Supreme Court noted that the victim testified that she did not know the defendant, had never seen him prior to when he entered her apartment, and that "[n]othing appears in the record to show that defendant had ever been in the apartment occupied by [the victim] prior to [the date of the offense]." 284 N.C. at 335, 200 S.E.2d at 635. In *Jackson*, the victim was able to identify the defendant by his voice. *Id.* Here, by contrast, although the victim heard his assailants speak, no identification was made based on voice recognition. Moreover, as we have already pointed out, in this case, there are no "premises," only a mobile backpack.

In *Blackmon*, the defendant's fingerprint was found a computer tower left on the grass outside the house that had been broken into. 208 N.C. App. at 402, 702 S.E.2d at 837. This Court held that the evidence was sufficient to show that the defendant was the perpetrator of the crime. *Id.* at 403, 702 S.E.2d at 837. Similarly, in *Boykin*, the defendant's fingerprint was found on a stolen radio, which this Court concluded was enough to support his conviction for larceny. 78 N.C. App. at 575, 337 S.E.2d at 680. In the present case, however, the stolen items were never recovered, and only fingerprint evidence found was the partial print linking defendant to the victim's mobile backpack.

In *State v. Thomas*, 291 N.C. 687, 688, 231 S.E.2d 585, 586 (1976), the Supreme Court referenced fingerprints impressed in blood, but those fingerprints were found on a serrated steak knife and a Cheerios box

in the kitchen of the victim's home, where the victim had been stabbed to death. In addition, about $400.00 to $500.00 cash was missing from the Cheerios box, and defendant had been aware that the victim kept cash in the Cheerios box. *Id.* There is simply no comparable evidence in this case.

The State also argues that if other evidence, taken alongside the fingerprint, permits a reasonable inference that defendant was the perpetrator, the trial court should deny the motion to dismiss. The State argues that there is "other evidence" connecting defendant to the robbery. Specifically, the State notes that "[d]efendant was arrested within a month of the robbery and only a few hundred yards from the crime scene." That is true, but defendant was stopped on Westcliff Court for a tinted window violation. And it is clear from the State's evidence that the area where defendant was stopped was a public street in a residential area with many apartments, townhomes, and private residences.

Although being found in close proximity to a crime scene at or very near the time of a crime may be "other evidence" which could connect a defendant to the crime, we have been unable to determine how defendant's presence in the general vicinity nearly a month after the crime was committed is relevant. The State cites to *Irick*, where the Supreme Court noted that "defendant's print was found on the inside frame of the window from which the tissue box and pasteboard had been removed on the night of the burglary, but other unidentified prints were found on and around the same window. These facts do not constitute 'substantial' evidence that the print could have only been impressed at the time of the alleged burglary." 291 N.C. at 492, 231 S.E.2d at 841. In *Irick*, the court determined that "other circumstances" could support a reasonable inference that defendant was the perpetrator. *Id.* Specifically,

> Defendant was observed by a police officer coming from the general direction of the Hipp home shortly after the burglary transpired; defendant had in his pocket at the time of his arrest loose bills in the same denominations and total amount as those stolen from the Hipp house; defendant was tracked by the bloodhound from the Wood home to the place where the stolen vehicle was parked (the dirty kitchen towel linked the Hipp and Wood burglaries), and defendant attempted to flee from police officers shortly after the burglaries took place.

Id., 231 S.E.2d at 841-42.

The only resemblance this case bears to *Irick* is the presence of a fingerprint identified as defendant's along with other unidentified fingerprints, in a place that could suggest that it may be been impressed at the time of the crime. None of the "other circumstances" are present. Defendant was not seen anywhere near the scene of the crime when it occurred. None of the stolen property was ever recovered. The canine was unable determine exactly where the perpetrators went, having lost the track in a heavily travelled courtyard. No one tried to flee from the officers on the night of the crime, and no physical evidence of any sort other than the lone partial print on the outside of the backpack connected defendant to the incident.

The State also argues that that fact that Detective Codrington "believed Defendant lived on Westcliff Court, where his vehicle was stopped" somehow "supports a reasonable inference of guilt,"[1] citing to *State v. Cross*, 345 N.C. 713, 483 S.E.2d 432 (1997). In Cross, the victim was attacked as she got into her car, and the assailant beat her and forced her to get into the back seat. He took her wallet and ATM card and drove her car to make "numerous stops for money" and eventually stopped the car and left. *Id.* at 715, 483 S.E.2d at 434. The State's evidence showed a "latent fingerprint on the edge of the left rear door of the victim's vehicle" which was from

> only one finger and was a portion of the finger, "like it had been cut off." This fact prompted Agent Duke to process the rear quarter panel adjacent to the area where the print was found on the rear door. No fingerprints or partial fingerprints were found in the area adjacent to the left rear door. In other words, the rear portion or remainder of this partial print did not extend over to the rear quarter panel of the car. Agent Joseph Ludas, a latent print examiner with the City/County Bureau of Identification, testified, as an expert in the field of fingerprint identification, that the latent fingerprint found on the left rear door of the victim's vehicle matched the right index finger of the defendant.
>
> The fact that the defendant's fingerprint was only a partial print, which was cleanly cut off and did not extend over to the rear quarter panel, strongly suggests that the door was open when the defendant's finger contacted

1. The State also notes that "[d]efendant now admits that he kept an apartment on Westcliff Court." But this "admission" is in defendant's post-trial affidavit filed in support of his MAR and is not in the evidence presented at trial.

> the vehicle. The evidence is uncontradicted that the only time the rear driver's side door was opened during the victim's stay in Raleigh was when the assailant opened the door and shoved the victim into the backseat. Moreover, Agent Ludas testified that a lot of pressure and twisting was used when the defendant's finger made contact with the vehicle. This fact, when viewed in the light most favorable to the State, logically suggests that the print was left as defendant pushed the back door closed. The fingerprint evidence is consistent with the victim's account of the crime and does not support an inference that the defendant merely touched the victim's automobile while walking through the Crabtree Sheraton parking lot.

Id. at 718, 483 S.E.2d at 435.

The Supreme Court held in *Cross* that this evidence was sufficient to show that the defendant's fingerprint "could only have been impressed at the time the crime was committed." *Id.* at 718, 483 S.E.2d at 435. The Court then noted that although the fingerprint evidence alone was sufficient to survive the motion to dismiss, there was other "corroborating evidence" that

> the assailant abandoned the victim within blocks of where the defendant was frequently seen and where defendant was eventually located and arrested, that a pathway existed near that location which led to the back of the apartment defendant was in when he was arrested, that the defendant made efforts to change his appearance by shaving his head, that the defendant made an effort to evade arrest, and that the defendant repeatedly denied to police officers that his name was "Cross."

Id. at 718-19, 483 S.E.2d at 435-36.

Cross bears more resemblance to this case than the others cited by the State, since the fingerprint was on a mobile object and not stationary premises or a weapon. In *Cross*, however, the decisive factor was the victim's description of exactly how the assailant had grabbed the car door, which was consistent with the characteristics of the print that was found in the place she described. *Id.* at 718, 483 S.E.2d at 435. Here, by contrast, the fingerprint had no distinguishing features which would indicate how or when it was impressed, and it was on the outside of the backpack. And the other "corroborating evidence" noted in *Cross* was far stronger than here, as the *Cross* defendant was arrested in an apartment

which was at the end of the pathway near where he left the victim and her car, altered his appearance, and denied his name. *Id.* at 718-19, 483 S.E.2d at 435-36. Here, at the most, defendant had an apartment residence in a densely populated area of townhouses and apartments in the general vicinity of the place where a canine lost a trail nearly a month before the defendant's arrest on a public street nearby. This is simply not comparable to the evidence noted in other cases addressing "other circumstances" which along with fingerprint evidence connects a defendant to a crime. Many people had residences in that area, and other unidentified fingerprints were also found on the backpack.

The State also argues that "although Mr. Major could not identify who robbed him, his description of his assailant's manner of speaking was consistent with Defendant's manner of speaking," citing to two places in the trial transcript. We give the State the benefit of every reasonable inference from the evidence, but still the State's implication that defendant was identified by his voice goes far beyond anything the record can support. First, although the jury did hear the videotaped recording of the interview with defendant, Mr. Major never identified the voice in that video as sounding like one of the men who assaulted him. Mr. Major's entire testimony about the voices was the following:

> Q. You were able to hear these assailants talk; is that correct?
>
> A. Yes.
>
> Q. What if anything did you notice about the language that they used?
>
> A. They didn't use a lot of eubonics [sic]. They spoke to me very clearly. I understood what they were saying.

The other evidence cited by the State is Detective Codrington's testimony regarding his interview of defendant:

> Q. You had the opportunity to speak to him that night?
>
> A. Yes.
>
> Q. He's a pretty well-educated, well-spoken individual?
>
> A. Yes.

Defendant argues that *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 417 (1979) most resembles his, since in that case the single thumbprint

of the defendant stood alone, with no other evidence to show that it "could only have been placed on the box at the time of the homicide." We agree that there are similarities and comparisons that can be drawn. In *Scott*, the defendant's thumbprint was found in the victim's home on a "small metal box on top of the desk in the den." *Id.* at 521, 251 S.E.2d at 416. The box contained papers and "odds and ends" and was kept in a closed but unlocked filing cabinet in the den. *Id.* The victim was found in the home, dead, shot through the head, with his hands and feet tied with tape. *Id.* at 520, 251 S.E.2d at 415. The house had been ransacked and the deceased's pocket watch and money from his wallet had been stolen. *Id.* at 520-21, 251 S.E.2d at 415-16. Ms. Goodnight, who also lived in the home, testified that the defendant was " 'a total stranger' " and she had never seen him and he had never visited the house to her knowledge. *Id.* at 521, 251 S.E.2d at 416. She notified the police immediately upon finding her uncle on the floor and was careful not to disturb anything in the house until after the officers "completed their investigation." *Id.* The Supreme Court found that this single thumbprint, standing alone, was not sufficient to support defendant's conviction. *Id.* at 526, 251 S.E.2d at 419.

The *Scott* Court analyzed other cases in which a fingerprint was found on the premises of the crime and noted that in those cases, "the prosecuting witnesses were in a position to have personal knowledge of all persons visiting the premises and . . . there was some additional evidence of guilt." *Id.* at 525, 251 S.E.2d at 418. The Court noted that in *Scott*, Ms. Goodnight "was simply not in a position to know who came into the house 'during the five week days' " since she worked during the week, while her uncle who was retired, remained at home. *Id.* at 526, 251 S.E.2d at 419. The State's expert testified that the print could have been placed on the box "several weeks before the homicide." *Id.*

Ultimately, the Court concluded that

> In the light of all these facts, we are constrained to hold that the evidence was insufficient to withstand a motion to dismiss. The burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt. . . . We reach the conclusion that the evidence introduced in the present case is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture.

Id. at 526, 251 S.E.2d at 419 (citations and quotation marks omitted).

The State argues that "[d]efendant's inability to offer a plausible explanation *when initially confronted with the evidence* supports a reasonable inference of guilt." The State describes defendant's argument in his brief that the fingerprint may have been impressed "while the backpack was on a crowded bus or on the coat rack at Red Lobster" (where Mr. Major worked) as "unavailing." Yet the flaw in the State's argument is that "[t]he burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt." *Id.* The State's evidence was that the print could have been on the backpack for "10 seconds or 10 days or 10 months" and that Mr. Major regularly wore the backpack on a crowded bus to and from work. He also left it unattended on a coat rack at work. If in the *Scott* case, Ms. Goodnight's testimony that she was not aware of defendant ever having been in her home was not sufficient to show that the thumbprint could not have been impressed at any other time than when her uncle was killed, certainly we cannot say that there was no other opportunity for defendant to impress a print on the outside of a backpack that has regularly been exposed to the public. In this regard, defendant's apartment near the scene of the crime does not favor the State's case, since that could make it more likely that he was on the same bus with Mr. Major during the months before the incident and may have inadvertently touched the bag.

Citing only to *Cross*, 345 N.C. at 718-19, 483 S.E.2d at 435-36 the State also argues that defendant's behavior was "incompatible with innocence" because he was "not surprised" when he was arrested and he fell asleep in the interrogation room. We are unable to determine how *Cross* supports this proposition. In *Cross*, the defendant "shav[ed] his head, . . . made an effort to evade arrest, and . . . repeatedly denied to police officers that his name was 'Cross.' " *Id.* at 719, 483 S.E.2d at 436. This behavior could be seen as "incompatible with innocence." Here, in comparison, defendant was not particularly nervous, even when he was stopped, and he was not evasive. He simply maintained his innocence during his questioning and denied knowing anything about the crime, but the State argues that even this is incriminating. The State has not cited any case in which an *absence* of nervousness was seen as evidence of guilt; typically we see exactly the opposite evidence and argument. *See, e.g.*, *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999) (discussing the use of nervousness in determination of reasonable suspicion of criminal activity and noting that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate

factor to consider when determining whether a basis for a reasonable suspicion exists." (Citations omitted)).

As we observed upon a similar occasion in *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967), we reach the conclusion that the evidence introduced in the present case "is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture." *See also State v. Jones*, 280 N.C. 60, 67, 184 S.E.2d 862, 866 (1971) ("The circumstances raise a strong suspicion of defendant's guilt, but we are obliged to hold that the State failed to offer substantial evidence that defendant was the only who shot his wife in the back. The evidence proves only that at the time his wife was killed defendant was degradedly drunk and intermittently violent."); *State v. Minton*, 228 N.C. 518, 521, 46 S.E.2d 296, 298 (1948) ("The circumstances relied on by the State are inconclusive and do not lead to a satisfactory deduction that the accused, and no one else, perpetrated the crimes alleged in this action. All of these circumstances can be true, and the defendant can still be innocent.").

After considering all of the State's evidence in light of the applicable cases, we cannot find that there was substantial evidence to show that defendant's fingerprint could have only been impressed at the time of the crime, and thus, the trial court should have allowed defendant's motion to dismiss.

d. Ineffective assistance of counsel

Defendant argues that his appellate counsel in the first appeal "performed below an objective standard of reasonableness by failing to argue that the evidence was insufficient."

> The United States Supreme Court has set forth the test for determining whether a defendant received constitutionally ineffective assistance of counsel, which our Supreme Court expressly adopted in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to the two-part test, First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466

> U.S. 668, 687, 80 L. Ed. 2d 674, 693[, 104 S. Ct. 2052, 2064] (1984). With respect to the first element, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 80 L. Ed. 2d at 694-95[, 104 S. Ct. at 2065] (citation and internal quotation marks omitted). The second element of the *Strickland* test requires that the defendant show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698[, 104 S. Ct. at 2068]. Our Supreme Court also has noted that defendants who seek to show ineffective assistance of counsel must satisfy both prongs: "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

Blackmon, 208 N.C. App. at 400-01, 702 S.E.2d at 836.

As to the first prong of the *Strickland* test, the State argues that defendant's prior appellate counsel "apparently made a strategic decision to pursue the constitutional claim that the trial court's failure to grant a continuance deprived him of adequate time to prepare a defense" and that he "received ineffective assistance of trial counsel." The State does not explain how omission of this issue could be a "strategic" decision. The law regarding fingerprint evidence was well-established at the time of the first appeal and it has not changed since then. The issues and arguments presented in the first appeal are not mutually exclusive or conflicting to the issue of sufficiency of the evidence. The text of the brief in defendant's first appeal was only about 19 pages, so the page limitations of our Appellate Rules did not force counsel to make a "strategic decision" to limit the brief to the two issues presented.

As to the second prong of *Strickland*, the State argues that "[d]efendant was not prejudiced by counsel's failure to challenge the sufficiency of the evidence on appeal" because the evidence was sufficient. But we have determined that there is " 'a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different' " in the first appeal, had the issue of sufficiency of the evidence been raised. *Blackmon*, 208 N.C. App. at 401, 702 S.E.2d at 836 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 694-95, 104 S. Ct. at 2064). As discussed above, if defendant had raised this issue in his first appeal, this Court would have addressed it and there is a reasonable probability that we would have come to the same result as we have in this opinion, which is that the trial court should have allowed defendant's motion to dismiss. Therefore, the trial court erred by failing to grant defendant's MAR.

We have determined that defendant had ineffective assistance of appellate counsel in his first appeal and that he likely would have been successful had he raised sufficiency of the evidence. Defendant's motion did not raise any factual issues, only the legal question of sufficiency of the evidence, so there was no need for an evidentiary hearing and the trial court should have granted the MAR. Moreover, since we find that defendant's MAR should have been granted and that he has established that the fingerprint evidence presented at trial was insufficient, we need not address his request for post-conviction discovery. *See*, *e.g.*, *State v. McDowell*, 217 N.C. App. 634, 638, 720 S.E.2d 423, 425 (2011) ("Because we find that the trial court erred in denying defendant's motion to dismiss, we do not reach defendant's other arguments.").

Conclusion

In sum, we find that the trial court erred in concluding that defendant received effective assistance of his appellate counsel because the State presented insufficient evidence that defendant committed the underlying offense, and if defendant's appellate counsel had raised this issue in the initial appeal, defendant's conviction would have been reversed. Consequently, we hold that the trial court's denial of defendant's MAR was in error. We, therefore, reverse the trial court's order and remand to the trial court to enter an order granting defendant's MAR and vacating the defendant's conviction.

REVERSED AND REMANDED.

Judge DIETZ concurs with separate opinion.

Judge TYSON dissents.

DIETZ, Judge, concurring.

I concur in the judgment. There is no evidence, much less "substantial evidence" to suggest that the fingerprint "could only have been impressed at the time the crime was committed." *State v. Irick*, 291 N.C. 480, 492, 231 S.E.2d 833, 841 (1977). The victim carried his backpack around with him in public, and any number of people could have touched it in any number of public places.

Thus, under *Irick*, the fingerprint evidence was sufficient to survive a motion to dismiss only if "other circumstances tend to show that defendant was the criminal actor." *Id.* But the only "other circumstances" tying Todd to the robbery is his coincidental traffic stop, one month after the crime, on a dead-end road just a few hundred yards from where the robbery occurred. That, and the fact that Todd was an African-American man, as was the alleged perpetrator.

These facts alone cannot be enough to constitute "other circumstances" under *Irick*. If they were, then fingerprint evidence would be admissible against anyone who shared the same race and gender as the perpetrator, and who lived near the scene of a crime, even if there was no evidence that the fingerprint was impressed at the time of the crime. And this, of course, wholly undermines the rationale of *Irick*.

Still, it seems that the outcome here may not be what our Supreme Court intended when it established this fingerprint rule in cases like *Irick*. Suppose, for example, that instead of the fingerprint, it was some other circumstantial evidence, such as a witness who later saw the defendant with some of the items stolen from the victim. That evidence, combined with the coincidental stop nearby, and the fact that he matched the race and gender of the alleged perpetrator, would be sufficient to survive a motion to dismiss. *See State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). Indeed, in those circumstances, the law actually creates a presumption that the defendant stole the items—a presumption that is "strong or weak depending on the circumstances of the case." *Id.*

It may be that our Supreme Court intended for *Irick* to be broader than this Court reads it. For example, in a case like this one, where the fingerprint match is relatively strong, perhaps the "other circumstances" tying the defendant to the crime can be much weaker yet still satisfy the *Irick* standard. This Court quite frequently entertains appeals challenging the admission of fingerprint evidence under *Irick*. *See*, *e.g.*, *State v. Martin*, 2016 WL 1745224, 786 S.E.2d 432 (N.C. Ct. App. May 3, 2016) (unpublished); *State v. Dawson*, 2016 WL 3889912, ___ S.E.2d ___ (N.C. Ct. App. July 19, 2016) (unpublished). Guidance from our State's highest court would benefit us as we review these frequently raised issues.

TYSON, Judge, dissenting.

This Court's prior issuance of a writ of certiorari brings review of defendant's IAC claim properly before us. Defendant has failed to show the performance of his appellate counsel in the prior appeal was deficient. The record contains sufficient evidence of all elements of the charge of robbery with a dangerous weapon. I would affirm the trial court's denial of defendant's motion for appropriate relief, and find no error in defendant's jury conviction and the judgment entered for robbery with a dangerous weapon. I respectfully dissent.

I. Standard of Review

"To show ineffective assistance of appellate counsel, [d]efendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (2006) (citing *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L.Ed.2d 756, 780 (2000)) *disc. review denied*, 360 N.C. 653, 637 S.E.2d 191 (2006). Judge Stroud accurately sets forth our standard of review to determine ineffective assistance of counsel.

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

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

II. State's Evidence

Appellate counsel in defendant's prior appeal was not deficient. Sufficient evidence was presented to the jury on each element of the charge of robbery with a dangerous weapon, to include defendant's identity as a perpetrator. Defendant's trial counsel moved to dismiss the charges at the close of the State's evidence and renewed her motion at the close of all the evidence. Defendant did not testify or offer any evidence at trial. Upon a motion to dismiss, evidence presented by the State is reviewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Irick*, 291 N.C. 480, 491, 231 S.E.2d 833, 840 (1977). The trial

court heard and considered the evidence, and denied the motions to dismiss.

The fingerprint evidence in this case does not "stand alone" to warrant a higher level of scrutiny. Citing *Irick*, Judge Stroud asserts appellate counsel on the prior appeal was deficient, and our Court must "focus on whether 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' " *Id.* at 492, 231 S.E.2d at 841. Presuming the plurality's notion that this higher level of scrutiny is required, "[o]rdinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury." *Id.* at 489, 231 S.E.2d at 839.

The assertion that "[t]he circumstances of the crime alone provide no evidence which might show that 'the fingerprint [] could only have been impressed at the time the crime was committed' " is incompatible with the record evidence. The record shows the State produced more than just "stand alone" evidence of defendant's fingerprint on the exterior of the victim's plastic backpack to help identify defendant to this crime.

The victim called the police immediately after he was robbed on the sidewalk near 325 Buck Jones Road. The victim testified he did not see the faces of his assailants, but saw their hands and arms. He described a perpetrator's hands as calloused, described the color of shirt sleeves, and the race and sex of both attackers. The victim indicated it sounded like his assailants had fled across Buck Jones Road. The police canines were able to track the perpetrators to a common area in the back of Portree Place townhomes, not far from the crime scene at 325 Buck Jones Road.

Trial testimony placed Portree Place townhomes near the intersection of Buck Jones Road and Bashford Drive. Detective Codrington testified Westcliff Court was "very, very close as far as the proximity, and it would explain . . . from the direction that the person ran from after [the robbery], explains that sort of in the direction of Westcliff Court and Little Sue's Mini-mart which everybody cuts behind." He testified that near the time of the crime "[a]ll the info [he] could gather" pointed to defendant "living at 448 Westcliff Court," near the crime scene. Detective Codrington testified the Westcliff Court entrance is right on Bashford Road, parallel to the side of the Little Sue's Mini-mart and near the back of Portree Place townhomes to where the canines tracked the attackers.

Three weeks after the victim was robbed, defendant was stopped by police on Westcliff Court for an illegal tint on his vehicle's windows, a few hundred yards from the crime scene. Defendant was arrested on the outstanding robbery warrant and was taken into the station for questioning.

Detective Codrington interviewed defendant. Defendant waived his right to remain silent and was unable to account for his whereabouts on the night of the robbery. Defendant offered an alternative "hypothesis" about how his fingerprint could have been placed upon the victim's backpack.

Defendant told the detective that perhaps "someone he knew had a bag that he had presumably touched and then that bag had gotten stolen, and that's how [the victim's] bag" may have "had his fingerprint on it." During his interview, Defendant did not identify who that "someone he knew" was, or possibly when, where, and how he could have touched the victim's backpack and left his identifiable fingerprint thereon other than during the robbery.

The State also offered the testimony of the crime scene investigator, who lifted defendant's print from the backpack, as well as the testimony of Officer Heinrich, the latent unit supervisor at the City County Bureau of Identification [CCBI]. Officer Heinrich testified defendant was linked by CCBI's database to the latent prints lifted from the backpack. Once the database produced matches, Heinrich physically reviewed the prints and concluded it was defendant's fingerprint present on the outside of the backpack.

The victim testified he had owned the backpack for 6 months and wore it to and from work. He indicated he wrapped the pack inside a jacket before he hung it on the employee coat rack in "the dry stock past the kitchen" in "an employee only" area at his work. The victim testified one of his assailants held him down, while the other was "going through his pockets and pawing around in [his] backpack."

III. Ineffective Assistance of Appellate Counsel

Effective appellate advocates winnow out weaker arguments and focus on those more likely to prevail on appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 994 (1983). This accepted discretionary process lies within the professional judgment of appellate counsel. When the State's evidence is sufficient to support a conviction, defendant's counsel may use his professional judgment and select what he believes to be "the most promising issues for review." *Id.* at 752, 77 L. Ed.

2d at 994. This record and defendant's MAR provide nothing to support a claim that defendant's appellate counsel was ineffective, either under the standards provided by the Supreme Court of the United States or the Supreme Court of North Carolina to vacate his conviction on ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 673; *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

Defendant-Irick argued to our Supreme Court that the fingerprint evidence should not have been admitted into evidence until after the State showed that the print could only have been impressed at the time the crime was committed. The Supreme Court found defendant to have misconstrued the cases on this subject. *Irick*, 291 N.C. at 488, 231 S.E.2d at 839. The Court held "the probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated." *Id.* at 489, 231 S.E.2d at 839.

As discussed by the plurality, the defendant in *Irick* also challenged the trial court's denial of his motion for nonsuit (dismissal). *Id.* at 490, 231 S.E.2d at 840. The *Irick* Court recognized that a key piece of circumstantial evidence to connect the defendant in the case was the fingerprint identification.

The *Irick* Court found other circumstances tended to show the defendant was the criminal actor. The defendant was observed by a police officer coming from the general direction of the burglarized home shortly after the burglary transpired; the defendant had loose bills in the same denominations and total amount as those stolen; the defendant was tracked by the bloodhound from one crime scene to another, and attempted to flee from the police soon after the burglaries took place. The Court held "[a]ll of these circumstances, taken with the fingerprint identification, when considered in the light most favorable to the State, permit a reasonable inference that defendant was the burglar at the Hipp house." *Id.* at 492, 231 S.E.2d at 841-42.

When viewed in the light most favorable to the State, all of the circumstances shown by the State permit a reasonable inference that defendant was one of the robbers of Mr. Major. Where there is more than just fingerprint evidence "standing alone," the State is not required to provide a higher level of "substantial evidence of circumstances from which the jury can find the fingerprint[] could only have been impressed at the time the crime was committed" to survive a motion to dismiss. *Id.* at 491-92, 231 S.E.2d at 841. In addition, "[o]rdinarily, the question of

whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury." *Id.* at 489, 231 S.E.2d at 839.

IV. Conclusion

Upon defense counsel's motion to dismiss for insufficiency of the evidence, the trial court reviewed the evidence, twice denied the motions, and allowed the case to be decided by the jury. The jury heard all of the evidence, the trial court's instructions, and found defendant to be guilty of robbery with a dangerous weapon beyond a reasonable doubt.

> The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, *it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.*

Id. at 491, 231 S.E.2d at 841 (quotation marks and citations omitted) (emphasis supplied).

Reviewing the uncontroverted facts offered by the State, in the light most favorable to the State, the trial court properly denied defense counsel's motion to dismiss at the close of the State's evidence and at the close of all evidence. Appellate counsel apparently knew the standard of review and this question of fact was a jury issue, and made a tactical decision not to raise this issue on appeal. Defendant failed and cannot show his appellate counsel was deficient in his failure to raise the trial court's denial of defendant's motions to dismiss in defendant's initial appeal. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The standard of review applicable to this appeal and the questions of fact for the jury should end our inquiry at the first prong.

Defendant also fails to meet *Strickland*'s second prong: but for appellate counsel's alleged "deficient performance" a different result would have occurred had the argument been raised by counsel on his prior appeal. *Id.* at 687, 80 L. Ed. 2d at 693. The conclusions to find error under either prong and vacate defendant's conviction is error. No error occurred in the trial court's denials of the motions to dismiss, the submission of the fingerprint evidence to the jury, and the jury's verdict or the judgment entered thereon. I respectfully dissent.

TROPIC LEISURE CORP., MAGEN POINT, INC.
D/B/A MAGENS POINT RESORT, PLAINTIFFS
v.
JERRY A. HAILEY, DEFENDANT

No. COA15-1254

Filed 16 August 2016

Judgments—foreign—collateral attack—argument not raised below

The Uniform Enforcement of Foreign Judgments Acts did not permit defendant to mount a collateral attack on a foreign judgment from the Virgin Islands based on an argument that he could have raised in the rendering jurisdiction (violation of due process) but chose to forego until plaintiffs sought enforcement of the judgment in North Carolina.

Appeal by defendant from order entered 10 September 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 25 May 2016.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and Daniel K. Keeney, for defendant-appellant.

Warren, Shackleford & Thomas, P.L.L.C., by R. Keith Shackleford, for plaintiffs-appellees.

DAVIS, Judge.

Jerry A. Hailey ("Defendant") appeals from an order denying his motion for relief from a foreign judgment that Tropic Leisure Corp. and Magens Point, Inc., d/b/a Magens[1] Point Resort (collectively "Plaintiffs") sought to enforce in North Carolina. On appeal, Defendant argues that the foreign judgment should not be enforced because it was rendered in violation of his due process rights. After careful review, we affirm.

Factual Background

On 2 April 2014, Plaintiffs, who are corporations organized under the laws of the United States Virgin Islands (the "Virgin Islands"), obtained

1. While this entity's name appears as "Magen Point, Inc." in the trial court's order, it is referred to elsewhere in the record as "Magens Point, Inc."

a default judgment (the "Judgment") in the small claims division of the Virgin Islands Superior Court against Defendant, who is a resident of North Carolina, in the amount of $5,764.00 plus interest and costs. Defendant did not appeal the default judgment. On 17 February 2015, Plaintiffs filed a Notice of Filing Foreign Judgment in Wake County District Court along with a copy of the Judgment and a supporting affidavit.

Defendant filed a motion for relief from foreign judgment on 6 April 2015 in which he argued that the Judgment was not entitled to full faith and credit in North Carolina because it was obtained in violation of his constitutional rights and was against North Carolina public policy. Plaintiffs subsequently filed a motion to enforce the foreign judgment.

The parties' motions were heard before the Honorable Debra Sasser on 30 July 2015. On 10 September 2015, the trial court entered an order denying Defendant's motion for relief and concluding that Plaintiffs were entitled to enforcement of the Judgment under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and North Carolina's Uniform Enforcement of Foreign Judgments Act ("UEFJA"), N.C. Gen. Stat. §§ 1C-1701 *et seq*. Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred in extending full faith and credit to the Judgment. This issue involves a question of law, which we review *de novo*. *See DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 375, 758 S.E.2d 390, 393 (applying *de novo* review to whether Full Faith and Credit Clause required North Carolina to enforce foreign judgment), *cert. denied*, __ U.S. __, 135 S. Ct. 678, 190 L.Ed.2d 390 (2014).

The Full Faith and Credit Clause "requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered."[2] *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). "[B]ecause a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign

2. The Full Faith and Credit Clause applies to the Virgin Islands because it is a territory of the United States. *See* 48 U.S.C. § 1541 (designating the Virgin Islands as a territory); 28 U.S.C. § 1738 (applying Full Faith and Credit Clause to judgments filed "in every court within the United States and its Territories and Possessions"); *see also Bergen v. Bergen*, 439 F.2d 1008, 1013 (3rd Cir. 1971) (holding that the Full Faith and Credit Clause "is applicable to judgments of the Territory of the Virgin Islands").

judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit." *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223, *disc review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994).

The UEFJA "governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina." *Lumbermans Fin., LLC v. Poccia*, 228 N.C. App. 67, 70, 743 S.E.2d 677, 679 (2013) (citation and quotation marks omitted). In order to domesticate a foreign judgment under the UEFJA, a party must file a properly authenticated foreign judgment with the office of the clerk of superior court in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment. *See* N.C. Gen. Stat. § 1C-1703(a) (2015).

The introduction into evidence of these materials "establishes a presumption that the judgment is entitled to full faith and credit." *Meyer v. Race City Classics, LLC*, 235 N.C. App. 111, 114, 761 S.E.2d 196, 200, *disc. review denied*, 367 N.C. 796, 766 S.E.2d 624 (2014). The party seeking to defeat enforcement of the foreign judgment must "present evidence to rebut the presumption that the judgment is enforceable . . . ." *Rossi v. Spoloric*, __ N.C. App. __, __, 781 S.E.2d 648, 654 (2016). A properly filed foreign judgment "has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(c). Thus, a judgment debtor may file a motion for relief from the foreign judgment on any "ground for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a) (2015).

Our Supreme Court has held that "the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment." *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397. In *DOCRX*, the Court provided the following examples of potential defenses to enforcement of a foreign judgment:

> that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification,

> or that the judgment debtor's due process rights have been violated.

Id. In the present case, Defendant argues that he was denied due process during the Virgin Islands proceeding because the rules governing small claims cases in that jurisdiction do not (1) permit parties to be represented by counsel; or (2) allow for trial by jury.

Some understanding of the structure of the Virgin Islands court system is necessary to our analysis. Congress has created the District Court of the Virgin Islands, which possesses jurisdiction equivalent to that of a United States district court. *See* 48 U.S.C. § 1611; *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 358 (3rd Cir. 2007). In addition, the legislature of the Virgin Islands has established (1) the Virgin Islands Supreme Court, a court of last resort; and (2) the Superior Court of the Virgin Islands, a trial court of local jurisdiction. V.I. Code Ann. tit. 4, § 2.

The Virgin Islands Superior Court contains a small claims division "in which the procedure shall be as informal and summary as is consistent with justice." V.I. Code Ann. tit. 4, § 111. The small claims division has jurisdiction over all civil actions where the amount in controversy does not exceed $10,000.00. V.I. Code Ann. tit. 4, § 112(a). Neither party in a proceeding before the small claims court may appear through an attorney. V.I. Code Ann. tit. 4, § 112(d). Parties must appear in person, although a party who is not a natural person may send a personal representative. *Id.* In addition, small claims cases are heard before a magistrate without a jury. *See* V.I. Super. Ct. R. 64.

A party may appeal a judgment of the small claims division to the Appellate Division of the Superior Court. *See H & H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 462-63 (2009); V.I. Super. Ct. R. 322.1(a). No additional evidence may be taken in the Appellate Division. V.I. Super. Ct. R. 322.3(a). If a party does not agree with the decision of the Appellate Division, it may then appeal to the Virgin Islands Supreme Court. *See* V.I. Code Ann. tit. 4, § 32; *H & H Avionics*, 52 V.I. at 462-63. Parties are permitted to be represented by counsel on appeal to the Virgin Islands Supreme Court.[3] *See* V.I. Sup. Ct. R. 4(d).

In the present case, Defendant's failure to appear in the Virgin Islands small claims court to contest Plaintiffs' lawsuit against him resulted in a default judgment. Defendant did not appeal that judgment.

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3. It is unclear whether parties may appear through counsel in the Appellate Division of the Superior Court. *See Wild Orchid Floral & Event Design v. Banco Popular de Puerto Rico*, 62 V.I. 240, 249 (V.I. Super. Ct. 2015).

Defendant does not dispute the fact that Plaintiffs complied with the UEFJA by filing a properly authenticated copy of the Judgment and an accompanying affidavit in a North Carolina court. Accordingly, Plaintiffs are entitled to a "presumption that the judgment is entitled to full faith and credit." *Meyer*, 235 N.C. App. at 114, 761 S.E.2d at 200.

We also note that Defendant does not argue that the Virgin Islands small claims court lacked subject matter jurisdiction or personal jurisdiction in the underlying action. Rather, Defendant's sole argument in this Court is that the Judgment is not entitled to full faith and credit because he was deprived of his right to due process by the rules of the rendering jurisdiction's small claims court, which did not allow the parties to appear through counsel or provide for trial by jury.[4]

However, Defendant failed to raise these due process concerns in the Virgin Islands proceedings, and he has not demonstrated that he was in any way prevented from doing so. In fact, caselaw from the Virgin Islands establishes that courts in that jurisdiction are authorized to adjudicate due process challenges concerning matters arising in small claims court. *See*, *e.g.*, *Gore v. Tilden*, 50 V.I. 233, 239-40 (2008) (due process challenge to adequacy of notice in connection with small claims court default judgment); *Moore v. Walters*, No. SX-09-SM-203, 2013 V.I. LEXIS 73, at *7, 2013 WL 9570350, at *3 (V.I. Super. Ct. Sept. 25, 2013) (due process challenge to small claims court evidentiary matter), *aff'd*, 61 V.I. 502 (2014).

We hold that the UEFJA does not permit Defendant to mount a collateral attack on a foreign judgment based on an argument that he could have raised in the rendering jurisdiction but instead chose to forego until Plaintiffs sought enforcement of the judgment in North Carolina. Allowing Defendant to raise in the present action an issue "that could have and should have been litigated in the rendering court is inconsistent with decisions of the United States Supreme Court holding that judgments that are valid and final in the rendering state are entitled to enforcement in the forum state under the Full Faith and Credit Clause." *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397.

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4. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, §1. Congress has applied this rule to the Virgin Islands by statute. *See* 48 U.S.C. § 1561 ("No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law . . . .")
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This principle has been recognized by numerous courts. *See*, *e.g.*, *Wilson v. Wilson*, 667 F.2d 497, 498 (5th Cir.) (Full Faith and Credit Clause and doctrine of *res judicata* required enforcement of out-of-state judgment because party seeking to defeat enforcement "could have appealed or raised the points he now makes" yet failed to do so in the rendering jurisdiction), *cert. denied*, 458 U.S. 1107, 73 L.Ed.2d 1368 (1982); *Dawson v. Duncan*, 144 Ill. App. 3d 532, 537, 494 N.E.2d 900, 903 (1986) (under Uniform Enforcement of Foreign Judgments Act, a "judgment debtor may defend against a foreign judgment sought to be enforced in this State, but not on grounds which could have been presented to the foreign court in which the judgment was rendered"); *Osteoimplant Tech., Inc. v. Rathe Prods., Inc.*, 107 Md. App. 114, 118, 666 A.2d 1310, 1311-12 (1995) ("To permit appellant to reopen litigation in Maryland and address issues that were or could have been addressed in the previous forum would effectively subject appellee to trying its case over again."); *Duncan v. Seay*, 553 P.2d 492, 494 (Okla. 1976) (because litigant seeking to defeat enforcement of out-of-state custody judgment "could have litigated [service and personal jurisdiction] questions there, but he did not choose to do so . . . [h]e should not be rewarded for fleeing the jurisdiction instead of remaining and contesting the issues in a manner provided by law").

Here, Defendant did not appear in the Virgin Islands small claims court at all — either to defend Plaintiffs' claims against him on the merits or to assert a due process challenge to the rules prohibiting him from being represented by counsel or having a trial by jury. Nor did he raise his due process argument in appeals to the Appellate Division of the Superior Court or to the Virgin Islands Supreme Court. Accordingly, he is foreclosed from raising such an argument for the first time here as a defense under the UEFJA.

Conclusion

For the reasons stated above, we affirm the trial court's 10 September 2015 order.

AFFIRMED.

Judges ELMORE and DIETZ concur.

KEVIN J. TULLY, PLAINTIFF
v.
CITY OF WILMINGTON, DEFENDANT

No. COA15-956

Filed 16 August 2016

Constitutional Law—North Carolina—police department promotional process—failure to follow policies

Where plaintiff, a city police officer, filed a complaint against the City of Wilmington alleging claims for violations of his due process rights under the Equal Protection and "fruits of their own labor" clauses of the North Carolina Constitution based on the City's failure to comply with its own established promotional process, the trial court erred by dismissing plaintiff's complaint. The Court of Appeals held that it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only fail to follow them but also claim that the employee subject to the policies is not entitled to challenge that failure.

Judge BRYANT dissenting.

Appeal by Plaintiff from judgment entered 1 May 2015 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 29 March 2016.

Tin Fulton Walker & Owen, PLLC, by Katherine Lewis Parker, for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for Defendant.

The McGuinness Law Firm, by J. Michael McGuinness, for amici curiae the Southern States Police Benevolent Association and the North Carolina Police Benevolent Association.

STEPHENS, Judge.

Plaintiff, a city police officer, appeals from the trial court's judgment on the pleadings in favor of Defendant, his employer, foreclosing Plaintiff's claims for violation of his State constitutional rights to substantive due process and equal protection as a result of Defendant's

failure to comply with its own rules and policies regarding its promotion process. Because we hold that Plaintiff has alleged a valid property and liberty interest in requiring Defendant to comply with its own established promotional process, we reverse the order of the trial court.

Factual and Procedural Background

Since 2000, Plaintiff Kevin J. Tully has been employed with the Wilmington Police Department ("the WPD"), a department of Defendant the City of Wilmington. He obtained the rank of Corporal in June 2007. In 2008, Tully was assigned to the WPD's Violent Crimes Section ("the VCS"), investigating major cases involving, *inter alia*, alleged rape, robbery, homicide, and sexual assault. As part of the VCS, through 2014, Tully worked on more than fifty homicide cases with a one hundred percent clearance rate in those for which he served as lead investigator. In 2011, Tully was named Wilmington Police Officer of the Year, and, in 2014, he was awarded the "Public Safety Officer Medal of Valor," the highest award given to a police officer in the United States.

The events giving rise to this case began in the fall of 2011, when Tully decided to seek promotion to the rank of Sergeant, following the policies and procedures established by the WPD. The promotion process involves several phases, beginning with a written examination. According to the WPD's policy on promotions, only candidates scoring in the top 50th percentile of those taking the written examination may advance to the next phase of the promotional process. The top-scoring one-third of candidates who complete all specified phases are then placed on an eligibility list for promotion, which is then provided to the Chief of Police. The Chief of Police reviews a file on each promotion-eligible candidate, which may include, *inter alia*, materials regarding supervisory evaluation ratings, length of service, educational background, current position, commendations and awards, and disciplinary actions. From the candidates whose files he reviews, the Chief of Police selects officers for promotion. Finally, the Chief's selections must be approved by the City Manager.

In the fall of 2011, Tully sat for the written examination for promotion to the rank of Sergeant and thereafter was notified that he had failed it, thus barring Tully from moving forward in the promotion process. However, Tully alleges that, when he reviewed a copy of the purportedly correct answers for the written examination, he realized that several of the "correct" answers were based on outdated law, particularly regarding searches and seizures. Thus, Tully alleges that other candidates for the position of Sergeant who answered those examination questions

"correctly"—meaning their answers matched the official test answers—and therefore advanced in the promotional process, had actually revealed an incorrect understanding of some areas of the current law in our State. Meanwhile, Tully, who actually demonstrated an understanding of the current law on those issues, was disqualified from advancing to the next phase of the WPD's promotion process.

Noting that the WPD's promotional policy provided that "[c]andidates [for promotion] may appeal any portion of the selection process[,]" Tully grieved this issue of the outdated examination answers through the WPD's internal grievance procedure. On 3 January 2012, Tully was informed by the City Manager that his grievance was denied because the examination answers were not a grievable item.

On 30 December 2014, Tully filed his complaint in this action, alleging claims for violations of his due process rights under the Equal Protection and "fruits of their own labor" clauses of the North Carolina Constitution. On 15 March 2015, the City filed its answer to the complaint, along with a motion for judgment on the pleadings pursuant to Rule of Civil Procedure 12(c). The City's motion was heard at the 8 April 2015 session of New Hanover County Superior Court, the Honorable Gary E. Trawick, Judge presiding. Following the hearing, the trial court granted the City's motion and dismissed Tully's complaint in its entirety. A written judgment dismissing the case with prejudice was entered on 1 May 2015. From that judgment, Tully timely appealed.

Discussion

On appeal, Tully argues that the trial court erred in granting the City's motion and entering judgment against Tully on the pleadings. We agree.

I. Standard of review

North Carolina Rule of Civil Procedure 12(c), provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). "Judgment on the pleadings is not favored by law[,] and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008) (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). When ruling on a motion for judgment on the pleadings, "[a]ll 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 . . . ." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). "This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764 (citation omitted).

II. Tully's constitutional claims

As an initial matter, we must clarify the bases for Tully's claims that his constitutional rights have been violated. Our review of the record reveals that, both in the trial court and on appeal, the City has consistently attempted to reframe Tully's claims as assertions of a property and liberty interest *in receiving a promotion*, a position that, as the City accurately observes, is not supported by precedent. However, Tully's actual claim is that the City violated Tully's constitutional rights *by failing to comply with its own policies and procedures regarding the promotional process*. In other words, as Tully states in his reply brief, he

> is *not arguing that he has an absolute property interest in being promoted*. Rather, he is arguing that if the government has a process for promotion of its employees, particularly law enforcement officers who are sworn to uphold and apply the law to ordinary citizens, *that process cannot be completely arbitrary and irrational* without running afoul of the North Carolina Constitution.

(Emphasis added). Thus, before addressing the pertinent case law we find persuasive in support of Tully's position, we review the details of his claims and allegations.

In his complaint, citing Article I, section 19 of our State's Constitution (containing the "law of the land" and "Equal Protection" clauses),[1] Tully first alleged that, "[b]y denying [Tully's] promotion *due to his answers on the Sergeant's test* and then *determining that such a reason was not grievable*, the City *arbitrarily and irrationally* deprived [Tully] of property in violation of the law of the land, in violation of the North

1. "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws . . . ." N.C. Const. art. I, § 19.

Carolina Constitution." (Emphasis added). Similarly, citing Article I, section 1 (containing the "fruits of their own labor" clause),[2] Tully further alleged that, "[b]y denying [Tully's] promotion *due to his answers on the Sergeant's test* and then *determining that such a reason was not grievable*, the City arbitrarily and irrationally deprived [Tully] of [the] enjoyment of the fruits of his own labor, in violation of the North Carolina Constitution." (Emphasis added).

Specifically, Tully contends that the City violated his property and liberty interests in an equal and non-arbitrary promotional *opportunity* under Article I, sections 1 and 19 of the North Carolina Constitution by failing to comply with its own promotional policies and procedures in two respects. First, Tully alleges that the City administered a written Sergeant's examination that included questions based upon incorrect and outdated law such that, *although Tully answered certain questions accurately based on the correct and existing law, those answers were marked wrong, causing Tully to fail the examination* and score below the 50th percentile of candidates, thereby barring him from proceeding to the next stage of the promotional process.[3] Tully contends that the use of a Sergeant's test based on outdated and incorrect law violates specific promotional policies promulgated by the City.

The record on appeal includes a copy of a document entitled "Wilmington Police Department Policy Manual/Directive 4.11 Promotions/ Effective: 02/24/2005 Revised: 07/25/2011" ("the manual").[4] The manual states that its purpose is to "*establish*[] *uniform guidelines that govern promotional procedures* within the Wilmington Police Department *and ensure*[] *procedures used are job-related* and non-discriminatory" with "the objective of . . . provid[ing] *equal promotional opportunities* to all members of the Police Department *based on a candidate's merit, skills*,

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2. "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

3. As noted *supra*, the City's alleged use of outdated law on the examination would also have caused other applicants for promotion to receive credit for correct answers even where their answers were in reality wrong. Thus, the City's alleged use of a flawed Sergeant's examination doubly disadvantaged Tully, in that, not only was his score wrongly lowered, but other applicants' scores were wrongly raised. In light of the City's policy that only applicants in the top half of scorers could advance in the promotional process, the use of an allegedly flawed examination was highly prejudicial to Tully.

4. The manual was attached to the City's answer as Exhibit 1 and thus was before the trial court.

knowledge, and abilities . . . ." (Emphasis added). In order to achieve this goal, per Policy A.1.c of the manual, the Chief of Police is responsible for "[c]onducting *a review of the promotional process* prior to each promotional opening *to ensure* [*that*] *the selection of the qualified candidates is done in a fair and equitable manner*." (Emphasis added). In addition, under Policy B.1.c of the manual, the Chief of Police must

> *establish screening devices*, *to include written examinations* . . . . specific to the vacancy, [including p]roviding written examination instruments using both job and task analysis specific to the Wilmington Police Department or by using nationally recognized instruments. *All instruments used shall have demonstrated content and criterion validity*,[5] which is accomplished by contracting with qualified outside entities *to develop the written testing instruments. Instruments will assess candidate's knowledge*, *skills and abilities as related to the promotional position.* Work sample exercises will be internally validated using Wilmington Police Department subject matter experts.

(Emphasis added).

As part of his first constitutional claim, Tully has alleged that the City violated its own policies by administering a written examination based on outdated and inaccurate law such that it did not assess "a candidate's merit, skills, knowledge, and abilities." The hearing transcript makes clear that, despite the City's consistent focus on case law establishing that employees do not have a property or liberty interest in *receiving a promotion*, Tully's trial counsel clarified that his claims were based on the City's failure to provide a *non-arbitrary promotional process* in regard to the allegedly outdated test materials: "[T]o deny [Tully] his right to *pursue* [a promotion] based on an *arbitrary test* that is absolutely contrary to the public interest[,]. . . interfering with [his] fundamental right to the fruits of [his] own labor . . . ." (Emphasis added).

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5. "Content validity addresses the match between test questions and the content or subject area they are intended to assess." The College Board, https://research.collegeboard.org/services/aces/validity/handbook/evidence (last visited 25 July 2016). "Criterion-related validity looks at the relationship between a test score and an outcome." *Id.* "The College Board is a mission-driven not-for-profit organization that connects students to college success and opportunity. . . . Each year, the College Board helps . . . students prepare for a successful transition to college through programs and services in college readiness and college success—including the SAT and the Advanced Placement Program." *See* The College Board, https://www.collegeboard.org/about (last visited 25 July 2016).

The second violation of his constitutional rights alleged by Tully concerns the City's failure to follow its own grievance policy in regard to the promotional process. Policy F.1 of the manual provides that "[c]andidates [for promotion] *may appeal any portion of the selection process*. . . ." (Emphasis added). Again, at the hearing, Tully's counsel noted that the City placed "significant emphasis on *policies* and their officers following policies, invit[ed] [Tully] to grieve [his allegations regarding the flawed test questions] and walk[ed] him through the process and then just walk[ed] all over him at the end and [said], well, *you didn't really have a grievable item* anyway . . . ." (Emphasis added).

In sum, Tully's constitutional claims are *not* based upon an assertion that he was entitled *to receive a promotion* to the rank of Sergeant, but simply that he was entitled *to a non-arbitrary and non-capricious promotional process*. Tully's argument—that a government employer that fails to follow its own established promotional procedures acts arbitrarily, and thus, unconstitutionally—appears to be one of first impression in this State. However, it is supported by persuasive federal case law and is in keeping with our State's constitutional jurisprudence.

III. Analysis

> Arbitrary and capricious acts by government are . . . prohibited under the Equal Protection Clause[] of . . . the North Carolina Constitution[]. No government shall deny any person within its jurisdiction the equal protection of the laws. The purpose of the Equal Protection Clause . . . is to secure every person within the [S]tate's jurisdiction *against intentional and arbitrary discrimination*, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Dobrowolska v. Wall, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000) (citations and internal quotation marks omitted; emphasis added), *disc. review allowed*, 352 N.C. 588, 544 S.E.2d 778 (2000), *disc. review improvidently allowed in part and appeal dismissed ex mero motu in part*, 355 N.C. 205, 558 S.E.2d 174 (2002). Likewise, "irrational and arbitrary" government actions violate the "fruits of their own labor" clause. *See*, *e.g.*, *Treants v. Onslow Cty.*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986) (citations omitted), *affirmed*, 320 N.C. 776, 360 S.E.2d 783 (1987).

In this light, we find highly persuasive the rule discussed and applied by the Fourth Circuit Court of Appeals in *United States v. Heffner*:

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process.

420 F.2d 809, 811-12 (4th Cir. 1969); *see also Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 125, 133, 741 S.E.2d 315, 320 (2012) (citing *Heffner* with approval), *disc. review denied*, 366 N.C. 419, 735 S.E.2d 174 (2012). In *Heffner*, the defendant appealed after he was convicted of "two counts of wilfully furnishing to his employer . . . false and fraudulent statements of federal income tax withholding exemptions" in violation of federal law. 420 F.2d at 810. The Fourth Circuit reversed the defendant's convictions, noting that the Internal Revenue Service ("IRS") had "issued instructions to all Special Agents of the Intelligence Division. . . . describ[ing] its procedure for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations[,]" but that the Special Agent who interrogated the defendant had failed to comply with those procedures. *Id.* at 811 (citation and internal quotation marks omitted). The Court explained that it was "of no significance that the procedures or instructions which the IRS has established [were] more generous than the [United States] Constitution requires. . . . [n]or . . . that these IRS instructions to Special Agents were not promulgated in something formally labeled a 'Regulation' or adopted with strict regard to the [federal] Administrative Procedure Act . . . ." *Id.* at 812 (citations omitted). The critical point is that the constitutional violation was demonstrated by "the *arbitrariness which is inherently characteristic of an agency's violation of its own procedures*." *Id.* (emphasis added). Additionally, "[t]he *Accardi* doctrine . . . requires reversal irrespective of whether a new trial will produce the same verdict." *Id.* at 813.

Although as noted *supra*, this appeal presents a matter of first impression in our State courts, courts in other jurisdictions have considered similar arguments made by government employees and have reached the same result we reach here. *See, e.g.*, *McCourt v. Hampton*, 514 F.2d 1365 (4th Cir. 1975) (applying the reasoning of *Heffner* where a

civilian employee of the United States Army Aviation Systems Command alleged his government employer acted arbitrarily in violating its own rules); *Sumler v. Winston-Salem*, 448 F. Supp. 519 (M.D.N.C. 1978) (citing *Heffner* with approval where a recreation department employee alleged his government employer acted arbitrarily in violating its own rules); *Burnaman v. Bay City Indep. Sch. Dist.*, 445 F. Supp. 927 (S.D. Tex. 1978) (applying the reasoning of *Heffner* where a public school vocational counselor alleged his government employer acted arbitrarily in violating its own rules); *Bd. of Educ. v. Ballard*, 507 A.2d 192 (Md. App. 1986) (applying the reasoning of *Heffner* and *Accardi* where a public school librarian alleged her government employer acted arbitrarily in violating its own rules); *Bd. of Educ. v. Barbano*, 411 A.2d 124 (Md. App. 1980) (applying the reasoning of *Heffner* and *Accardi* where a public school teacher alleged her government employer acted arbitrarily in violating its own rules). While not mandatory authority, these decisions present a convincing case supporting our adoption of the *Heffner* rule in this matter.

In addition, while we have found no case from our State's appellate courts applying the rule of *Heffner* and *Accardi* in the context of a government entity alleged to have failed to follow its own established procedures in a matter where, as here, that allegation is the sole basis to establish a property or liberty interest, this Court has noted this concept with approval in *dictum*:

> The parties have not cited in their briefs and we have not found a North Carolina case [that] deals with the power of an administrative agency not to follow its own rules. There have been cases in the federal courts dealing with this question. We believe the rule from these cases is that a party has the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule were followed. This insures that those who appear before a board will be treated equally. We believe this rationale is sound.

Farlow v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1984) (citations omitted), *disc. review denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985). In *Farlow*, the plaintiff "appealed from a judgment . . . affirm[ing] an order of the North Carolina State Board of Chiropractic Examiners [("the Board")] suspending his license to practice for a period of six months[,]" arguing that the Board failed to render its decision within 90 days of the plaintiff's

disciplinary hearing as its rules required. *Id.* at 204, 207, 332 S.E.2d at 697, 699-70. This Court overruled the appellant's argument after determining that "the result was not changed because the Board did not follow its own rule[,]" and thus the Board's failure to follow its own rules was not prejudicial to the plaintiff. *Id.* at 208, 332 S.E.2d at 670.

While the Court in *Farlow* considered prejudice, whereas the *Heffner* and *Accardi* decisions explicitly held that prejudice was irrelevant, this distinction is not pertinent here where Tully's appeal is before us from a dismissal on the pleadings. We cite *Farlow* merely to demonstrate that this Court has previously found the "rationale . . . sound" that a government entity should follow its own established procedures and rules to ensure equal treatment. *See id.* at 208, 332 S.E.2d at 700. In line with the reasoning discussed in *Accardi*, *Heffner*, and *Farlow*,[6] we now hold that it is *inherently arbitrary* for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure.[7] To paraphrase Tully, if a government entity can freely disregard its policies at its discretion, why have a test or a grievance process or any promotional policies at all?

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6. While decisions interpreting the United States Constitution, like *Heffner* and *Accardi*, do not bind North Carolina courts on issues of North Carolina constitutional law, *see e.g.*, *Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577 (1996), we find their reasoning highly persuasive on this matter of first impression.

7. *Compare N.C. Dep't of Pub. Safety v. Owens*, __ N.C. App. __, 782 S.E.2d 337 (2016). In that case, the Highway Patrol placed a patrol sergeant on administrative duty during which time the Highway Patrol did not permit him "to complete the firearms training or other training which were required to maintain his credentials" and then, after the administrative duty period ended, fired the sergeant "based [in part] on . . . his loss of certain credentials necessary to perform" his job duties. *Id.* at __, 782 S.E.2d at 341. On appeal, this Court affirmed the reversal of the sergeant's termination, noting:

> The Administrative Code may allow for an employee to be terminated without prior warning for the failure to maintain required credentials; however, an employee so terminated is entitled to relief . . . where the employer-agency acts arbitrarily and capriciously in terminating him on this basis. Here, . . . the Highway Patrol acted arbitrarily and capriciously in terminating [the sergeant] on the basis of loss of credentials. For instance, it was arbitrary and capricious for the Highway Patrol to prevent [the sergeant] from taking his annual firearms training (necessary to retain his credentials), though the Highway Patrol was under no disability to allow the training to take place, and then terminate [the sergeant] for his failure to complete said training.

Id. at __, 782 S.E.2d at 342-43.

In reaching this holding, we emphasize that the questions before the trial court in ruling on the City's motion for judgment on the pleadings and now before this Court on appeal are *not* whether the City did violate its own promotional policies and procedures and whether Tully should prevail in this matter. Instead, the dispositive questions before us are whether Tully has sufficiently *alleged* claims of arbitrary and capricious action by the City in its failure to follow its own procedures and whether the City has established on the pleadings "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). For the reasons discussed *supra*, we conclude that Tully has sufficiently alleged constitutional claims and that genuine issues of material fact remain to be resolved. Accordingly, to permit Tully to engage in discovery and present a forecast of evidence to support his allegations of arbitrary and capricious action in the City's failure to follow its own policies and procedures regarding promotions, we reverse the trial court's order.

REVERSED.

Judge McCULLOUGH concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority states

> the dispositive questions before us are whether Tully has sufficiently alleged claims of arbitrary and capricious action by the City in its failure to follow its own procedures and whether the City has established on the pleadings "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).

The majority also acknowledges this is an issue of first impression, as our courts have never held that a governmental employer that fails to follow its own established procedures acts arbitrarily and, therefore, unconstitutionally. Because the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an

unfair result in a standard process—do not state a viable constitutional claim. Therefore, I respectfully dissent.

Tully alleged in his complaint that denying him a promotion "due to his answers on the test and then determining that the reason was not grievable" was an "arbitrary and irrational deprivation of property in violation of the North Carolina Constitution." Tully now argues on appeal that he was subjected to an arbitrary and capricious *process* by the City's failure to follow its own established promotional procedures, an important distinction that was not alleged in Tully's complaint. Tully says in brief that "he never had a true opportunity to grieve his denial of a promotion based on his answers to the Sergeant's test." However, Tully's complaint alleges that he was given the opportunity to appeal the selection process and to be heard on his grievance, and was then "informed that his grievance was denied, as the test answers were not a grievable item." Nevertheless, Tully's allegations in his complaint tend to undercut his ultimate constitutional claims where the promotional process was followed and he was heard on his grievance through the internal grievance procedure.

Tully contends he was arbitrarily discriminated against based on test results that he was not permitted to challenge and that such arbitrary and irrational treatment violated his liberty interests as protected by the North Carolina Constitution. Further, Tully argues that his lack of opportunity to adequately challenge his test results was in violation of the WPD's own regulations. While I recognize Tully's opinion of the unfairness of the result of the WPD's testing scheme (Tully's denial of a promotion), and his unsuccessful challenge to the result, it is not clear that Tully's claims have a basis in our state constitution. Further, the cases cited by Tully in support of his claims for constitutional review relate to the government acting as a *sovereign*, rather than as an *employer*, and are inapposite to the facts at hand.

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.' " *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598, 170 L. Ed. 2d 975, 983 (2008) (alteration in original) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896, 6 L. Ed. 2d 1230, 1236 (1961)). " '[T]he government as employer indeed has far broader powers than does the government as sovereign.' " *Id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 697 (1994) (plurality opinion)). In *Engquist*, the U.S. Supreme Court explained this distinction as follows:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. Given the common-sense realization that government offices could not function if every employment decision became a constitutional matter, constitutional review of governmental employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.

553 U.S. at 598–99, 170 L. Ed. 2d at 983–84 (alterations in original) (internal citations and quotation marks omitted); *see also Connick v. Myers*, 461 U.S. 138, 150–51, 75 L. Ed. 2d 708, 722 (1983) (explaining that the government has a legitimate interest "in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] [maintaining] proper discipline in the public service' " (quoting *Ex parte Curtis*, 106 U.S. 371, 373, 27 L. Ed. 232, 235 (1882)).

The cases cited by plaintiff in his principal brief and in the Amicus Brief submitted on his behalf concern either a governmental entity's assertion of its power as a *sovereign* to regulate or prohibit acts detrimental to their citizens' health, safety, or welfare, *see*, *e.g.*, *King v. Town of Chapel Hill*, 367 N.C. 400, 401–02, 758 S.E.2d 364, 367 (2014) (addressing town's regulation of vehicle towing services); *Roller v. Allen*, 245 N.C. 516, 517–18, 96 S.E.2d 851, 853 (1975) (considering the legality of a statute regulating the licensure of tile, marble, and terrazzo contractors); *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 732–33 (1949) (addressing the regulation of photographers), or is otherwise not binding precedent on this Court, *see*, *e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 413–15 (6th Cir. 2005) (striking down promotional test for police officers that violated Title VII as it was based on arbitrary standards and did not approximate a candidate's potential job performance); *Guardians Ass'n of the NYC Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 109–12 (2d Cir. 1980) (holding test designed to select candidates for hiring as entry level police officers had a racially disparate impact and ordering any subsequent exam receive court approval prior to use); *Johnson v. Branch*, 364 F.2d 177, 180–82 (4th Cir. 1966) (en

banc) (remanding with instructions that school board renew teacher's contract for the next school year after board failed to renew it).[1]

As the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large[,]" *Engquist*, 553 U.S. at 599, 170 L. Ed. 2d 984, the cases cited in the briefs submitted on behalf of plaintiff related to the government acting in its capacity as a sovereign are inapplicable here where the government acted as an employer in denying plaintiff a promotion.

Because plaintiff cannot establish a valid property or liberty interest in obtaining a promotion or in the promotional process itself, nor can plaintiff establish that he was deprived of substantive due process or equal protection rights in failing to be so promoted, I dissent from the majority opinion. However, because our state Supreme Court has mandated that the N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties, *see Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." (citation omitted)), I would strongly urge the Supreme Court to take a close look at this issue to see whether it is one that, as currently pled, is subject to redress under our N.C. Constitution. Accordingly, I respectfully dissent.

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1. Neither *Isabel* nor *Guardians* asserted a constitutional violation, and *Johnson*, which raised arguments based on the federal constitution, was remanded based on the plaintiff's federal statutory claims. *See Johnson*, 364 F.2d at 179 ("No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary in order to retaliate against her for exercising her constitutional right to protest racial discrimination.").

AURORA ZETINO-CRUZ, PLAINTIFF
v.
ZOILA NOHEMY BENITEZ-ZETINO AND CARLOS GIOVANI AMAYA-AREVALO, DEFENDANTS

No. COA15-1154

Filed 16 August 2016

1. Appeal and Error—interlocutory orders and appeals—change of venue—statutory right

Plaintiff was allowed to appeal from an interlocutory order where the judge sua sponte changed venue. Plaintiff had a statutory right for the action to remain in Durham County, unless and until defendant filed a motion for change of venue to a proper county.

2. Venue—change sua sponte by judge—no legal basis—no inherent power

The trial court erred by changing venue from Durham County to Lee County. The trial court had no legal basis to change venue since no defendant had answered or objected to venue. Further, the trial court did not have any inherent power to change venue for the "convenience of the court." The order was vacated and remanded to Durham County.

Appeal by plaintiff from order entered 14 August 2015 by Judge Doretta L. Walker in District Court, Durham County. Heard in the Court of Appeals 7 March 2016.

The Law Office of Derrick J. Hensley, by Derrick J. Hensley, for plaintiff-appellant.

No brief filed on behalf of defendants-appellees.

STROUD, Judge.

Plaintiff Aurora Zetino-Cruz appeals from the trial court's order changing venue from Durham County to Lee County, North Carolina. Plaintiff argues that the court committed reversible error when it changed venue to Lee County *sua sponte*. We conclude that the trial court had no legal basis upon which to change venue since no defendant had answered or objected to venue. Nor did the trial court have any inherent power to change venue for the "convenience of the court." We therefore vacate the trial court's order and remand to Durham County for further proceedings.

Facts

On 1 May 2015, plaintiff filed a complaint in Durham County, seeking custody of her grandchildren, Javier, born in 2006, and Maria, born in 2009.[1] According to the verified complaint, defendants are the children's mother and father. Both of the children and defendants are citizens of El Salvador. Plaintiff, the children's maternal grandmother, had lived in North Carolina for about 15 years prior to filing this action, and the two children had resided with her in Sanford, North Carolina, since May 2014, or for about 12 months before the filing of the action. Plaintiff's complaint set forth extensive details regarding how the children ended up in her care. They have never lived with defendant-father, whom plaintiff alleged was involved in "Mara 18, one of the principal criminal gangs in El Salvador that controls many communities and subjects local residents to violence and terror." Defendant-father has also never provided financially for the children or assisted in their care. She further alleged that defendant-mother had fled El Salvador "[f]earing for her life and for the well-being of the Minor Children," due to defendant-father's criminal activities and the "extreme violence committed by organized criminal gangs that have taken control of" much of El Salvador as the "de facto government."

In May 2014, defendant-mother and the children were "apprehended by U.S. Immigration officers" in Texas and later released on their own recognizance; they then moved to North Carolina to live with plaintiff. Defendant-mother failed to appear at her scheduled immigration hearing on 24 November 2014 and absconded. Plaintiff alleged that defendant-mother has made only one phone call to her since she absconded and has failed to provide any support for the children. When defendant-mother absconded, she left the children with plaintiff but failed to sign any documents which would give plaintiff legal authority to "fulfill the regular legal, medical, and educational decisionmaking that may only be done by a legal custodian." In addition, plaintiff alleged that Javier has "very extensive special needs" which require special services in school, including occupational therapy and speech therapy. Without any legal authority to authorize care or make decisions regarding Javier's services, plaintiff has had extreme difficulty maintaining the care that Javier needs.

Plaintiff's complaint requested full physical and legal custody of the children and also requested additional factual findings by the trial court regarding "Special Immigrant Juvenile Status" of the children pursuant to 8 U.S.C. § 1101(a)(27)(J) and 8 CFR 204.11. Plaintiff alleged that these findings would assist her in preventing removal of the children

1. We have used pseudonyms to protect the privacy of the children.

by immigration authorities and possible deportation, since return of the children to El Salvador would subject them to abuse and neglect from defendant-father, disruption of their education, and risk from the "extraordinarily high levels of crime and violence" in El Salvador. The complaint had many attached exhibits including birth certificates of the children and affidavits regarding the situation in El Salvador and risks to the children should they have to return there.

Plaintiff filed a motion for emergency temporary custody along with the verified complaint and a notice of hearing for 14 May 2015 for an emergency temporary custody hearing. On 14 May 2015, the Honorable James T. Hill, District Court Judge presiding, entered a temporary custody order granting plaintiff full legal and physical custody of the children. In this order, the court concluded that the children are "at risk of irreparable harm if an emergency custody order is not issued to allow their legal, educational, and medical needs to be met." The temporary custody order also provided that:

> The terms of this order will remain in effect until such time as a further hearing occurs, and is entered without prejudice to the rights of the parties to a full and fair hearing on the merits of this matter. Should no further hearing occur in a reasonable time frame, this order will become the permanent order of this court, subject to modification only by a showing of a substantial change in circumstances.

The temporary custody order also set the case for a pre-trial hearing and "any necessary review of this temporary order" on 14 August 2015 at 9:30 am and set a permanent custody hearing on 10 September 2015 at 9:30 am in Courtroom 6B of the Durham County Courthouse. The complaint was served on both defendants by publication, in both Spanish and English in Durham and in Spanish in El Salvador; the affidavit of service was filed on 24 July 2015. The publication also included the dates set by the temporary order for the pretrial hearing and trial. The first publication date was 10 June 2015, so defendants' answers were due by 20 July 2015. Neither defendant filed any answer or other response.

On Friday, 14 August 2015, the matter came on for pretrial hearing as scheduled by the temporary order, but before a different judge. Plaintiff, her counsel, and the minor children were present.[2] The case was called for hearing, and the following colloquy ensued:

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2. Plaintiff filed a memorandum regarding child custody venue on 14 August 2015, the day of the hearing, that noted that the minor children "are physically present in Durham County and attending today's pretrial hearing[.]"

MR. HENSLEY: Good morning, Your Honor. That's on for pretrial this morning.

THE COURT: Does everybody live in Durham?

MR. HENSLEY: Your Honor, nobody lives in Durham.

THE COURT: All right. It will be the Court's own motion will be transferring.

MR. HENSLEY: Your Honor, if I may be heard briefly. I prepared –

THE COURT: I'll hear you briefly. Just be brief. Tell me what county you want this transferred to.

MR. HENSLEY: We will not be transferring this, Your Honor.

The trial court then called another case.

After the trial court returned to plaintiff's case, the following discussion continued between the court and plaintiff's counsel:

THE COURT: All right. Now you want to address something with me, Aurora Cruz?

MR. HENSLEY: Yes, Your Honor.

THE COURT: I'm listening.

MR. HENSLEY: If I could switch out my piles here.

Your Honor, it came to my attention yesterday afternoon that the question of venue had recently come to your attention. I previously prepared a memorandum for Judge Battaglia on this subject which was in my understanding satisfactory to him. So I prepared a memorandum for you this morning. If I may approach.

THE COURT: All right.

MR. HENSLEY: I do have two copies.

THE COURT: What county is this?

MR. HENSLEY: The Plaintiff and the children happen to reside in Lee County but they may be found as contemplated by the statute and case law in the County of Durham.

THE COURT: I already looked this up. The Court is changing venue to Lee County.

MR. HENSLEY: Your Honor -- Your Honor, if I could go back to the table and be heard briefly.

THE COURT: I'm listening.

MR. HENSLEY: So I would like to first object to lack of notice for this Court's motion.

THE COURT: I have so noted.

MR. HENSLEY: And, Your Honor, the matter of venue is a substantive procedural right for the plaintiff and for the defendant when timely objected to.

In this case the defendant has not objected and it is convenient to the Plaintiffs to be heard in the County of Durham wherein the children may be found on the occasion of filing the complaint and case law specifies that that is sufficient.

Moreover, I'm representing these individuals and it is most convenient for them to have an attorney practice in its own district in order to have most efficient representation possible.

And beyond that, Your Honor, the case law specifically gives the right to object to venue only to the defendant, the parties may agree otherwise, but the only statutory basis for changing venue is by objection of a defendant and ask that you carefully read the memorandum before issuing any order in this matter, Your Honor.

THE COURT: I carefully read the law and I transfer --

MR. HENSLEY: And the only other --

THE COURT: -- the venue to Lee County and you may have the same option as the people that you talked to yesterday. Thank you very much.

MR. HENSLEY: Your Honor, could you please state for the record what that option would be. I would like to have a full and complete record of these proceedings and what you mean by these things because I was not given any notice. I was not given a written motion. I just heard

from a friend yesterday afternoon that there was a question of venue.

THE COURT: This transfers to Lee County.

MR. HENSLEY: And what are the alternatives that you spoke of just a moment ago, Your Honor?

THE COURT: I happen to move my calendar, Mr. Hensley, which consist [sic] of you.

The trial court never identified what the "same option as the people that you talked to yesterday" was. The trial court then called another case. After completion of all of the remaining cases plaintiff's counsel had with the court, the trial court returned to plaintiff's case, and counsel asked the trial court the following in relation to this case:

MR. HENSLEY: . . .

Is there a written ruling with regards to the out-of-county matter?

THE COURT: Yes, sir, there is.

MR. HENSLEY: All right. Is there a copy available for me at this time?

THE COURT: Ask the clerk.

MR. HENSLEY: Thank you, Your Honor.

Both plaintiff's memorandum regarding child custody venue, which was handed up to the trial court during the hearing, and the trial court's order changing venue were filed at 9:40 am on the same day as the hearing, Friday, 14 August 2015 with the Durham County Clerk of Superior Court. Plaintiff filed notice of appeal from the order in Durham County on 28 August 2015 and an alternative notice of appeal from the order in Lee County on 31 August 2015, since the case had been transferred to Lee County. Defendants were served with the notices of appeal by filing with the clerk of court, in accord with Rule 26(c) of the Rules of Appellate Procedure. Neither has appeared in this appeal.

Discussion

A. Interlocutory appeal

[1] Because the order on appeal does not finally resolve the case, it is interlocutory. *See Pay Tel Commc'ns, Inc. v. Caldwell Cnty.*, 203 N.C. App. 692, 694, 692 S.E.2d 885, 887 (2010) ("[T]he trial court's order

granting defendants' motion to change venue is an interlocutory order, and thus, not generally subject to appellate review."). Plaintiff argues that the order changing venue affects her substantial rights and thus she has a right to immediate appeal. Plaintiff notes that the trial court relied upon N.C. Gen. Stat. § 50-13.5(f) (2015) as authority for the change of venue. This statute provides in pertinent part:

> (f) Venue. -- An action or proceeding in the courts of this State for custody and support of a minor child *may* be maintained in the county where the child resides or *is physically present* or in a county where a parent resides, except as hereinafter provided.[3]

N.C. Gen. Stat. § 50-13.5(f) (emphasis added).

Thus, plaintiff argues that she had a statutory right to file the lawsuit in Durham County, since she claims that the children were "physically present" in Durham County, even if she and the children reside in Lee County. In addition, she argues that even if Durham County was an improper venue based upon residence of the parties, venue is not jurisdictional and may be waived. Our case law agrees. *See, e.g.*, *Bass v. Bass*, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979) ("Venue may be waived by any party. Plaintiff voluntarily appeared and participated in the 27 June 1977 hearing on child support. He did not object to the venue or move for change of venue." (Citation omitted)).

Our Supreme Court has noted that

> Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable.

Gardner v. Gardner, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (internal citations omitted). Unfortunately, we have only the appellant's brief in this case, since neither defendant has appeared. Furthermore, since the trial court's action was *sua sponte*, we also have no argument or legal authority, other than that cited in the order itself, addressing the rationale behind the trial court's ruling. Based upon the cases discussed in detail below, however, plaintiff had a statutory right for the action to remain in Durham County, unless and until a defendant should

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3. The remainder of the subsection addresses cases in which there are also claims for annulment, divorce, or alimony, none of which are applicable here.

file a motion for change of venue to a proper county. *See, e.g.*, *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) ("[S]ince venue is not jurisdictional it may be waived by express or implied consent[.]"). Accordingly, plaintiff's interlocutory appeal is properly before this court.

1. Standard of Review

[2] Plaintiff argues that our review should be *de novo* since the trial court's order was expressly based upon N.C. Gen. Stat. § 50-13.5(f). Plaintiff is correct that the order cites N.C. Gen. Stat. § 50-13.5(f) as the venue statute for custody matters, but based upon the conclusions of law, we believe that the trial court ultimately relied instead upon N.C. Gen. Stat. § 1-83 (2015) as to the change of venue.[4] We have been unable to find any case addressing the standard of review for a trial court's *sua sponte* change of venue in this type of factual situation, so we will look to the usual standards of review for questions regarding venue.

Our review of an issue of venue involves two steps, and each step has a different standard of review. The first step is determining the proper venue for a case, which is based upon the substantive statute for the particular type of claim. This determination of proper venue under the substantive statute presents a question of law which is reviewed *de novo*. The second step is determining whether a change of venue is appropriate under the procedural statute regarding changes of venue, which in this instance appears to be N.C. Gen. Stat. § 1-83. If a case has been filed in an improper venue under the substantive statute and a defendant has filed a timely objection to venue "before the time of answering expires," N.C. Gen. Stat. § 1-83, then the trial court must change the venue and has no discretion to deny removal.

" 'The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court *may* change the place of trial when the county designated is not the proper one has been interpreted to mean *must* change.' " *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014) (emphasis added) (quotation marks omitted) (quoting *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279), *aff'd per curiam*, 368 N.C. 33, 769 S.E.2d 837 (2015). If, however, the case has been filed in a substantively proper venue and a defendant moves to change venue after filing an answer, the trial court

4. The order does not refer to N.C. Gen. Stat. § 1-83 specifically, but most of the language in the conclusion of law is based upon this statute, and we cannot determine any other potential statutory basis for change of venue.

may in its discretion change venue, so we review that ruling for abuse of discretion. *See N. Carolina Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 562, 752 S.E.2d 775, 778, *disc. review improvidently allowed per curiam*, 367 N.C. 642, 766 S.E.2d 282 (2014). There is no "bright line" test for abuse of discretion as to venue, and our review is based upon all of the facts and circumstances.

> The trial court is given broad discretion when ruling on a motion to change venue for the convenience of witnesses: The trial court may change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. However, the court's refusal to do so will not be disturbed absent a showing that the court abused its discretion. The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of N.C. Gen. Stat. § 1-83 unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue, or that failure to grant the change of venue will deny the movant a fair trial. In resolving this issue here, we do not set forth a "bright line" rule or test for determination of whether a trial court has abused its discretion in denying a motion to change venue. Rather, the determination of whether a trial court has abused its discretion is a case-by-case determination based on the totality of facts and circumstances in each case.

Id. (citations, quotation marks, brackets, and ellipses omitted).

The common element in review of changes of venue, whether from an improper venue or proper venue, is that the right to any change of venue is triggered by a timely motion filed by a defendant. The question then normally becomes whether the defendant has waived proper venue, and we review the determination of waiver *de novo*.

> [A]lthough we apply abuse of discretion review to general venue decisions, we apply *de novo* review to waiver arguments. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

LendingTree, LLC v. Anderson, 228 N.C. App. 403, 407-08, 747 S.E.2d 292, 296 (2013) (citations, quotation marks, and brackets omitted).

2. Analysis

The order on appeal is brief, so we will quote its findings of fact, conclusions of law, and decretal in their entirety:

FINDINGS OF FACT

1. That neither party is a resident or citizen of Durham County, North Carolina.

2. That N.C.G.S. § 50-13.5(f) states that "An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides."

3. Although a court may hear actions in counties in which neither party resides, a change of venue is within the discretion of the presiding judge.

4. That in the above listed case, Durham County is an inconvenient forum for the courts and neither party, nor the minor child resides in Durham County, North Carolina.

CONCLUSIONS OF LAW

1. That . . . because of the convenience of witnesses, the convenience of the court, significant ties of minor child and Plaintiff to the County in which they reside, and the interests of justice Durham County is not the appropriate forum.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That venue shall be changed to Lee County, North Carolina and all files shall be transferred for continuing issues regarding child custody and Petitions for Special Immigration Status.

The order appears to be on a form, as it is typed, except for the handwritten additions of information specific to this case: the parties' names, the file number, the date of hearing, and the county to which the case is being removed.[5]

5. The county to which the case is to be removed is the only blank in the body of the order, underlined above.

Although the order has a section entitled "Findings of Fact," it only contains one true factual finding: "That neither party is a resident or citizen of Durham County, North Carolina." The rest of the "findings" are either legal conclusions or general statements of law. Moreover, plaintiff does not challenge the trial court's findings of fact on appeal, and plaintiff has never disputed that she lives in Lee County. In any event, the trial court did not hear any evidence upon which it could make findings of fact. Plaintiff does challenge the trial court's legal conclusions on appeal, both those contained within the "Findings of Fact" and the one conclusion of law titled as such.

First, the trial court skipped the first requisite inquiry into whether venue was proper under N.C. Gen. Stat. § 50-13.5(f) in the county where plaintiff filed the action. The order contains no findings of fact upon which a determination of proper or improper venue could be made. Yet to the extent that the trial court's conclusion of law is based upon N.C. Gen. Stat. § 50-13.5(f), it does seem to overlook one distinction: the statute does not address where the *parties* reside. Venue is based upon residence of the *parents* or a child or where a child is "physically present." Plaintiff is the children's grandmother, not their parent. N.C. Gen. Stat. § 50-13.5(f) places proper venue in custody actions in "the county where the child resides or is physically present or in a county where a parent resides[.]"

As is apparent from the complaint, the service by publication, and the lack of response from either defendant, no one knows where the parents reside. The complaint does show that the children reside with plaintiff, but the record also indicates that the children were "physically present" in Durham County for the hearing, as noted in plaintiff's memorandum regarding child custody venue. In any event, the order made no factual findings about the children's residence or physical presence. Nevertheless, it would appear that even under N.C. Gen. Stat. § 50-13.5(f), either Lee County, where the complaint alleges that the children reside, or Durham County, where they were "physically present," could have proper venue. And basing venue on the physical presence of the children would seem entirely appropriate, particularly where a grandparent is seeking to protect grandchildren whose parents have disappeared. In fact, the order does not really conclude that venue in Durham County is "improper" under N.C. Gen. Stat. § 50-13.5(f) but only that it is "inappropriate" based upon various factors.

Yet even if we assume that Durham County was not a proper venue under N.C. Gen. Stat. § 50-13.5(f), the trial court may not change venue, even if the action was filed in an improper venue, "unless the defendant,

before the time of answering expires, demands in writing that the trial be conducted in the proper county[.]" N.C. Gen. Stat. § 1-83. In this case, "time of answering" expired in July 2015, and the defendants filed no answer. The trial court made one legal conclusion:

> 1. That . . . because of the convenience of witnesses, the convenience of the court, significant ties of minor child and Plaintiff to the County in which they reside, and the interests of justice Durham County is not the appropriate forum.

Although the order does not cite to N.C. Gen. Stat. § 1-83, the language of the conclusion of law seems to be based upon it, at least to the extent that the order concludes that venue should be changed based upon "the convenience of witnesses" and "interests of justice." There is no legal conclusion regarding proper or improper venue.

If Durham County was a proper venue for this case, the trial court may have discretion to move the matter, as laid out in N.C. Gen. Stat. § 1-83. N.C. Gen. Stat. § 1-83(2) provides that venue may be changed "When the convenience of witnesses and the ends of justice would be promoted by the change." Under N.C. Gen. Stat. § 1-83, however, a defendant must first file an answer and also move for change of venue before the trial court has discretion to order removal. This Court has previously addressed a situation in which a trial court changed venue under N.C. Gen. Stat. § 1-83(2) where a defendant had not yet answered, and based upon Supreme Court precedent, held that the trial court abused its discretion in changing venue prior to the defendant's answer.

> Pursuant to N.C. Gen. Stat. § 1-83(2), the court may change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion. Moreover, motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), must be filed after the answer is filed. Defendant's motion, based upon the "convenience of the witnesses and the ends of justice," was filed prior to an answer and it was therefore prematurely filed. As the trial court abused its discretion to the extent that it prematurely made a discretionary ruling to remove the case to Haywood County, we believe that this Court must reverse and remand to the trial court for further proceedings.

ITS Leasing, Inc. v. RAM DOG Enterprises, LLC, 206 N.C. App. 572, 576, 696 S.E.2d 880, 883 (2010) (citations, quotation marks, brackets, ellipses, and emphasis omitted).

Since the trial court's authority to change venue is triggered by a defendant's objection to venue whether the filing venue was proper or improper, we cannot find any authority for a *sua sponte* change of venue in this situation. Whether we review this order for abuse of discretion or *de novo*, we must reverse the order changing venue. Neither defendant has filed an answer or objected to venue. Even assuming that Durham County was an improper venue under N.C. Gen. Stat. § 50-13.5(f), unless a defendant has filed an objection in writing to venue, the issue has been waived. Here, since defendants never appeared or filed an answer, they made no objection to venue and thus it is clear that they waived it.

We have searched to find any inherent power for a trial court to change venue s*ua sponte* but have not found any legal authority which can support the trial court's order. "Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction*. Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Matter of Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citations omitted). We cannot discern any reason that a change of venue in this case would be "necessary to the orderly and efficient exercise of [the trial court's] jurisdiction." *Id.*

We have been able to find only two cases addressing a trial court's power to change venue *ex mero motu*, at least in dicta, under a related statute, N.C. Gen. Stat. § 1-84, in cases in which a party is unable to have a "fair and impartial trial" in the county where the action was filed. Both cases noted that the trial court does have discretionary as well as statutory authority to change venue. *See Everett v. Town of Robersonville*, 8 N.C. App. 219, 224, 174 S.E.2d 116, 119 (1970) ("In addition, however, to the express statutory authority granted in G.S. 1-84, the judge of superior court has the inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending."); *English v. Brigman*, 227 N.C. 260, 260, 41 S.E.2d 732, 732 (1947) (holding superior court judge "had the inherent power *ex mero motu* to order a change of venue" after concluding a fair and impartial trial could not be held in original county). But the trial court did not conclude that plaintiff (or defendants) could not have a "fair and impartial"

trial in Durham County, and nothing in our record suggests any reason to believe this.

Since the legal basis for the order is unclear, we will also address the other factors the trial court cited as supporting a change of venue under N.C. Gen. Stat. § 1-83, "convenience of the court," "convenience of witnesses," and "the interests of justice." We cannot discern how plaintiff and the children, who were present and ready to proceed, could possibly find removal to Lee County "convenient." In fact, plaintiff's counsel expressed that removal to Lee County would not be convenient for plaintiff. The record does not indicate any other potential witnesses who may be in Lee County. But the phrase "convenience of witnesses" is at least a recognized factor under N.C. Gen. Stat. § 1-83 and may apply based upon the facts of a particular case and where proper objection or motion is made. Yet we cannot find any authority for a transfer of venue based upon "convenience of the court." We cannot even determine what this phrase means and we decline plaintiff's invitation to speculate.

Nor can we determine how the "interests of justice" are furthered by the change of venue. The most obvious "interest of justice" in this case is the welfare of the minor children. Plaintiff is a grandmother seeking custody of her grandchildren who were, as alleged by her complaint, abused, neglected, and abandoned by their parents. She requested legal authority to address their medical and educational needs, and in fact had already been granted temporary custody based upon the "risk of irreparable harm if an emergency custody order is not issued to allow their legal, educational, and medical needs to be met." Our legislature and courts have many times recognized the importance of the court's role in protecting children:

> The legislature has spoken to the issue of child custody in three separate chapters, Chapter 50 (addressing primarily divorce and separation proceedings), Chapter 7A of the Juvenile Code, (focusing on juvenile delinquency, neglect and abuse), and Chapter 50A, (the Uniform Child Custody Jurisdiction Act). A constant theme sounded throughout each of these chapters is the overriding importance of protecting the welfare of children.

Sharp v. Sharp, 124 N.C. App. 357, 362, 477 S.E.2d 258, 261 (1996) (citations omitted).

The order changing venue has served only to delay a final resolution of custody of the children, and our Supreme Court has often recognized the need to avoid delay in cases involving children:

> The importance of timely resolution of cases involving the welfare of children cannot be overstated. A child's perception of time differs from that of an adult. As one commentator observed, "The legal system views [child welfare] cases as numbers on a docket. However, to a child, waiting for a resolution seems like forever -- an eternity with no real family and no sense of belonging."
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> This Court has recognized that justice delayed in custody cases is too often justice denied. Notably, our Rules of Appellate Procedure provide for expedited appeals in cases involving termination of parental rights and issues of juvenile abuse, neglect, and dependency. Thus, in almost all cases, delay is directly contrary to the best interests of children, which is the "polar star" of the North Carolina Juvenile Code.

In re T.H.T., 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008) (citations omitted.)

Javier and Maria are not "numbers on a docket;" they are children who need protection. The trial court's concern "to move my calendar" was misplaced in this instance, and it had no legal authority to change venue *sua sponte* under N.C. Gen. Stat. § 1-83 where no defendant had answered or objected to venue. The only party actively participating in the proceedings was present and ready to proceed in Durham County. All in all, we can find no inherent authority for the trial court to change venue *sua sponte*. The plaintiff has the right to select a forum initially for filing, and although circumstances may later change in such a way that venue could be changed for various reasons, there was no such change here. Accordingly, we reverse the trial court's order changing venue to Lee County and remand for further proceedings in Durham County consistent with this opinion.

Conclusion

The trial court had no authority to enter an order *sua sponte* changing venue where no defendant had answered or objected to venue. We vacate the order and remand this matter to the trial court for further proceedings in Durham County consistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE and Judge ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 AUGUST 2016)

BERENS v. BERENS No. 15-1136	Mecklenburg (13CVD11484)	Affirmed
BOLING v. GREER No. 15-681	Iredell (14CVS1176)	Affirmed
BULLOCK v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 15-1391	Granville (15CVS238)	Affirmed
DUTCH v. LAUREL HEALTH CARE HOLDINGS, INC. No. 15-1045	N.C. Industrial Commission (Y18976)	Affirmed
EBRON v. AM. RED CROSS No. 15-1166	N.C. Industrial Commission (X29498)	Affirmed
IN RE A.H. No. 16-187	Robeson (13JT333) (13JT334)	Affirmed
IN RE APPEAL OF OLD N. STATE ACQUISITION LLC No. 15-769	Property Tax Commission (12PTC1362)	Reversed and Remanded
IN RE ESTATE OF SANDERS No. 15-1244	Johnston (12E332)	Affirmed in part; Dismissed in part
IN RE S.M.W. No. 16-138	Orange (15JT10)	Affirmed
IN RE T.D.A. No. 16-95	Cabarrus (14JT14-16)	Dismissed in Part and Affirmed in Part
IN RE T.R. No. 16-154	Orange (14JT47-50)	Affirmed in part; Remanded in part.
LENNON v. STATE OF N.C. No. 15-1341	Pitt (14CVS2142)	Reversed and Remanded
OWEN v. HOGSED No. 15-1321	N.C. Industrial Commission (PH-2616) (W85154)	Affirmed

STATE v. ASHFORD No. 15-1245	Wayne (13CRS53715)	Affirmed and Remanded for correction of Clerical Error
STATE v. BLACK No. 15-1387	Cabarrus (14CRS54134) (15CRS392)	No Error
STATE v. BLOUNT No. 15-1330	Mecklenburg (12CRS246618) (12CRS49083)	No Error
STATE v. DAVIS No. 15-1268	Hertford (13CRS52049-50) (14CRS431) (15CRS489)	No Error
STATE v. HILL No. 16-133	Buncombe (06CRS11483-84) (06CRS60021) (06CRS60038-39)	Affirmed
STATE v. JONES No. 15-935	Pitt (14CRS52758)	No Error
STATE v. MAYNOR No. 15-1159	Union (13CRS54353) (14CRS1911)	Affirmed
STATE v. MITCHELL No. 16-110	McDowell (15CRS50504-07)	Affirmed
STATE v. MOORE No. 16-136	Buncombe (13CRS59400) (13CRS59404) (13CRS59502) (13CRS61789) (13CRS62966) (13CRS703674)	Affirmed
STATE v. MUNJAL No. 15-1203	Buncombe (13CRS62573)	Affirmed in part; remanded in part
STATE v. PACE No. 15-1338	Forsyth (13CRS1562)	Affirmed in part; dismissed without prejudice in part
STATE v. PLESS No. 16-81	Rowan (15CRS50279)	No Error

STATE v. PRIDGEN No. 16-75	Forsyth (12CRS51379) (13CRS153)	No Error
STATE v. SEEGARS No. 16-150	Union (14CRS2732-33) (14CRS54753-55)	Affirmed
TD BANK, N.A. v. EAGLES CREST AT SHARP TOP, LLC No. 15-807	Yancey (13CVS73)	Dismissed in part and Affirmed in part

AZIGE v. HOLY TRINITY ETHIOPIAN ORTHODOX TEWAHDO CHURCH

[249 N.C. App. 236 (2016)]

ANIMAW AZIGE, TEWODROS ABEBE, MESERET TEFERA, ZENASH ABEY, TADESE GEBREGIORGIS, DAWIT GETAHUN, EDOM A. GERU, AZEMERAWU GETANEH, TSIGE KIBRET, TEWODROSE G. TIRFE, HAILU AFRO, MEQUANINT TSEGAW, ZEBENE MESELE, MEAZA JEMBERE, NIGATU KASSA, ALMAZ MEKONEN, ASTER MLES, ADDISU FENTAHUM AYALWE, ASKALE YESHANEW, AND HAIMONOT GEDAMU, PLAINTIFFS

v.

HOLY TRINITY ETHIOPIAN ORTHODOX TEWAHDO CHURCH, SOLOMON GUGSA, LULESEGED DERIBE, TESFA GASHAREBA, SAMUEL AGONAFER, SAMSON KASSAYE, GEDEWON KASSA, YOHANNES ASSEFA, TASSEW KASSAHUN, AND EYOEL MULUGETA, DEFENDANTS

No. COA15-760

Filed 6 September 2016

Churches and Religion—complaint regarding church—bylaws

Where plaintiffs alleged in their amended complaint that they were members of a church and requested a declaratory judgment that numerous violations of the church's bylaws had occurred, the trial court lacked subject matter jurisdiction because plaintiffs' claims raised questions that went far beyond the consideration of neutral principles of law and would require the courts to interpret or weigh church doctrine, in violation of the First Amendment.

Appeal by defendants from order entered 5 January 2015 by Judge Robert C. Ervin Superior Court, Mecklenburg County. Heard in the Court of Appeals on 17 December 2015.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson and John T. Holden, for plaintiff-appellees.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Matthew F. Tilley, for defendant-appellant Tassew Kassahun.

Essex Richards, P.A., by N. Renee Hughes, and the Lewis Firm, PLLC, by Earl N. "Trey" Mayfield, III pro hac vice, for defendant-appellants.

STROUD, Judge.

Defendants appeal from the trial court's order denying their motion to dismiss for lack of subject matter jurisdiction. On appeal, defendants argue that the trial court lacks subject matter jurisdiction over plaintiffs' claims because exercising jurisdiction would require the court to

address ecclesiastical matters in contravention of the First Amendment of the United States Constitutions and Article 1, Section 13 of the North Carolina Constitution. After review, we reverse the trial court's order because judicial involvement would impermissibly entangle the judicial system in ecclesiastical matters. We remand the case to the trial court with instructions for the court to enter an order granting defendants' motion to dismiss for lack of subject matter jurisdiction.

I. Background

The Holy Trinity Ethiopian Orthodox Tewahdo Church ("Holy Trinity") was founded in Charlotte, North Carolina in 1999. Holy Trinity is a non-profit organization and is governed by a parish council which is responsible for the day-to-day operation of church affairs. In 2007, Holy Trinity amended its constitution and bylaws. The amended bylaws provided:

> 10.6 The term of the members of the Parish Council will be two years. However, in order to ensure continuity and momentum in leadership, for the first Parish Council elected after the adoption of these by-laws only, the five members of the Executive Committee, as elected by the full Parish Council will serve for three years. Following this "bridge" term; all other successive terms will be limited to two years.
>
> 10.7 A Registered Member is eligible to serve two consecutive terms. In order to be eligible to serve again, a full term (two years) must elapse.

Thereafter various disputes arose in Holy Trinity, including disagreements about the termination of a priest, and at a meeting held in March of 2014 it was determined that "the current parish council were granted at least a one year and six months extension" to address "the turmoil situations [(sic)] created by few individuals who support the terminated priest."

In November of 2014, plaintiffs filed an amended complaint against Holy Trinity and defendants, the parish council members. Plaintiffs alleged that they are all registered members of Holy Trinity and requested a declaratory judgment that numerous violations of the bylaws had occurred including: "the 2012 election[,]" improperly extended terms of certain parish council members, the process of adopting "the purported March 16, 2014 amendment[,]" and improperly transferred real property. Furthermore, defendants had excluded plaintiffs as registered members of the church, though again, plaintiffs claim they are registered members of the church. On 1 December 2014, defendants filed a motion to

dismiss for lack of subject matter jurisdiction. On 5 January 2015, the trial court denied defendants' motion. Defendants appeal.

II. Interlocutory Appeal

Defendants concede that this appeal is interlocutory; however, defendants argue that it "affects their substantial First Amendment rights and will cause injury if not corrected prior to final judgment." Our Supreme Court has recognized that

> [t]he United States Supreme Court has found First Amendment rights to be substantial, and has held the First Amendment prevents courts from becoming entangled in internal church governance concerning ecclesiastical matters. When First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders. Accordingly, we reaffirm our stance that First Amendment rights are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters.
>
> . . . .
>
> . . . The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

Harris v. Matthews, 361 N.C. 265, 269-70, 643 S.E.2d 566, 569 (2007) (citations and quotation marks omitted). Therefore, we will consider defendants' appeal.

III. Motion to Dismiss

Defendants argue that the trial court's exercise of jurisdiction in this case will impermissibly entangle the court in ecclesiastical matters in contravention of the First Amendment of the United States Constitution and Article 1, Section 13 of the North Carolina Constitution. "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo[.]" *Id.* at 271, 643 S.E.2d at 569.

> The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. However, not every dispute involving church property implicates ecclesiastical matters. Thus, while circumscribing a court's authority to resolve

> internal church disputes, the First Amendment does not provide religious organizations absolute immunity from civil liability.
>
> As such, our Courts may resolve disputes through neutral principles of law, developed for use in all property disputes. *The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.*

Davis v. Williams, ___ N.C. App. ___, ___, 774 S.E.2d 889, 892 (2015) (emphasis added) (citation and quotation marks omitted); *see also Harris v. Matthews*, 361 N.C. 265, 271–72, 643 S.E.2d 566, 570 (2007) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. Civil court intervention into church property disputes is proper only when relationships involving church property have been structured so as not to require the civil courts to resolve ecclesiastical questions. When a congregational church's internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further and must instead defer to the decisions by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government." (citations, quotation marks, and brackets omitted)).

Plaintiffs contend that "[t]he only issue before this Court is whether the trial court has subject matter jurisdiction to decide whether the Church followed its own bylaws." Although plaintiffs seek to present this dispute as a simple procedural disagreement over the adoption of bylaws in accord with proper procedure, the substance of the complaint belies this claim. The amended complaint alleges that each plaintiff is "a registered member" of the church; defendants dispute their membership. Although defendants moved for dismissal without filing an answer, an affidavit filed by defendants alleges that "Plaintiffs have failed to comply with the requirements for Church membership." Although plaintiffs raise other claims regarding the governance of the church, even they implicitly concede their standing to challenge the defendants' actions depends upon their status as registered members.[1]

While we realize plaintiffs' amended complaint supersedes the original complaint, *see Hyder v. Dergance*, 76 N.C. App. 317, 319, 332 S.E.2d

1. Though standing was not the basis of the motion to dismiss, plaintiffs spend approximately two pages of their thirteen page brief to address that "as registered members, appellants [(sic)] have standing to maintain their suit." (Original in all caps.)

713, 714 (1985) (noting the "general principle that an amended complaint has the effect of superseding the original complaint."), the background of this case in the record before us is still relevant to this jurisdictional inquiry, and in plaintiffs' original complaint they requested "a declaratory judgment pursuant to N.C. Gen. Stat. § 1- 253, *et. seq.* stating that they are all registered members of the Church, can participate in worship at the church, and that the purported attempt to ban them from the premises violates the Church's bylaws and is void." Plaintiffs' amended complaint omits this request and subsumes the membership issue in the following allegation:

> 33. As registered members of the Church, Plaintiffs[] have a cognizable civic, contract, and property interest in the operation of the Church and whether the Parish Council has acted within the scope of its authority and followed the Church's bylaws.

But even considering only the amended complaint, this case does not appear to be primarily a property dispute or a dispute regarding misappropriation of funds, as many of the cases arising out of church disputes are, *see, e.g.*, *Davis*, ___ N.C. App. at___, 774 S.E.2d at 891 (including allegations of "wrongfully converted church funds for personal use, and embezzled from the church"); *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 508, 714 S.E.2d 806, 809 (2011) (including allegations of "wasted . . . property and . . . transactions prohibited by the Internal Revenue Code"), but instead plaintiffs' allegations are focused upon the actual governance of the church and their right as members to participate fully in the church.[2] Plaintiffs' status as registered members and right as members in good standing to vote are thus central to this action.

Our courts have defined an ecclesiastical matter as:

> one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of

2. Plaintiffs did object to a real property transaction, but this transaction does not seem to be the primary focus of the complaint. The main focus of this complaint is that the proper percentage of the total registered members did not participate in the vote, but again, the correct number depends on the total number of registered members who are qualified to vote. Defendants do not count plaintiffs as registered members.

> membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.
>
> Membership in a church is a core ecclesiastical matter. The power to control church membership is ultimately the power to control the church. It is an area where the courts of this State should not become involved. This stricture applies regardless of whether the church is a congregational church, incorporated or unincorporated, or an hierarchical church.
>
> The prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns. By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs. Moreover, by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks establishing a religion.

Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324, 327–28, 605 S.E.2d 161, 163–64 (2004) (citations and quotation marks omitted).

Plaintiffs rely primarily upon *Johnson* in arguing that this case does not require inquiry into ecclesiastical matters. But the dispute in *Johnson* related to "a number of violations of the North Carolina Nonprofit Corporation Act and intentional infliction of emotional distress[.]" 214 N.C. App. at 508, 714 S.E.2d at 808. As we noted, *Johnson* arose in part, as many church cases do, out of a real property dispute. 214 N.C. App. at 508, 714 S.E.2d at 809. In *Johnson*, this Court specifically noted that in that case "[w]hether Defendants' actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine or practice." *Id.* at 511, 714 S.E.2d at 810. The Court in *Johnson* ultimately determined that it could address "the very narrow" issues in that case based upon *Tubiolo*:

> In *Tubiolo*, we recognized that membership in a church is a core ecclesiastical matter. However, we also recognized that an individual's membership in a church is a form of a property interest. Accordingly, it was proper

> for a court to address the very narrow issue of whether the plaintiffs' membership was terminated in accordance with the church's bylaws—whether bylaws had been adopted by the church, and whether those individuals who signed a letter revoking the plaintiffs' membership had the authority to do so. In the present case, the trial court is therefore not prohibited by the First Amendment from addressing Plaintiffs' first claim.

Johnson, 214 N.C. App. at 512, 714 S.E.2d at 811 (citations, quotation marks, and brackets omitted).

This case is both factually and legally different from *Johnson*. *See id.*, 214 N.C. App. 507, 714 S.E.2d 806. The issues before us would require interpretation of the bylaws which do impose doctrinal requirements. Even if a declaration of plaintiffs' status as registered members is not specifically the issue before us, in order to determine if plaintiffs even have standing to bring the other issues or to determine if the correct number of members voted for the challenged amendments, the trial court would need to address the contested membership status, which is governed by the bylaws:

> **5.1 Membership**
>
> Without limitation to age, any individual member of a household who believes that our Lord Jesus Christ is the Savior and has been baptized into the Orthodox Tewahdo Church will have the right to be registered as a member of Holy Trinity. Any such member who is 18 years old or older *and meets the following criteria will be eligible to exercise an additional right to vote* on Church matters requiring a vote:
>
> 5.1.1 Unless extenuating circumstances dictate, frequently attends Church services and diligently works to promote the mission of HTEOTC;
>
> 5.1.2 Contributes financially to support the services of the Church according to his/her means;
>
> 5.1.3 Complies with these by-laws and related directives[.]

(Emphasis added.)

The bylaws also impose additional requirements upon members, including specific duties which include the following:

> 6.2.1 Unless extenuating circumstances dictate, Registered Members are expected to fulfill the financial obligation they agreed to.
>
> 6.2.2 Although all functions and roles within the Church are voluntary in nature, members are expected to show their support and participation and support of Church activities when requested.
>
> 6.2.3 Each member will have the duty to accept these by-laws of the Church and to be bound by all provision contained herein.
>
> 6.2.4 When on Church property, each member is strictly prohibited from initiating on [(sic)] taking part in any disruptive or divisive action or language that adversely affects the unity and cohesion of the Church's community.
>
> 6.2.5 Although Registered Members have the right to offer their perspective and participate in discussions during general member meetings, they are required to control their language and mannerisms to ensure that it they are respectful and considerate of the other members present. Accordingly, all listening members should respect any perspective offered by a member and treat them with respect and free from any pressure or intimidation. Member discussions will not be counter to the by-laws of the Church.

Even assuming for purposes of argument that plaintiffs are registered members, Article 5.1 imposes additional requirements even for registered members to have the right to vote "on Church matters requiring a vote" and these requirements raise ecclesiastical questions. Plaintiff requested a declaratory judgment determining that "the Parish Council did not comply with Article 17 of the Church's bylaws." Article 17, regarding elections, requires those who "participate in electing or to be elected" to "meet the eligibility criteria for Registered Member[s,]" which again requires consideration of various requirements of the bylaws, including whether the individual "diligently works to promote the mission of HTEOTC[.]" Plaintiffs also request the trial court to determine that defendants had not complied with Article 18 regarding meetings and Article 20 regarding amendments; again, both these articles include

sections limiting participation to registered members. Plaintiffs also request the trial court to find violations of Article 7 regarding termination of membership and Article 19 regarding a transfer of property. Article 7 addresses whether a Registered Member has "engage[d] in misconduct or immoral behavior" and Article 19 allows for the transfer of property if it "provide[s] service to the growing membership and its needs." The courts cannot determine the "immoral behavior" of plaintiffs for purposes of the bylaws nor can the courts evaluate whether a particular transaction serves the needs of the membership of this church without involvement in ecclesiastical matters. In summary, plaintiffs' claims cannot be adjudicated in the judicial system as they raise questions which go far beyond the consideration of "neutral principles of law" and would "require[] the court to interpret or weigh church doctrine" in contravention of the First Amendment. *Davis*, ___ N.C. App. at___, 774 S.E.2d at 892 (2015).

IV. Conclusion

For the foregoing reasons, we reverse the trial court's denial of defendants' motion to dismiss.

REVERSED.

Judges DIETZ and TYSON concur.

CHRISTOPHER v. COBBLESTONE HOMEOWNERS ASS'N OF CLAYTON, INC.

[249 N.C. App. 245 (2016)]

DENNIS DRAUGHON AND MEGAN DRAUGHON, PLAINTIFFS
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1280

FILED 6 SEPTEMBER 2016

ROBERT SAIN AND JENNIFER SAIN, PLAINTIFFS
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1302

FILED 6 SEPTEMBER 2016

VINCENT FRANKS, JR., PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1303

FILED 6 SEPTEMBER 2016

FRANK CHRISTOPHER, PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1282

FILED 6 SEPTEMBER 2016

Appeal by Defendant from orders entered 13 May and 4 June 2015 and judgment entered 26 May 2015 by Judge O. Henry Willis, Jr. in District Court, Johnston County. Heard in the Court of Appeals 23 May 2016.

Spence & Spence, P.A., by Robert A. Spence, Jr., for Plaintiff-Appellee Frank Christopher.

No briefs filed for other Plaintiffs-Appellees.

Jordan Price Wall Gray Jones & Carlton, by J. Matthew Waters and Hope Derby Carmichael, for Defendant-Appellant.

McGEE, Chief Judge.

These cases are companion cases to *Sanchez v. Cobblestone*, COA15-1281, filed contemporaneously with these opinions. *Sanchez* includes the facts and analysis relevant to resolution of the cases consolidated in this opinion: COA15-1280, COA15-1282, COA15-1302, and COA15-1303. For the reasons stated in the majority opinion in *Sanchez*, we affirm.

AFFIRMED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

These are companion cases to *Sanchez v. Cobblestone*, COA15-1281. For the reasons fully stated in my dissenting opinion in *Sanchez*, I respectfully dissent.

EMERALD PORTFOLIO, LLC, PLAINTIFF
v.
OUTER BANKS/KINNAKEET ASSOCIATES, LLC, RAY HOLLOWELL INDIVIDUALLY, AND DONNA HOLLOWELL INDIVIDUALLY, DEFENDANTS

No. COA16-31

Filed 6 September 2016

1. Negotiable Instruments—lost note—transfer—right to enforce

The trial court erred by granting summary judgment for Emerald Portfolio, LLC, against Outer Banks/Kinnakeet Associates in an action to enforce a lost note. Where a party who would otherwise have a right to enforce a lost note under N.C.G.S. § 25-3-309 subsequently assigns that note, the assignee does not acquire the right to enforce the note unless the assignee is in actual possession of the note.

2. Guaranty—contractual promise—defenses other than payment waived

The trial court did not err by granting summary judgment in favor of Emerald Portfolio, LLC against Ray Hollowell, a guarantor

of a note, where the note was lost and unenforceable. The execution of the guaranty was a contractual promise, the explicit terms of which waived defenses other than full payment.

Appeal by defendants Outer Banks/Kinnakeet Associates, LLC and Ray Hollowell from orders entered 27 August 2015 by Judge Cy A. Grant in Dare County Superior Court. Heard in the Court of Appeals 26 May 2016.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Robert A. Mays, for plaintiff-appellee.

Phillip H. Hayes for defendants-appellants Outer Banks/Kinnakeet Associates, LLC and Ray Hollowell.

ZACHARY, Judge.

Where the assignee of a note lacked possession of the note and did not satisfy the statutory provisions for enforcement of a lost note, the trial court erred in granting summary judgment in favor of the assignee. Where there was no genuine issue of material fact as to obligor's contractual debt pursuant to the guaranty agreement, and the agreement was not unconscionable, the trial court did not err in granting summary judgment in favor of the assignee-obligee of the guaranty agreement.

I. Factual and Procedural Background

On 30 August 2006, Outer Banks/Kinnakeet Associates, LLC, (OBKA) executed a promissory note in favor of First South Bank (FSB) in the amount of $3,025,500. Ray Hollowell, in his capacity as OBKA's manager, signed the note on behalf of OBKA. On that same day, Ray Hollowell and his spouse, Donna Hollowell (collectively, the Hollowells) each signed separate, but identical, commercial guaranties imposing personal liability on them under contract for OBKA's payment of the note. On 24 December 2008, 23 January 2009, and 18 March 2010, FSB and OBKA entered into agreements modifying the terms of the original note.

In February of 2013, FSB sold the loan to Emerald Portfolio, LLC (Emerald). On 23 June 2014, Emerald, as assignee of FSB, filed a complaint against OBKA and the Hollowells alleging a default pursuant to the terms of the note, as modified, along with the guaranties, and seeking to recover the unpaid balance on the note. Included in an attachment to the complaint was an affidavit, signed by FSB's senior vice president, alleging that FSB was the lawful owner and payee of the note, that the note

could not be located, and that the note had been endorsed to Emerald as of 21 February 2013. This attachment also contained a copy of the note.

On 5 August 2014, the Hollowells filed an answer and counterclaim, raising the defenses of credit and offset and unconscionability, and counterclaiming for unfair and deceptive trade practices. The answer admitted the existence of the note and guaranties. On 11 August 2014, Emerald filed an answer to the Hollowells' counterclaim, together with a motion to dismiss. On 15 September 2014, Emerald also filed a motion for summary judgment or judgment on the pleadings with respect to the Hollowells.

On 18 September 2014, Emerald filed a motion for entry of default against OBKA, alleging that it had failed to answer. Default was entered by the Clerk of Court of Dare County that same day. Also that same day, the Clerk of Court entered default judgment against OBKA. On 3 October 2014, OBKA moved to set aside entry of default and default judgment. This motion was granted in open court on 6 October 2014, and rendered in writing on 27 July 2015.

On 2 October 2014, the Hollowells filed a motion to amend their answer. This motion was granted in open court on 6 October 2014, and rendered in writing on 27 July 2015.

On 3 November 2014, the trial court entered an order on Emerald's motion for summary judgment or judgment on the pleadings and dismissal. The trial court noted that Emerald's motion for summary judgment or judgment on the pleadings was withdrawn without prejudice, and dismissed the Hollowells' counterclaim with prejudice.

On 14 November 2014, OBKA filed its answer, alleging credit and offset, and contending that Emerald was not entitled to enforce the lost note. On 11 May 2015, Emerald moved to strike OBKA's untimely answer and for summary judgment against OBKA and the Hollowells. On 20 July 2015, the Hollowells and OBKA collectively filed a motion for summary judgment.

On 19 August 2015, Emerald filed a motion seeking an order prohibiting the Hollowells and OBKA from participating in any voluntary transfer of the subject property without prior court approval. On 27 August 2015, the trial court granted this motion, ordering that other than payment of ordinary expenses the Hollowells and OBKA were not to participate in any voluntary transfer of the subject property without court approval.

On 3 September 2015, the trial court entered an order granting Emerald's motion for summary judgment as to appellants, and denying the Hollowells' and OBKA's motion for summary judgment. This order also awarded Emerald the monetary relief sought from appellants and certified the order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The order further found that Donna Hollowell was a guarantor on the commercial guaranty, and was jointly and severally liable to Emerald under the note "unless she can prove an affirmative defense under the Equal Credit Opportunity Act" at trial of this matter.

From, *inter alia*, the order granting Emerald's motion for summary judgment, OBKA and Ray Hollowell (appellants) appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Summary Judgment

In their various arguments, appellants contend that the trial court erred in granting summary judgment against appellants in favor of Emerald, and denying summary judgment in favor of appellants. We agree in part and disagree in part.

A. OBKA and the Lost Note

[1] First, appellants maintain that the trial court erred in entering summary judgment in favor of Emerald against OBKA because FSB could not locate the promissory note at the time it was assigned to Emerald.

Our statutes provide an avenue for recovery on a lost instrument. Specifically:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a

> person that cannot be found or is not amenable to service of process.

N.C. Gen. Stat. § 25-3-309(a) (2015). In other words, appellants contend that Emerald was entitled to enforce the note only if (i) Emerald possessed and was able to enforce the note at the time that it was lost, (ii) the loss was not the result of a transfer or lawful seizure, and (iii) the note could not reasonably be obtained due to loss, destruction, or wrongful taking. Because FSB possessed the note and had lost it at the time that it was assigned to Emerald, appellants assert that the first prong of this analysis fails.

In construing this statute, we find it helpful to compare it with the language of the Uniform Commercial Code (UCC), and to contrast where the two diverge. A previous version of UCC § 3-309, in effect when N.C. Gen. Stat. § 25-3-309 was enacted, was identical to the North Carolina statute. However, that UCC provision has since been amended, as follows:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (1) the person seeking to enforce the instrument:
>
> (A) was entitled to enforce the instrument when loss of possession occurred; or
>
> (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

UCC § 3-309 (2002). The language in (a)(1)(B) marks a clear distinction between the two, in that the amended UCC provision allows a party not in possession of an instrument to enforce it if ownership was acquired from someone with a right to enforce the instrument.

There is no question in the instant case that FSB had a right to enforce the note under both the North Carolina statute and the UCC.

FSB was in possession of the instrument when it was lost, the loss was not a result of a transfer or lawful taking, and possession could not thereafter reasonably be obtained. Moreover, under the revised UCC provision, Emerald would be able to enforce the note as well, notwithstanding its lack of possession, due to "directly . . . acquir[ing] ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred[.]" UCC § 3-309(a)(1)(B).

However, Emerald's enforcement rights are not determined by the UCC, but by North Carolina statute. Pursuant to the provisions of N.C. Gen. Stat. § 25-3-309, Emerald is not entitled to enforce the note. *See, e.g.*, *In re Patterson*, 2012 WL 5906865 (Bankr. W.D.N.C. Nov. 26, 2012). This statute is current; it has not been revised since 1995. Our legislature could have revised it to coincide with the UCC revision in 2002, but it did not do so. We must conclude from this distinction that our legislature intended to exclude the additional language of the UCC, and as such intended not to provide this avenue of recovery to parties not in possession of the relevant instrument.

Accordingly, we hold that where a party who would otherwise have a right to enforce a lost note under N.C. Gen. Stat. § 25-3-309 subsequently assigns that note, the assignee does not acquire the right to enforce the note unless the assignee is in actual possession of the note. As the note in the instant case remains missing, we hold that Emerald lacked standing to enforce it against OBKA. The trial court erred as a matter of law in granting summary judgment in favor of Emerald against OBKA.

B. The Hollowells and the Guaranty

[2] Next, appellants contend that the trial court erred in entering summary judgment in favor of Emerald against Ray Hollowell because he could not be held liable as a guarantor if the note itself could not be enforced.

This argument is flawed. "North Carolina . . . recognizes that the obligation of the guarantor and that of the maker [of a note], while often coextensive are, nonetheless, separate and distinct." *EAC Credit Corp. v. Wilson*, 12 N.C. App. 481, 485, 183 S.E.2d 859, 862 (1971), *aff'd*, 281 N.C. 140, 187 S.E.2d 752 (1972). "A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction." *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001). When a note is transferred, no separate transfer of the guaranty is required; however, this does not mean that a guaranty cannot exist in the absence of a note. A guaranty is an obligation in contract, and irrespective of the status

of the note, may be enforced in contract. *See generally First Am. Sav. Bank, F.S.B., v. Adams*, 87 N.C. App. 226, 360 S.E.2d 490 (1987). In *First American*, the defendants were guarantors on a note held by the plaintiff. The note secured the debt of a corporation wholly owned by the defendants. The defendants contended that they were discharged from their obligations as guarantors by reason of the plaintiff's "unjustified impairment of the collateral securing the loan." *Id.* at 231, 360 S.E.2d at 494. We noted, however, that the defendants enjoyed close ties with the debtor corporation, and that even if the collateral were impaired, the guaranty would remain enforceable. *Id.* at 232, 360 S.E.2d at 494-95.

In the instant case, as in *First American*, the Hollowells are closely tied to the debtor corporation OBKA, being its sole members and owners. Although appellants challenge the note itself rather than the impairment of the collateral, both arguments go to the enforceability of the instrument. We therefore find the reasoning in *First American*, that the guaranty may be enforced even if circumstances render the instrument unenforceable, applicable to this case.

Moreover, under the express terms of the guaranty, Ray Hollowell agreed to waive many defenses to enforcement, in pertinent part as follows:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full legal tender, of the indebtedness; (D) any right to claim discharge of the indebtedness on the basis of unjustified impairment of any collateral for the indebtedness; . . . or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness.

Accordingly, the guaranty executed by Ray Hollowell is enforceable.

" 'A guaranty of payment is an absolute and unconditional promise to pay the debt at maturity if not paid by the principal debtor.' " *Epes v. B.E. Waterhouse, LLC*, 221 N.C. App. 422, 425, 728 S.E.2d 390, 393 (2012) (quoting *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 640, 486 S.E.2d 229, 231 (1997)). " 'Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and

summary judgment is appropriate. In contrast, an ambiguity exists in a contract if the language of the contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Id.* (quoting *Carolina Place Joint Venture*, 145 N.C. App. at 699, 551 S.E.2d at 571). Ray Hollowell's execution of the guaranty was a contractual promise to pay outstanding debts if the principal, here OBKA, failed to do so. The explicit terms of said contract, which were clear and unambiguous and must be construed as such, waived any defenses other than full payment of the debt. Accordingly, the unenforceability of the obligation by Emerald against OBKA is no defense for Ray Hollowell as guarantor, and the guaranty may be enforced.

Appellants did not challenge at trial, and do not challenge on appeal, the fact that Ray Hollowell signed a guaranty for the debt secured by the note. This created an obligation in contract in accordance with the terms of the guaranty, enforceable even in the absence of the note. There is no genuine issue of material fact that Ray Hollowell owed the debt pursuant to that contractual obligation. Accordingly, the trial court did not err in granting summary judgment in favor of Emerald against Ray Hollowell.

This argument is without merit.

C. Unconscionability

Lastly, appellants contend that the trial court erred in entering summary judgment in favor of Emerald against Ray Hollowell because the guaranty contained unconscionable provisions.

"Unconscionability is an affirmative defense, and the party asserting it bears the burden of establishing it." *Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992).

> For a court to conclude that a contract is unconscionable, the court must determine that the agreement is both substantively and procedurally unconscionable. The question of unconscionability is determined as of the date the contract was executed. Procedural unconscionability involves bargaining naughtiness in the formation of the contract, such as fraud, coercion, undue influence, misrepresentation, [or] inadequate disclosure. Substantive unconscionability involves an inequality of the bargain that is so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 212-13, 652 S.E.2d 701, 712 (2007) (citations and quotation marks omitted).

With respect to procedural unconscionability, at trial, appellants argued as follows:

> The courts want to see something called procedural unconscionability, something -- the naughtiness in -- some kind of misbehavior in the formation of a contract, as well as substantive unconscionability, that being the unfairness of the provisions at issue.
>
> I don't know that I can argue to you, outside of requiring Ms. Hollowell to sign, that there was any other misconduct in the formation of the contract, but when you have people as a condition of a loan signing a boilerplate contract that says you waive all acts/omissions of any kind at any time with respect to any matter whatsoever, that it's just so broad that the court should deem such a provision unconscionable.

In essence, at trial, appellants conceded that the only possible evidence of procedural unconscionability was FSB's requirement that Donna Hollowell execute the guaranty as well as Ray Hollowell; the remainder of their argument goes to the substantive unconscionability of the terms of the guaranty, not procedural unconscionability.

We are reluctant to hold, as appellants would have us hold, that it is *per se* procedurally unconscionable for a lender to require that both members of an LLC execute a guaranty of the LLC's loan obligation. In the absence of other evidence of procedural unconscionability, we hold that, on appeal and before the trial court, appellants have failed to demonstrate procedural unconscionability.

We acknowledge that there is no bright-line rule as to just how much procedural or substantive unconscionability must be shown. What our law establishes conclusively, however, is that some of each is necessary to demonstrate unconscionability. In the absence of *any* procedural unconscionability, it cannot be said that the guaranty agreement was unconscionable. As such, we hold that the trial court did not err in rejecting the unconscionability defense asserted by Ray Hollowell.

This argument is without merit.

IV. Conclusion

Because Emerald did not acquire the right to enforce the missing note from FSB, the trial court erred in granting summary judgment in favor of Emerald and denying it to OBKA. Because no genuine issue of material fact existed as to Ray Hollowell's contractual obligation for the debt pursuant to the guaranty agreement, and the agreement was not unconscionable, the trial court did not err in granting summary judgment in favor of Emerald and denying it to Ray Hollowell.

REVERSED IN PART, AFFIRMED IN PART.

Judges STEPHENS and McCULLOUGH concur.

HSBC Bank USA, National Association, as successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank National Association, as Indenture Trustee under that certain Indenture dated as of February 1, 2005, as the same may be amended from time to time, for the benefit of the SBA and the holders of the Business Loan Express SBA Loan-Backed Notes, Series 2005-1, as their interests may appear subject to the Multi-Party Agreement dated February 1, 2005 by Business Loan Center, LLC solely in its capacity as Servicer, Plaintiff

v.

PRMC, Incorporated and Zulfiqar M. Khan, Defendants

No. COA16-96

Filed 6 September 2016

1. Appeal and Error—pro se appearance by corporation—not permitted

An appeal by a corporation was dismissed where the corporation had appeared in the trial court pro se through its president and its pro se appeal was not perfected. A corporation cannot appear pro se in North Carolina and must be represented by an attorney licensed to practice in North Carolina, with certain exceptions not applicable here. The individual appeal of the corporate president was allowed to proceed.

2. Continuances—motion denied—multiple delays

The trial court did not abuse its discretion by denying defendant-Khan's motion to continue where the trial court gave ample consideration to both sides and expressed sympathy for defendants'

position, but noted that the pendency of the case was verging on unacceptable.

3. Fiduciaries—breach of duty—harm to corporation—no claim by president as individual

The trial court did not err by granting summary judgment for plaintiff in a case arising from a loan default where defendant-Khan alleged that a fiduciary duty had been created and breached but Khan, as an individual, had no right to appeal the breach of a fiduciary duty that damaged defendant-PRMC, Inc.

Appeal by defendants from order entered 28 May 2015 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 9 June 2016.

Nexsen Pruet, PLLC, by David S. Pokela, Brooks F. Bossong, and Brian R. Anderson, and Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for plaintiff-appellee.

Zulfiqar M. Khan, defendant-appellant pro se.

ZACHARY, Judge.

Where a corporation cannot appear *pro se*, we dismiss the corporation's *pro se* appeal. Where the trial court carefully considered the arguments of both sides, the trial court did not abuse its discretion in denying Khan's motion to continue. Where defendant guarantor did not establish his right to assert claims on behalf of defendant debtor corporation, defendant guarantor could not assert those claims. Where no genuine issue of material fact existed, the trial court did not err in granting plaintiff's motion for summary judgment against defendant guarantor.

I. Factual and Procedural Background

On 2 June 2004, Business Loan Center, LLC (BLC) loaned PRMC, Inc. (PRMC), the amount of $1,950,000.00. Zulfiqar M. Khan (Khan), president and sole shareholder of PRMC, executed an "Unconditional Guarantee" of the amount owed under the note. Khan, in his capacity as president of PRMC, also signed a "Deed of Trust, Assignment of Leases, Rents and Profits, Security Agreement and Fixture Financing Statement," granting BLC a security interest in certain real property, namely a hotel, including all fixtures, and certain personal property, including future personal property to be placed in and connected with the real property. On 20 September 2007, Khan and PRMC

(collectively, defendants), executed with BLC an Allonge to the note, which reduced the monthly payment on the note for four months. The Allonge included the following language:

> WHEREAS, BORROWER AND GUARANTOR EACH, AND ANY COMBINATION AND COLLECTIVELY, HEREBY FULLY AND FOREVER REMISE, RELEASE AND DISCHARGE LENDER, AND THEIR OFFICERS, AGENTS AND EMPLOYEES, OF AND FROM ANY AND ALL CLAIMS AND FROM ANY AND ALL OTHER MANNER OF ACTION AND ACTIONS, CAUSE OR CAUSES OF ACTION, RIGHTS, CLAIMS, COUNTERCLAIMS, DEFENSES, SUITS, SET OFFS, DEBTS, DUES, SUMS OF MONEY, ACCOUNTS, COVENANTS, CONTRACTS, CONTROVERSIES, OBLIGATIONS, LIABILITIES, AGREEMENTS, PROMISES, VARIANCES, TRESPASSES, DAMAGES, JUDGMENTS, LIENS, CLAIMS OF LIEN, LOSSES, COSTS, EXPENSES, JUDGMENT BONDS, EXECUTION AND DEMANDS OF EVERY NATURE AND KIND WHATSOEVER, IN LAW AND IN EQUITY, EITHER NOW ACCRUED OR HEREAFTER MATURING, WHICH ANY OF THEM HAD, MAY HAVE HAD, OR NOW HAVE, OR CAN, SHALL OR MAY HAVE, FOR OR BY REASON OF ANY MATTER, CAUSE OR THING WHATSOEVER, TO AND INCLUDING THE DATE HEREOF, ARISING OUT OF OR CONNECTED IN ANY WAY WITH THE INSTRUMENTS REFERENCED IN THE RECITALS, LENDER'S, AND/OR THEIR AGENTS', CONDUCT AND ACTIONS WITH RESPECT THERETO AND LENDER'S GENERAL BUSINESS RELATIONSHIP WITH ANY OF THEM, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE, OF LENDER; PROVIDED, HOWEVER, LENDER IS NOT RELEASED FROM ITS OBLIGATIONS UNDER THIS AGREEMENT.

On 10 July 2008, defendants and BLC executed a Deferral Agreement in which BLC granted PRMC's request for a two month deferral on payments. This agreement contained another release of claims, counterclaims and defenses, in bold print.

On 30 September 2008, BLC filed for bankruptcy. On 2 September 2010, BLC filed its plan of reorganization, which was confirmed on 12 November 2010 and became effective on 29 November 2010. BLC

served defendants with notice of the case and important bankruptcy proceedings, but neither PRMC nor Khan filed a proof of claim.

Thereafter, PRMC defaulted on the note. BLC instituted foreclosure proceedings under the note, and in order to prevent foreclosure, defendants executed a Forbearance Agreement with BLC on 1 October 2009. In the Forbearance Agreement, there was another release of claims, with similar language and in similarly bold typeface.

On 1 November 2010, PRMC filed for bankruptcy. In its Schedule A filing, PRMC declared the amount of secured interest in its real property to be $2,050,293.81. On the Schedule B filing of personal property, PRMC listed no present or future legal claims as assets. On 21 April 2011, BLC's successor in interest, HSBC Bank USA (HSBC), filed a motion for relief from the automatic stay, noting that the property was worth less than the debt. On 3 June 2011, the bankruptcy court entered a consent order modifying the automatic stay, recognizing that HSBC's security interest was perfected and that the property constituted "cash collateral," and lifting the automatic stay with respect to the property. On 17 October 2011, the bankruptcy court dismissed the bankruptcy case with prejudice.

On 20 October 2011, HSBC brought an action against defendants, alleging default of the agreement by PRMC and default of the guaranty by Khan, and seeking monetary damages.

On 26 October 2011, HSBC brought an action to foreclose on the note and deed, alleging another default. Defendants did not appeal from the resultant findings and order. The property was ultimately sold by the trustee at public auction.

On 3 January 2012, defendants filed answer and counterclaims to HSBC's complaint, seeking dismissal, asserting multiple defenses, alleging breach of fiduciary duty by HSBC, and seeking damages. On 14 May 2014, HSBC filed an amended reply to defendants' counterclaims. On 2 June 2014, defendants filed an amended motion to dismiss, answer, and counterclaim.

On 24 June 2014, HSBC filed a motion for summary judgment, and included copies of the BLC bankruptcy proceeding, the PRMC bankruptcy proceeding, the Allonge, and the PRMC receivership and foreclosure proceedings. On 4 August 2014, hearing on this motion was continued at the request of defense counsel. On 23 February 2015, HSBC filed a notice of hearing on its motion. On 3 March 2015, defendants filed a motion to continue the hearing on HSBC's motion, alleging HSBC's

failure to comply with discovery. On 10 March 2015, the trial court continued the hearing until 20 March 2015.

On 13 March 2015, defense counsel filed a request to withdraw, and moved for a continuance in order for defendants to seek other counsel. On 18 March 2015, the trial court entered an order allowing defense counsel's motion to withdraw, and continuing the case for sixty days.

On 14 May 2015, HSBC filed another notice of hearing on its motion. On 21 May 2015, defendants, now appearing *pro se* through Khan, moved for an additional continuance in order to procure counsel. At the hearing on 27 May 2015, the trial court denied defendants' motion to continue, and heard HSBC's motion for summary judgment. On 28 May 2015, the trial court entered an order granting summary judgment in favor of HSBC.

From the order granting summary judgment in favor of HSBC, defendants appeal.

II. PRMC's Appeal

[1] As a preliminary matter, we note that while an individual may appear *pro se* before the court, a corporation is not an individual under North Carolina law, and must be represented by an agent. *Seawell v. Carolina Motor Club*, 209 N.C. 624, 631 184 S.E. 540, 544 (1936) (holding that "[a] corporation cannot lawfully practice law. It is a personal right of the individual,"). Further, a corporation cannot appear *pro se*; it must be represented by an attorney licensed to practice law in North Carolina, pursuant to certain limited exceptions. *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002). These exceptions include the drafting by non-lawyer officers of some legal documents, and appearances in small claims courts and administrative proceedings.

The instant case fell within none of these exceptions. The matter now on appeal concerns a trial involving a nearly two million dollar loan. As such, it was error for the trial court to allow PRMC to appear *pro se* through its president, Khan. In addition, we hold that PRMC cannot appear before this Court *pro se*. As such, its appeal to this Court is not perfected. We will hear Khan's own appeal, as he, as an individual, may proceed *pro se*, but dismiss PRMC's appeal.

III. Motion to Continue

[2] In his first argument, Khan contends that the trial court erred in denying defendants' motion to continue. We disagree.

A. Standard of Review

"The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873, *disc. review denied*, 354 N.C. 219, 557 S.E.2d 531 (2001).

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

Khan contends that, as of the hearing on the motion of PRMC and Khan for further continuance, discovery was yet incomplete. Khan argues that, as a result, a hearing on summary judgment was premature, and the matter should have been continued until discovery was complete.

We note first that this was not the argument Khan made in the motion to continue. The motion stated, simply, that defendants needed time "in order for defendant to procure counsel and prepare." It was only at the hearing on this motion that Khan raised arguments concerning discovery issues.

At the hearing, Khan stated that he had "spoken with actually a couple of lawyers[,]" and that one had told him that "he is going to look into this case and be able to represent me." Khan went on to explain that he had spoken to multiple attorneys, and that as he was based in Richmond, Virginia, following these proceedings was difficult for him. He also mentioned that his father was suffering from Parkinson's, and that this had kept him preoccupied of late.

In response to the motion, HSBC argued that "this whole series of events is replete with delay by Mr. Khan." HSBC remarked upon the delays resulting from the Forbearance Agreement, the foreclosure, and PRMC's bankruptcy. HSBC then noted that its summary judgment motion had originally been set for 7 July 2014. It was continued, at defendants' request, to 3 March 2015, again to 6 March 2015, and then again to 20 March 2015. HSBC observed further that defendants' attorney handled all appropriate responses, pleadings, and motions before withdrawing. Subsequently, the matter was continued to 27 May 2015. With respect to defense counsel, HSBC noted that the attorney that Khan mentioned was an excellent attorney, but that defendants had

already had five attorneys in this case, and the attorney Khan mentioned would be the sixth. HSBC stated that the case itself, which started with a complaint filed 20 October 2011, had been pending for nearly four years, and had been calendared for five summary judgment hearings. Lastly, HSBC argued that a hearing wasn't even particularly necessary. HSBC maintained:

> But everything that can be done in this case -- because one of the things, if I'm not mistaken, that you said during this -- during these hearings is we're through filing papers in this. There's no more discovery. There's no more motions. There's no more anything because, you know, the deadlines for -- when you have to file your briefs, the deadlines for when you have to file your affidavits, the deadlines when you have to -- discovery was extended additional time to give him additional time. Your Honor, they're -- and that has been completed.
>
> Your Honor, there is nothing of a factual basis that needs to be considered in this case. All of our defenses come straight from the paperwork itself.

Khan responded by challenging the number of attorneys and the cause of the delays. He then challenged the discovery issue, arguing that, "We still have questions and things. Emails -- I have not gotten. I have about thousand [sic] of pages of emails but they are irrelevant emails talking about the reservation systems among themselves and all that. We have not gotten an -- one email that -- I have not seen, ma'am -- if I have missed it, that's -- I'm sorry." Subsequently, the trial court denied defendants' motion for a continuance. The trial court questioned whether defendants actually had an arrangement with the lawyer Khan mentioned, observing that "if [the attorney] was prepared to appear on your behalf, I believe that he would have notified the Court and opposing counsel even if he could not be here today because that's the usual method of communication." The trial court determined that "[t]here just comes a point in time when matters need to be resolved one way or the other."

Upon review of the transcript, records, and briefs, we agree. The trial court gave ample consideration to both sides. It expressed sympathy for defendants' position, but noted that the pendency of the case was verging on an unacceptable length. We hold that the trial court's decision was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 NC

at 777, 324 S.E.2d 833. Accordingly, we hold that the trial court did not abuse its discretion in denying Khan's motion to continue.

This argument is without merit.

III. Summary Judgment

[3] In his second argument, Khan contends that the trial court erred in granting HSBC's motion for summary judgment. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

B. Analysis

Khan contends on appeal that BLC, HSBC's predecessor in interest, "acted in such a manner dealing with the Defendants . . . as to constitute intentional wrongdoing and willful misconduct as well as acting in a grossly negligent manner." Khan specifically asserts that an employee of BLC acted as more than a mere lender, creating a fiduciary relationship. As a result, Khan maintains that there was a genuine issue of material fact, and that summary judgment was not appropriate.

Khan's arguments notwithstanding, the issue on summary judgment was not any claim by Khan concerning fraud. In fact, Khan made no counterclaim alleging fraud. Rather, Khan alleged that a fiduciary duty had been created, and was breached. This was, if any, the only factual issue.

More specifically, Khan contended that an employee of BLC had established a fiduciary relationship with PRMC, which was breached, causing injury to PRMC. Khan, as an individual, has not articulated a right to appeal this issue, which we note damages the corporation, not Khan individually.

Ultimately, there is no genuine issue of material fact. PRMC's appeal to this Court has been dismissed; the remaining appellant is Khan, in his individual capacity. Khan, as an individual, has failed to express a right to appeal the issue of a breach of fiduciary duty that damaged PRMC, and therefore has failed to raise a genuine issue of material fact. Accordingly, we hold that there was no genuine issue of material fact as

to whether Khan owed the debt alleged, and the trial court did not err in granting HSBC's motion for summary judgment.

This argument is without merit.

V. Conclusion

PRMC cannot proceed *pro se* on appeal, and as such PRMC's appeal is dismissed. The trial court did not abuse its discretion in denying Khan's motion to continue. Khan, as an individual, has failed to articulate his right to appeal from summary judgment of a claim for breach of fiduciary duty allegedly damaging PRMC. As a result, we hold that the trial court did not err in granting HSBC's motion for summary judgment.

DISMISSED IN PART, AFFIRMED IN PART.

Judges STEPHENS and McCULLOUGH concur.

IN THE MATTER OF K.B. AND L.R.

No. COA16-155

Filed 6 September 2016

Child Custody and Support—adequate resources to care for children—insufficient findings

Where the trial court granted custody to the children's maternal grandmother, the trial court's findings and the evidence were insufficient to verify that the maternal grandmother had adequate resources to care appropriately for the children pursuant to N.C.G.S. § 7B-906.1(j).

Appeal by respondent mother from order entered 25 November 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 15 August 2016.

Christopher C. Peace for petitioner-appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.

Parker, Poe, Adams & Bernstein L.L.P., by Fern A. Paterson, for guardian ad litem.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

DIETZ, Judge.

Respondent is the mother of Karen and Lisa.[1] Respondent appeals from a permanency planning order and guardianship order that granted custody to the children's maternal grandmother, allowed Respondent limited visitation, and ceased further permanency planning hearings.

As explained below, the trial court's findings, and the corresponding evidence in the record, are insufficient to verify that the maternal grandmother had "adequate resources" to care appropriately for the children, as the applicable statute requires. N.C. Gen. Stat. § 7B-906.1(j). We must therefore vacate the trial court's orders and remand for further proceedings consistent with this opinion.

Facts and Procedural History

On 18 October 2013, Mecklenburg County Department of Social Services filed a juvenile petition alleging that eleven-month-old Karen and three-year-old Lisa were neglected and dependent. The petition alleged that Respondent had untreated substance abuse and mental health issues, including bipolar disorder. DSS further alleged that Respondent was unemployed and without stable housing and did not know how to access community resources. The petition described Karen and Lisa as "dirty" and "only eating once per day due to lack of food in the home."

Respondent initially agreed to place the children with their maternal great aunt in South Carolina but the great aunt later notified DSS that she could not care for the children. Neither child's father was willing or able to take custody of his respective child and neither are parties to this appeal. As a result, DSS obtained non-secure custody of the children and placed them in foster care.

In January 2014, the children's maternal grandmother notified DSS that she was interested in being considered as a placement option for her granddaughters. With the trial court's permission, DSS arranged for a home study of the grandmother's residence in New York through the Interstate Compact on the Placement of Children.

The trial court adjudicated Karen and Lisa dependent juveniles on 15 September 2014. The court acknowledged Respondent's progress

1. We use pseudonyms to protect the children's identities.

on her case plan but found that her "[i]ssues of employment, mental health and housing . . . need to be resolved" before the children could be returned to her custody. The court left the children in DSS custody and ordered the agency to pursue a plan of reunification.

The trial court held the initial permanency planning hearing on 1 October 2014. While expressing its concern about Respondent's "lack of progress in her [case plan] and lack of honesty[,]" the court established a permanent plan of reunification with a concurrent plan of guardianship or adoption. The court noted that DSS had received no information regarding the results of the grandmother's home study.

Following a permanency planning hearing on 30 March 2015, the trial court changed the permanent plan for the children to guardianship or adoption with a concurrent goal of reunification with Respondent. The court found that Respondent, who was on bedrest due to a new pregnancy, had not resolved the issues leading to the children's removal from her home and had not been "consistent with visits or calls to the juveniles[.]" The court further found that the grandmother's home study had been approved and that Respondent "does not object" to the children's placement in guardianship with their grandmother.

The trial court suspended reunification efforts and changed the children's permanent plan to guardianship with a relative or other suitable person after a hearing on 15 July 2015. The court found that Respondent was not attending mental health services while on bedrest and that her doctor intended to prescribe medication for her depression once she was thirty-seven weeks into her pregnancy. Respondent remained unemployed and did not have electricity in her home. The children visited their grandmother in New York and returned to foster care with no behavioral problems. Lisa told her therapist that she wished to live with her grandmother.

On 23 November 2015, following a hearing, the trial court entered the permanency planning order and guardianship order that are the subject of this appeal. The court changed the permanent plan for the children to guardianship with their grandmother and, in a separate order, transferred legal custody from DSS to their grandmother as their guardian. Respondent timely appealed the permanency planning order but did not appeal the guardianship order. Respondent later filed a petition for a writ of certiorari seeking appellate review of the guardianship order. We allow the petition and will review the guardianship order together with the permanency planning order.

Analysis

We review the permanency planning order and guardianship order to determine "whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law." *In re C.M.*, 230 N.C. App. 193, 194, 750 S.E.2d 541, 542 (2013).

I. Challenge to Findings Concerning Guardianship

Respondent first claims the trial court failed to properly verify the statutory requirements that the grandmother "understands the legal significance" of guardianship and has the "resources to care appropriately for the juvenile." N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j).

When addressing these statutory criteria, the trial court need not "make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007). But the record must contain competent evidence demonstrating the guardian's awareness of her legal obligations and her financial means. *See In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 246 (2015). Specifically, the trial court must "make a determination that the guardian has 'adequate resources' and some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence." *Id.* at __, 772 S.E.2d at 246.

Here, the only evidence of the guardian's resources is the following testimony by the grandmother:

> Q: [Y]ou also would be financially responsible for the children. So do you and your husband work outside the home?
>
> A: No, I do not work. My husband works.
>
> Q: Do you have other income . . . other than what your husband earns?
>
> A: No, I receive disability myself.
>
> Q: So you do have that income coming in as well?
>
> A: Yes ma'am.

The trial court also noted that a social services agency in New York "conducted a home study on [the grandmother] and found her to be appropriate to provide care for the juveniles." That home study is not in the record. Finally, the record indicates that the grandmother lives in a four-bedroom home, but there was no evidence or testimony

concerning the value of the home or any corresponding mortgage. Based on the testimony and evidence described above, the trial court found that the grandmother "has adequate resources to care appropriately for [the children]."

We agree with Respondent that this evidence is insufficient to verify that the grandmother has "adequate resources" to serve as guardian of the children. The grandmother did not testify to how much her husband was paid, how much she received in disability payments, how much debt she had, or what her monthly expenses were. In a nearly identical case, this Court held that the evidence was insufficient to satisfy the verification requirement. *See In re P.A.*, __ N.C. App. at __, 772 N.C. App. at 245-48. There, the guardian testified that she had "the financial . . . ability to support th[e] child and provide for its needs" and that she lived in a three-bedroom home. *Id.* at __, 772 N.C. App. at 245, 247. This Court found that evidence insufficient because there was "no evidence at all of what [the guardian] considered to be 'adequate resources' or what her resources were." *Id.* at __, 772 N.C. App. at 248. Accordingly, under *In re P.A.*, we must vacate the guardianship order and permanency planning order for failure to satisfy the statutory verification requirement concerning adequate resources.

II. Visitation Plan

Respondent also challenges the visitation plan entered by the trial court, arguing that it improperly delegated the court's decision-making authority to the guardian. Because we vacate the guardianship order, upon which the visitation order is based, we likewise vacate the visitation order.

III. Waiver of Subsequent Permanency Planning Hearings

Finally, Respondent claims the trial court erred in waiving subsequent permanency planning hearings without entering the necessary findings of fact under N.C. Gen. Stat. § 7B-906.1(n).

Section 7B-906.1 requires that a permanency planning hearing be held "at least every six months" after the initial permanency planning hearing "to review the progress made in finalizing the permanent plan . . ., or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-906.1(a). Subsection (n) allows the court to waive further hearings "if the court finds by clear, cogent, and convincing evidence each of the following:"

> (1) The juvenile has resided in the placement for a period of at least one year.

> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n).

We agree with Respondent that not all of the criteria necessary to waive further permanency planning hearings were satisfied at the time the trial court entered its orders. Thus, the trial court was required to schedule permanency planning hearings at least once every six months until finding that the criteria for waiver were satisfied. Because we vacate the trial court's orders and remand for further proceedings, the trial court can address the need for additional scheduled permanency planning hearings on remand.

Conclusion

We vacate the trial court's permanency planning order and guardianship order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges STEPHENS and DAVIS concur.

JARRETT v. JARRETT

[249 N.C. App. 269 (2016)]

CATRINA JARRETT, PLAINTIFF
v.
WILLIAM ANDREW JARRETT, DEFENDANT

No. COA15-1346

Filed 6 September 2016

1. Pleadings—DVPO—events not alleged in pleading

The trial court did not err in a case involving a Domestic Violence Protection Order by allowing plaintiff to testify about events not alleged in her complaint where the complaint gave defendant sufficient notice of the nature and basis of her claim and defendant did not argue that he was unable to prepare for the hearing.

2. Evidence—hearsay—matters outside witness's knowledge—no prejudice

There was no prejudice in a case involving a Domestic Violence Protection Order in admitting what defendant contended was hearsay or in admitting testimony about which the witnesses did not have personal knowledge. The trial court did not rely on the challenged testimony in making its findings and conclusions.

3. Evidence—relevancy—no prejudice

There was no prejudice in a case involving a Domestic Violence Protection Order by admitting evidence over defense objections based on relevancy. Defendant was unable to show that a different result would have been reached at trial.

4. Domestic Violence—protective order—findings—supported by evidence

Competent evidence supported the trial court's findings of fact in a hearing on a Domestic Violence Protection Order. The trial judge is in the best position to judge the credibility of the witness evidence.

5. Domestic Violence—protective order—findings—sufficient

The trial court's findings supported the trial court's ultimate conclusion that defendant committed acts of domestic violence against plaintiff where the trial court found that on at least three occasions defendant had followed plaintiff on the highway, pulled in front of her car and slammed on his brakes, and that each incident caused plaintiff substantial emotional distress, such that she was admitted to a hospital with heart issues related to the incidents.

6. Domestic Violence—protective order—prohibitions proper

The trial court's Domestic Violence Protection Order (DVPO) properly ordered that defendant not assault, threaten, abuse, follow, harass, or interfere with plaintiff, that defendant be prohibited from purchasing a firearm during the duration of the DVPO, and that defendant stay away from plaintiff's residence.

7. Domestic Violence—protective order—surrender of firearms

The portion of a Domestic Violence Protective Order (DVPO) requiring defendant to surrender certain firearms and ammunition and have his concealed carry permit suspended during the duration of the DVPO was vacated where defendant had not used or threatened to use a deadly weapon against plaintiff or her children and the trial court did not check any of the boxes on the form that contained the statutory findings necessary for such an order.

8. Domestic Violence—protective order—stalking

The trial court properly found in a hearing on a Domestic Violence Protective Order that defendant stalked plaintiff where defendant, on at least three occasions, followed plaintiff on the highway, pulled in front of her car and slammed on his brakes, and that each incident caused plaintiff substantial emotional distress, such that she was admitted to a hospital with heart issues related to the incidents.

9. Appeal and Error—wavier of right to appeal—motion for involuntary dismissal denied—evidence subsequently presented

Defendant waived his right to appeal from the denial of his motion for an involuntary dismissal in a Hearing on a Domestic Violence Prevention Order where he presented evidence after his motion for involuntary dismissal was denied.

10. Judges—remarks about Court of Appeals—inappropriate

A district court judge was cautioned against negative comments about the Court of Appeals that undermined the integrity of the Court.

Appeal by defendant from orders entered 19 and 24 August 2015 by Judge Chester C. Davis in Catawba County District Court. Heard in the Court of Appeals 26 May 2016.

Legal Aid of North Carolina, Inc., by Celia Pistolis, TeAndra Miller, Amy Vukovich, and Emma Smiley, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for defendant-appellant.

McCULLOUGH, Judge.

William Andrew Jarrett ("defendant") appeals from a domestic violence order of protection entered 24 August 2015. For the reasons stated herein, we affirm in part, vacate in part, and dismiss in part.

I. Background

Catrina Rayfield Jarrett ("plaintiff") and defendant are former spouses, having been married on 25 May 1991, separated on 11 August 2010, and divorced on 7 December 2011. The parties have two children together.

On 20 July 2015, plaintiff filed a "Complaint and Motion for Domestic Violence Protective Order" against defendant. Plaintiff alleged, *inter alia*, that she was in fear of continued harassment that rises to such a level as to inflict substantial emotional distress based on the following reasons: defendant continued to legally harass her; defendant continued to attend their children's events after being asked not to attend and after being told they were afraid of him; defendant continued to cut plaintiff off on the highway and slam on his brakes; defendant continued to videotape plaintiff driving; defendant continued to take photographs; and continued to threaten their child.

On 24 July 2015, plaintiff filed an amendment to the 20 July 2015 complaint that included additional allegations[1].

On 6 August 2015, defendant filed a "Motion to Dismiss; Motion to Strike; Motion for Sanctions; and Affirmative Defenses and Answer." Defendant argued that, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and *res judicata*, plaintiff's 20 July 2015 complaint failed to state a claim because it requested "relief pursuant to claims, facts, and circumstances which were previously litigated in separate and previously-filed Catawba County District Court domestic violence actions – and in a manner adverse to Plaintiff." Defendant also moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f), to strike the allegations contained in plaintiff's 20 July 2015 complaint "which have already been fully adjudicated on the merits in prior actions" and argued that

1. This amendment was not served on defendant prior to the hearing held on 19 August 2015. Rather, it was served at the hearing and defendant did not request a continuance.

plaintiff's exhibits constituted hearsay which was inadmissible pursuant to Rule 802 of the North Carolina Rules of Evidence. Defendant moved pursuant to Rule 11 of the North Carolina Rules of Civil Procedure to sanction plaintiff. Finally, defendant argued the affirmative defenses of *res judicata* and collateral estoppel.

A hearing was held on 19 August 2015 at the civil session of Catawba County District Court, the Honorable Chester Davis ("Judge Davis") presiding. At the close of plaintiff's evidence, defendant made a motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

On 24 August 2015, the trial court entered a "Domestic Violence Order of Protection" ("DVPO"), effective until 20 August 2016. The DVPO ordered that defendant "shall not commit any further acts of domestic violence or make any threats of domestic violence" and defendant "shall have no contact with the Petitioner/Plaintiff." The DVPO entered a finding that in mid-June 2015, defendant had "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" by following plaintiff on a highway, pulling in front of plaintiff's vehicle, and applying defendant's brakes. The trial court found that this had occurred on three separate occasions, in March, May and mid-June of 2015 and that "[e]ach of these events caused the [plaintiff] substantial emotional distress." In addition, the trial court found that on 27 July 2015, plaintiff was admitted to a hospital with heart issues related to these events. Each of the three events was found to be "3 acts of stalking as defined – G.S. 14-277.3A was conduct with no legitimate purpose which tormented and terrified the [plaintiff]." Furthermore, the DVPO included findings that defendant "is in possession of, owns or has access to firearms, ammunition, and gun permits[,]" listed descriptions of specific firearms divided by categories entitled "sheriff to take" and "sheriff not to take," but also included a finding that defendant did not use or threaten to use a deadly weapon against plaintiff. The trial court concluded that defendant had committed acts of domestic violence against plaintiff. Accordingly, the trial court ordered as follows:

> 1. the defendant shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with the plaintiff. . . .
>
> . . . .
>
> 7. the defendant shall stay away from the plaintiff's residence or any place where the plaintiff receives temporary shelter. . . .

. . . .

> 11. the defendant is prohibited from purchasing a firearm for the effective period of this Order . . . and the defendant's concealed handgun permit is suspended for the effective period of this Order. . . .
>
> 12. the defendant surrender to the sheriff serving this order the firearms described [previously].

On 2 October 2015, the trial court entered an "ORDER (Re: Motion to Dismiss, Motion to Strike, and First Affirmative Defense)." The trial court entered the following findings of fact, in pertinent part:

> 5. On October 31, 2014, Plaintiff filed a Complaint and Motion for [DVPO] against Defendant (Catawba County File No. 14-CVD-2722). Defendant was not served with that Complaint and Motion for [DVPO].
>
> 6. On January 9, 2015, Plaintiff filed an Amended Complaint and Motion for [DVPO]. On the same day, the Court entered an Order granting Plaintiff's request for an emergency ex parte [DVPO] against Defendant.
>
> 7. On January 12, 2015, based on Plaintiff's allegation, the Court issued a Warrant for Arrest against Defendant for an alleged violation of the Ex Parte [DVPO] (Catawba County File No. 15-CR-050201).
>
> . . . .
>
> 9. On January 20, 2015, the Court conducted a hearing on Plaintiff's request for a one-year domestic violence protective order.
>
> 10. The Court denied Plaintiff's Amended Complaint and Motion for [DVPO] in open court on January 20, 2015, and filed a written Order to that effect on February 3, 2015 (Catawba County File No. 14-CVD-2722).
>
> 11. The February 3, 2015 Order denying Plaintiff's Amended Complaint and Motion for [DVPO] included specific findings of fact regarding all of Plaintiff's allegations of domestic violence by Defendant through and including January 11, 2015, and concluded that Plaintiff failed to prove grounds for issuance of a domestic violence protective order.

> 12. On June 5, 2015, the Court heard the criminal matter regarding Defendant's alleged violation of the Ex Parte [DVPO]. That same day, the Court dismissed all charges against Defendant and concluded that he had not violated any valid domestic violence protective order.
>
> 13. On July 20, 2015, Plaintiff filed a new Complaint and Motion for [DVPO], alleging certain acts identical to those dismissed by the February 3, 2015 Order.
>
> 14. All allegations of facts and instances of domestic violence occurring on or before January 11, 2015 have been fully litigated and adjudicated on the merits in a manner adverse to Plaintiff.
>
> 15. Allegations of facts and instances of domestic violence occurring after January 11, 2015 have not been litigated or adjudicated in a court of law.

The trial court then entered the following conclusions of law, in pertinent part:

> 2. As all allegations of facts and instances of domestic violence occurring on or before January 11, 2015 have been fully litigated and adjudicated on the merits in a manner adverse to Plaintiff, Plaintiff is barred from re-litigating those issues under the doctrines of *res judicata* and collateral estoppel.
>
> 3. Plaintiff's allegations of facts and instances of domestic violence occurring after January 11, 2015 have not been litigated or adjudicated, and are not barred by the doctrines of *res judicata* and collateral estoppel.
>
> 4. Defendant's Motion to Strike pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure should be granted as more particularly ordered herein.
>
> 5. Accordingly, Defendant's Affirmative Defenses of *Res Judicata* and Collateral Estoppel should also be granted as to all allegations of domestic violence that occurred on or before January 11, 2015.
>
> 6. Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure should be denied.

The trial court reserved ruling on defendant's motion for sanctions.

Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred (A) by concluding that defendant committed domestic violence against plaintiff; (B) by finding that defendant stalked plaintiff; and (C) by denying defendant's motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

A. Domestic Violence

Defendant argues that the trial court erred by concluding that he had committed acts of domestic violence against plaintiff.

> When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted). Our Court has recognized that

> the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words. The trial court's findings turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court.

Brandon v. Brandon, 132 N.C. App. 646, 651-52, 513 S.E.2d 589, 593 (1999) (internal citations and quotation marks omitted).

N.C. Gen. Stat. § 50B-1 defines "domestic violence" as follows:

> (a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1 (2015).

Here, in support of its conclusion that defendant committed acts of domestic violence against plaintiff, the trial court found as follows, in pertinent part: defendant had "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" by following plaintiff on a highway, pulling in front of plaintiff's vehicle, and applying defendant's brakes; these incidents had occurred on three separate occasions, on 31 March 2015, May 2015 and mid-June of 2015 and that "[e]ach of these events caused the [plaintiff] substantial emotional distress;" and, that on 27 July 2015, plaintiff was admitted to a hospital with heart issues related to these events. The DVPO also included findings that defendant "is in possession of, owns or has access to firearms, ammunition, and gun permits[,]" listed descriptions of specific firearms divided by categories entitled "sheriff to take" and "sheriff not to take," and found that defendant did not use or threaten to use a deadly weapon against plaintiff.

Evidentiary Rulings

[1] First, defendant contends that the trial court made several erroneous evidentiary rulings during the 19 August 2015 hearing. We address each argument in turn.

Defendant argues that plaintiff should not have been allowed to testify about events not alleged in her 20 July 2015 complaint. Defendant contends that plaintiff's complaint only alleged that he followed her on the highway, cut her off, and slammed on his brakes in May 2015 and failed to allege that similar incidents occurred in March or June of 2015.

Our Court has held that:

> Under G.S. 1A-1, Rule 8(a), detailed fact-pleading is not required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced

> the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and – by using the rules provided for obtaining pretrial discovery – to get any additional information he may need to prepare for trial.

Lewis v. Gastonia Air Service, Inc., 16 N.C. App. 317, 318, 192 S.E.2d 6, 7 (1972) (citations and quotation marks omitted).

In light of these principles, we find that plaintiff's 20 July 2015 complaint gave defendant sufficient notice of the nature and basis of her claim. Plaintiff sought a DVPO based on allegations that defendant had placed her "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" Plaintiff's complaint provided that in May 2015, defendant had continued to cut her off on the highway and slam on his brakes and in an amendment to her complaint, filed 24 July 2015, plaintiff alleged that defendant had followed her on the highway in March and June 2015. Although the amendment was not served on defendant but was first presented to him at the 19 August 2015 hearing, defendant does not argue that he was unable to prepare a responsive pleading or that he was unable to prepare for the hearing. Rather, at the hearing, defendant unequivocally denied that he had followed plaintiff on the highway since January 2015. Based on the foregoing, we reject defendant's argument.

[2] Next, defendant argues that the trial court erred by admitting the following testimony against his objections: plaintiff's testimony regarding the contents of a piece of paper purporting to move their younger child's bus stop away from her home; plaintiff's testimony that her younger child told her that he enjoyed riding the bus with his friends; plaintiff's testimony regarding the contents of mail that plaintiff claims proves defendant changed her address to prevent her from receiving mail; plaintiff's testimony about the contents of a paper purportedly showing that she was diagnosed with heart palpitations; a witness's testimony that the younger child told the witness that he "did not want to attend matches because he was afraid he would see his father and be reminded what had happened to his family[;]" plaintiff's question to a witness about whether the younger child ever told the witness "since January of this year that there is a problem with the Defendant who is sitting at the end of the table[;]" the younger child's testimony that he wrote a letter regarding defendant's "abuse [of] the court system to bully me and my family[;]" and plaintiff's question to a witness whether plaintiff had told the witness why she "was crying" after the witness testified that plaintiff was "crying and the whole family was broken, but

you were trying to spend some time together. Something major happened." Defendant asserts that the aforementioned testimony amounted to hearsay.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is generally inadmissible unless it falls within one of the exceptions recognized in the North Carolina Rules of Evidence or another statute.

Little v. Little, 226 N.C. App. 499, 502, 739 S.E.2d 876, 879 (2013) (citing N.C. Gen. Stat. § 8C-1, Rules 801(c) and 802). However, it is well established that "an appellant alleging improper admission of evidence has the burden of showing that it was unfairly prejudiced . . ., that appellant has been denied some substantial right and that the result of the [hearing] would have been materially more favorable to appellant." *McNabb v. Bryson City*, 82 N.C. App. 385, 389, 346 S.E.2d 285, 288 (1986).

Assuming *arguendo* that the challenged testimony amounted to inadmissible hearsay, we are unable to see any prejudice in its admission. The trial court did not rely on this challenged testimony in making its findings of fact and conclusion of law that defendant committed domestic violence against plaintiff. Rather, the trial court based its conclusion on findings that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress by following her on a highway, pulling in front of her, and applying his brakes on three separate occasions.

Defendant also argues that the trial court erred by allowing plaintiff and her witnesses, over objections, to testify about matters of which they had no personal knowledge. Specifically, defendant directs our attention to the following evidence: plaintiff's testimony about an occasion where one of her sons was served while at school; plaintiff's testimony that defendant had stopped driving an orange Jeep since the January court proceedings; and the older son's testimony that plaintiff received letters and "other legal harassment."

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 602 (2015), "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." However, even assuming arguendo that the trial court erred by allowing this testimony, defendant must still meet the burden of showing he was prejudiced by its admission. Here, defendant has failed to demonstrate that he was prejudiced by the admission of the challenged testimony, as the challenged testimony did not form the basis of the trial court's DVPO.

[3] Next, defendant argues that the trial court improperly overruled numerous objections by defendant's counsel based on relevancy. Defendant contends that the following evidence should not have been admitted: a witness's testimony regarding whether he believed that the children had experienced substantial emotional distress; plaintiff's testimony that defendant filed a request to move the younger child's bus stop from her home; plaintiff testified that she asked defendant to return two dirt bikes; plaintiff asked a witness about the children's character; plaintiff asked a witness when the last time was that the older child was called to the office for discipline and whether there had been a discipline problem since January of 2015 and since his graduation; testimony regarding a search for tracking devices on plaintiff's car; testimony of plaintiff's witness regarding whether she saw her or her children in distress; plaintiff's testimony that she had taken a special course in child abuse; and the younger child's testimony regarding the amount of money he withdrew from his account to bail plaintiff out of jail for contempt.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Jones*, __ N.C. App. __, __, 772 S.E.2d 470, 475 (2015) (citation omitted). Again, assuming *arguendo* that the foregoing evidence was irrelevant, any error was harmless because defendant is unable to show that a different result would have been reached at trial. Accordingly, we overrule defendant's arguments.

Findings of Fact

[4] Next, defendant contends that the evidence presented at the DVPO hearing was insufficient to support the trial court's findings of fact regarding the three separate incidents where defendant followed plaintiff on the highway. Defendant seems to argue that because he completely denied following plaintiff's vehicle on the highway after 11 January 2015 and because plaintiff presented conflicting evidence regarding these incidents on the highway, the trial court's findings of fact are not supported by competent evidence. Defendant also challenges the trial court's finding that plaintiff was "placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." Defendant's arguments have no merit.

Plaintiff's testimony at the DVPO hearing tended to show that in March, May, and June of 2015, defendant would follow her vehicle on the highway, pull in front of her vehicle, and slam on his brakes. Plaintiff would have "to veer out of my lane to avoid an accident." Plaintiff's older

son testified that he observed plaintiff "in distress" following these incidents on the highway. Further, plaintiff testified that in July of 2015, she received emergency medical treatment at Frye Regional Hospital "for a flurry of heart palpitations." Her emotional distress resulted from receiving information that defendant had petitioned to recover his weapons and ammunition that had been seized under an earlier court order.

On the other hand, defendant testified as follows at the DVPO hearing:

> Q. Have you followed a vehicle driven by [plaintiff] since January 11, 2015?
>
> [Defendant:] Absolutely not.

Based on this divergence, the trial court was placed in a position to judge the credibility of the witnesses. The trial court stated that:

> The Defendant has specifically denied that these events occurred. His words, as I recall, were -- just bear with me for a second -- all right, he was emphatic, when asked if he had followed his wife since January, he said absolutely not. He was not equivocal. That was an absolute no. Therefore, the Court is put in a position of deciding bluntly who to believe. Considering the totality of the evidence in this case, the Court decides and believes that the testimony reduced to its lowest level of the Plaintiff and one of her children is accurate.

As we have previously stated, the trial court is in the best position to judge the credibility of the witness testimony and our Court must give great deference to the trial court's determinations. In light of the testimony admitted during the DVPO hearing regarding defendant's conduct, we conclude that competent evidence supported the trial court's findings of fact.

Conclusion of Law

[5] Next, defendant argues that the findings of fact do not support the conclusion of law that he committed domestic violence. We disagree.

"[T]he plain language of [N.C.G.S. §] 50B-1(a)(2) imposes only a subjective test, rather than an object reasonableness test, to determine whether an act of domestic violence has occurred." *Thomas v. Williams*, __ N.C. App. __, __, 773 S.E.2d 900, 905 (2015) (citation omitted). "Domestic violence" means the

> commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . . Placing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]

N.C. Gen. Stat. § 50B-1(a) (2015). "Harassment" is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2015). "Substantial emotional distress" is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A (b)(4).

The trial court found that on at least three separate occasions, defendant had followed plaintiff on the highway, pulled in front of her vehicle, and slammed on his brakes. The trial court further found that each incident caused plaintiff such "substantial emotional distress," that in July 2015, plaintiff was admitted to a hospital with heart issues related to these incidents. These findings support the trial court's ultimate conclusion that defendant committed acts of domestic violence against plaintiff.

Surrender of Weapons

[6] Defendant asserts that the findings of fact and conclusion of law do not support the trial court's legal decree.

Here, defendant challenges the portions of the DVPO ordering that defendant: (1) "shall not assault, threaten, abuse, follow, harass . . ., or interfere with plaintiff[;]" (2) "stay away from the plaintiff's residence[;]" (3) surrender certain firearms; (4) have his concealed handgun permit suspended for the effective period of the DVPO; and (5) be prohibited from purchasing a firearm for the effective period of the DVPO.

Pursuant to N.C. Gen. Stat. § 50B-3,

> (a) If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:
>
> . . . .

> (9) Order a party to refrain from doing any or all of the following:
>
> a. Threatening, abusing, or following the other party.
>
> b. Harassing the other party, including by telephone, visiting the home or workplace, or other means. . . .
>
> c. Otherwise interfering with the other party.
>
> . . . .
>
> (11) Prohibit a party from purchasing a firearm for a time fixed in the order.
>
> . . . .
>
> (13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3 (2015).

Because we have upheld the trial court's conclusion that defendant committed domestic violence against plaintiff, we also hold that the trial court properly ordered that defendant not assault, threaten, abuse, follow, harass, or interfere with plaintiff, that defendant be prohibited from purchasing a firearm for the duration of the DVPO, and that defendant stay away from plaintiff's residence pursuant to N.C. Gen. Stat. § 50B-3.

[7] However, we vacate the portion of the DVPO ordering that defendant surrender certain firearms and ammunition and have his concealed handgun carrying permit suspended for the duration of the DVPO. Under N.C. Gen. Stat. § 50B-3.1, the trial court

> shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:
>
> (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
>
> (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

N.C. Gen. Stat. § 50B-3.1(a) (2015). In the present case, the trial court found that defendant had not used or threatened to use a deadly weapon against plaintiff nor the minor children and failed to check any of the boxes on the form that contained the statutory findings necessary to order the surrender of firearms or suspension of a permit. Consequently, we hold that the trial court erred by ordering defendant to surrender specific firearms and by suspending his concealed handgun permit for the duration of the DVPO, and we vacate those portions of the DVPO. *See Stancill v. Stancill*, __ N.C. App. __, __, 773 S.E.2d 890, 900 (2015) (holding that the trial court erred by failing "to check any of the boxes on the form that contained the statutory findings necessary to order the surrender of firearms" under N.C. Gen. Stat. § 50B-3.1(a)).

B. Stalking

[8] In his second issue on appeal, defendant asserts that the trial court erred by finding that defendant stalked plaintiff as defined in N.C. Gen. Stat. § 14-277.3A. Specifically, defendant contends that there was no competent evidence that he committed the three acts of stalking as found by the trial court. We find defendant's argument meritless.

N.C. Gen. Stat. § 14-277.3A(c), entitled "Stalking," provides as follows:

(c) Offense. -- A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following: (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates. (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

N.C. Gen. Stat. § 14-277.3A(c) (2015).

Testimony at the DVPO hearing from plaintiff and plaintiff's older son supported the finding that on at least three occasions after January

2015, defendant followed plaintiff's vehicle on the highway, pulled in front of her, and slammed on his brakes, causing plaintiff to suddenly veer in order to avoid an accident. Plaintiff also testified that she suffered heart issues that required medical attention due to defendant's conduct on the highway. This testimony supports the trial court's finding that "Each event . . . are 3 acts of stalking as defined – [N.C. Gen. Stat. §] 14-277.3A [and] was conduct with no legitimate purpose which tormented and terrified the [plaintiff]." After carefully reviewing the evidence, we conclude that the trial court did properly find that defendant stalked plaintiff.

C. Rule 41(b) of the North Carolina Rules of Civil Procedure

[9] In his last argument on appeal, defendant maintains that the trial court erred by denying his motion for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, made at the conclusion of plaintiff's evidence presented at the 19 August 2015 hearing.

N.C. Gen. Stat. § 1A-1, Rule 41(b) provides:

> (b) *Involuntary dismissal; effect thereof.* – For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2015).

Plaintiff directs our attention to *Hamilton v. Hamilton*, 93 N.C. App. 639, 379 S.E.2d 93 (1989) and we find that the holding in that case controls the outcome here. In *Hamilton*, the plaintiff made a motion for an involuntary dismissal at the conclusion of the defendant's evidence. *Id.* at 642, 379 S.E.2d at 94. Our Court held that because "the plaintiff presented evidence after his motion to dismiss was denied, he has waived any right to appeal from the denial of that motion." *Id.* Accordingly, we hold that because defendant presented evidence after his motion for involuntary dismissal was denied, he has waived his right to appeal from the denial of the motion.

D. Trial Court Judge's Remarks

[10] We are compelled to comment on the conduct and statements of the presiding judge in this case, the Honorable Chester Davis. During the DVPO hearing, Judge Davis stated as follows:

> THE COURT: Because I need to state my admiration for the Court of Appeals, but I've never felt compelled to follow them when I think they're wrong, which is frequently. . . .
>
> . . . .
>
> THE CLERK: Do you want me to leave the recording on, Judge?
>
> THE COURT: Not if you want to. Because if you turn it off, I can talk about the Court of Appeals. Okay. . . .

We find Judge Davis' commentary particularly troubling. His negative comments about our Court are patently inappropriate considering his judicial office and reflect a misunderstanding of this Court's authority. We strongly caution Judge Davis from making any future comments that undermine the integrity of our Court.

AFFIRMED IN PART; VACATED IN PART; DISMISSED IN PART.

Judges STEPHENS and ZACHARY concur.

DESIREE KING, BY AND THROUGH HER GUARDIAN AD LITEM, G. ELVIN SMALL, III; AND AMBER M. CLARK, INDIVIDUALLY, PLAINTIFFS

v.

ALBEMARLE HOSPITAL AUTHORITY D/B/A ALBEMARLE HEALTH/ALBEMARLE HOSPITAL; SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC D/B/A SENTARA ALBEMARLE MEDICAL CENTER; NORTHEASTERN OB/GYN, LTD.; BARBARA ANN CARTER, M.D.; AND ANGELA MCWALTER, CNM, DEFENDANTS

No. COA15-1190

Filed 6 September 2016

Statutes of Limitation and Repose—minor—tolling

The trial court erred by dismissing the minor plaintiff's action on the grounds that it was barred by N.C.G.S. § 1-15(c)'s three-year limitations period, because the plain language of N.C.G.S. § 1-17(b) tolled the limitations period until 4 February, 2024, when plaintiff becomes nineteen years old.

Appeal by plaintiff, by and through her guardian *ad litem*, from order entered 27 July 2015 by Judge Cy A. Grant in Pasquotank County Superior Court. Heard in the Court of Appeals 9 March 2016.

Hammer Law, P.C., by Amberley G. Hammer, and Ashcraft & Gerel, LLC, by Wayne M. Mansulla, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Robert E. Desmond and Samuel G. Thompson, for defendant-appellees Northeastern Ob/Gyn, Ltd.; Barbara Ann Carter, M.D.; and Angela McWalter, CNM.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and Charles E. Simpson, Jr., for defendant-appellees Albemarle Hospital Authority and Sentara Albemarle Regional Medical Center, LLC.

CALABRIA, Judge.

Desiree King ("plaintiff"), a minor, appeals from an order dismissing her medical malpractice action as barred by the statute of limitations. We reverse and remand.

I. Background

On 4 February 2005, plaintiff was born to Amber Clark ("Ms. Clark") at Albemarle Hospital. Barbara Ann Carter, M.D. ("Dr. Carter"), Ms. Clark's obstetrician, and Angela McWalter, CNM ("CNM McWalter"), Ms. Clark's nurse midwife, managed her care and delivered plaintiff. Shortly after her birth, medical staff discovered that plaintiff had a brain injury.

On 10 January 2008, the trial court entered an order appointing G. Elvin Small, III ("Small"), as plaintiff's guardian *ad litem* for the purpose of bringing a medical malpractice action on plaintiff's behalf. On that same date, plaintiff, by and through Small, filed an action alleging that her brain injury resulted from the medical malpractice and negligence of Albemarle Hospital and Dr. Carter. On 31 October 2008, for reasons unclear from the record or transcript, plaintiff's action was voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 30 January 2015, the trial court entered another order appointing Small to represent plaintiff "for the purpose of commencing a civil action on her behalf[.]" On that same date, plaintiff, by and through Small, initiated another medical malpractice action, this time alleging that her brain injury resulted from the medical malpractice and negligence of Dr. Carter; CNM McWalter; Dr. Carter and CNM McWalter's employer, Northeastern Ob/Gyn, Ltd.; Albemarle Hospital Authority; and Sentara Albemarle Regional Medical Center, LLC (parties collectively, "defendants"). In response, defendants filed motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the statute of limitations had expired.

After a hearing, the trial court entered an order on 27 July 2015 granting defendants' motions to dismiss plaintiff's claims pursuant to Rule 12(b)(6), "as [her] claims [were] barred by the applicable statute of limitations."[1] Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred by dismissing her action on the grounds that it was barred by N.C. Gen. Stat. § 1-15(c)'s three-year limitations period, because the plain language of N.C. Gen. Stat. § 1-17(b) tolled the limitations period until 4 February 2024 when plaintiff will turn nineteen years old. We agree.

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1. Initially, Ms. Clark was also a party to plaintiff's action against defendants. The trial court dismissed her claims on 27 July 2015, and she did not join this appeal.

The statute of limitations for "a cause of action for malpractice arising out of the performance of or failure to perform professional services" is three years from the date the action accrued, which is "the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2015). The parties do not dispute that N.C. Gen. Stat. § 1-15(c)'s three-year limitations period applies to plaintiff's malpractice action and that her action accrued when she was born on 4 February 2005. Therefore, the statute of limitations, absent a tolling provision, expired on 4 February 2008. The issue on appeal is whether the disability tolling provision of N.C. Gen. Stat. § 1-17(b) extended N.C. Gen. Stat. § 1-15(c)'s three-year limitations period.

Where, as here, there are no relevant facts in dispute, the issue of whether a statute of limitations bars an action is a question of law reviewed *de novo* on appeal. *See Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179, 184, 668 S.E.2d 923, 926 (2008). Issues of statutory construction are also questions of law reviewed *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citation omitted); *see also High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) ("[W]hen . . . [a] specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form."). Moreover, the "[l]egislature is presumed to know the existing law and to legislate with reference to it." *State v. Davis*, 198 N.C. App. 443, 452, 680 S.E.2d 239, 246 (2009).

N.C. Gen. Stat. § 1-15(c) sets forth limitation periods applicable to actions for professional negligence and provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . . Provided nothing herein shall be construed to reduce the statute of

> limitation in any such case below three years. Provided . . . that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

N.C. Gen. Stat. § 1-17 (2009)[2] tolled certain limitation periods if a claim accrues when a claimant is under a disability, such as infancy, and provided in pertinent part:

> (a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring [the] action within the time limited in this Subchapter after the disability is removed . . . when the person must commence his or her action . . . within three years next after the removal of the disability, and at no time thereafter.
>
> (b) Notwithstanding the provision of subsection (a) . . . , an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

N.C. Gen. Stat. § 1-17(b) "deals exclusively with minors and their rights to commence a malpractice action prior to attaining the full age of 19, when the statute of limitations in G.S. 1-15(c) has nevertheless expired." *Osborne v. Annie Penn Mem'l Hosp., Inc.*, 95 N.C. App. 96, 102, 381 S.E.2d 794, 797 (1989). This Court has interpreted the interplay between N.C. Gen. Stat. § 1-15(c) and N.C. Gen. Stat. § 1-17(b) and has stated:

> Our examination indicates that the language contained in G.S. 1-17(b) is quite clear. First, it refers specifically to malpractice actions brought on behalf of a minor plaintiff- the exact circumstances in the case *sub judice*. Secondly, it requires that the action to be commenced within the time limitations specified in G.S. 1-15(c), but then provides for

2. Effective 1 October 2011 and applicable to claims arising on or after that date, N.C. Gen. Stat. § 1-17(b) was amended to reduce the minor's age requirement from nineteen to ten years. Because plaintiff's action accrued when she was born in 2005, her claims are governed by N.C. Gen. Stat. § 17(b)'s age requirement of nineteen years.

> the exact situation before us. *If* the time limitations (as set forth in G.S. 1-15(c)) expire "before such minor attains the full age of 19 years, the action may be brought *before* said minor attains the full age of 19 years." Here, the time limitation *has* expired and the minor *has not* attained the full age of 19 years. The statute, therefore, expressly allows the minor plaintiff in this case to commence the action. When the language of a statute is clear, such as the language in this case, we are required to give the statute its logical application.

Id. We agree that the plain language of N.C. Gen. Stat. § 1-17(b) is clear and unambiguous. It provides that minors' malpractice actions are subject to N.C. Gen. Stat. § 1-15(c)'s limitations periods, "except that if those time limitations expire before the minor attains the full age of 19 years." N.C. Gen. Stat. § 1-17(b). In such a situation, as here, "the action *may be brought* before the minor attains the full age of 19 years." *Id.* (emphasis added).

Despite this clear statutory language, defendants argue that pursuant to *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960) (holding that the statute of limitations begins to run against a minor upon the appointment of a guardian charged with the duty of initiating an action on his behalf), N.C. Gen. Stat. § 1-15(c)'s three-year limitations period began running when Small was appointed as plaintiff's guardian *ad litem* on 10 January 2008 and ran uninterrupted until its expiration on 10 January 2011. Therefore, defendants contend, plaintiff's malpractice action, initiated in 2015, was properly barred because the applicable statute of limitations had expired. However, *Rowland* is readily distinguishable and, therefore, its holding is inapplicable to the instant case. *Rowland* involved the tolling of a minor's personal injury action, not the tolling of a minor's professional negligence action. *See* 253 N.C. at 234, 116 S.E.2d at 722. Additionally, the *Rowland* decision was based on the general tolling provision of N.C. Gen. Stat. § 1-17, later codified as § 1-17(a), not the more specific tolling provision of N.C. Gen. Stat. § 1-17(b). *See id.*

As a secondary matter, defendants advance a slippery-slope argument that it would "lead to potentially absurd results" if we hold that the *Rowland* doctrine does not apply to plaintiff's action and that her 2008 voluntary dismissal has no bearing on her ability to refile within the limitation period established by N.C. Gen. Stat. § 1-17(b). Defendants assert that "[t]aking this position to its logical extreme would theoretically permit a minor plaintiff to file, voluntarily dismiss, and refile an

infinite number of suits until the minor reaches" the age specified by the relevant version of N.C. Gen. Stat. § 1-17(b). We disagree.

Plaintiff's action is still subject to the North Carolina Rules of Civil Procedure. Rule 41(a)(1) provides in pertinent part:

> [T]he dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

N.C. Gen. Stat. § 1A-1, Rule 41(a) (2015). " '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' " *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (alterations in original) (quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)). In the instant case, plaintiff filed one voluntary dismissal, without prejudice, pursuant to Rule 41(a)(1). If plaintiff filed a subsequent voluntary dismissal, it would still "operate[] as an adjudication upon the merits" pursuant to Rule 41(a)(1), regardless of N.C. Gen. Stat. § 1-15(c)'s limitations period or the tolling provision of N.C. Gen. Stat. § 1-17(b).

III. Conclusion

Plaintiff's medical malpractice action is not barred by the statute of limitations because she brought her action within the limitation period extended by N.C. Gen. Stat. § 1-17(b). The *Rowland* doctrine does not apply to this case. Additionally, plaintiff's one voluntary dismissal pursuant to Rule 41(a)(1) merely left her in the same position as if she had never commenced the action in 2008; it did not bar her 2015 action. Therefore, the trial court erred by granting defendants' motions to dismiss on the grounds that plaintiff's claims were barred by the statute of limitations. Accordingly, we reverse the trial court's order and remand the case for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

LUEALLEN v. LUEALLEN

[249 N.C. App. 292 (2016)]

MIKE DEWAYNE LUEALLEN, PLAINTIFF
v.
MONICA GEORGETT LUEALLEN, DEFENDANT

No. COA15-890

Filed 6 September 2016

1. Appeal and Error—interlocutory—child custody order—not final—stay by another COA panel—issues addressed

An appeal from a child custody and child support order was interlocutory but was heard on appeal. Although the order was immediately appealable under N.C.G.S. § 50-19.1 because an equitable distribution claim remained unresolved, the order itself was not final as required by statute since future hearings were set to determine the mother's visitation. However, another panel of the COA had stayed the order pending this appeal, and the issues were addressed.

2. Child Custody and Support—order—sufficiently well organized

A mother's challenge to a child custody and support order based on it being written in a "haphazard" style was rejected where the order was reasonably well-organized. Orders are not required to have any particular style or organization, although a well-organized order is easier for everyone to understand.

3. Child Custody and Support—findings—not mere recitations of testimony

A mother's contention that the findings in a child custody and support order were merely recitations of evidence was rejected. Overall, the findings were not simply recitations of testimony but definitively found ultimate facts.

4. Child Custody and Support—findings—supported by the evidence

Findings in a child custody and support order were adequately supported by the evidence. Although there was conflicting evidence, the trial court evaluated the credibility and weight of the evidence and made findings accordingly.

5. Child Custody and Support—order—mental health evaluation and treatment—changing beliefs

The trial court erred in a child custody order by requiring the mother to undergo a mandatory mental health evaluation and therapy

with requirements that she change her beliefs concerning the father's substance abuse and his behavior with the child, and that the child's therapist accept the trial court's determinations in these matters. The trial court must make findings regarding events that have happened and order actions based on those facts, but it cannot order the mother or the therapist to wholeheartedly accept or believe anything. The trial court on remand may take into account the futility of further evaluations or therapy if the mother insists on her version of the facts, which could result in more restricted visitation.

6. Child Custody and Support—order—inferences from evidence—trial court role

There was no abuse of discretion in a child custody action where the mother challenged the award of primary legal custody and primary physical custody to the father. The mother's argument asked the appellate court to re-weigh the voluminous evidence and draw new inferences, but that was the trial court's role.

7. Child Custody and Support—support—calculation—not clear

A child support order was remanded where it lacked sufficient information for the calculation to be reviewed on appeal.

8. Child Custody and Support—support—imputed income—no error

While there was evidence that the mother in a child support action was seeking employment, the evidence supported the trial court's determination that she was acting in disregard of her child support obligation. The findings supported the trial court's conclusions that the mother was willfully suppressing her income in bad faith to avoid her child support obligation, and the trial court properly imputed income to the mother.

9. Child Custody and Support—support—arrearage—upcoming payment included

The findings did not support the arrearage decree in a child support order where the arrearage included an upcoming support payment. The order may address any arrears accrued up to the last day of the trial, based on evidence presented at trial.

10. Child Custody and Support— support—arrearages—calculation unclear

In a child support case remanded on other grounds, it was suggested as a practical matter that the calculation of arrears be set forth in a table where the appellate court could not get the math in the findings to work.

11. Child Custody and Support—support—arrearage—contempt—failure to find job—bad faith

In a contempt proceeding arising from an arrearage in child support, the findings that the mother had the ability to comply with the order but willfully failed to do so were supported by the evidence. The dispute arose from the ending of the mother's temporary job filling in for a teacher out on maternity leave and her failure to find another job.

12. Contempt—child support arrearage—purge conditions—impermissibly vague

A purge condition in a contempt order for a child support arrearage was remanded where the case was remanded on other grounds for recalculation of the support obligation and the arrears. However, the purge conditions were also impermissibly vague in that a monthly payment was required with no ending date specified.

13. Attorneys—fees awarded in domestic action—no finding of reasonableness

An order awarding the father's attorney fees in a domestic action involving child custody and support was remanded where the trial court made no findings regarding the reasonableness of the attorney fees.

Appeal by defendant from order entered 5 December 2014 by Judge Joseph J. Williams in District Court, Union County. Heard in the Court of Appeals 27 January 2016.

No brief filed on behalf of plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom III, for defendant-appellant.

STROUD, Judge.

Defendant Monica Georgett Lueallen ("Mother") appeals from the trial court's order on permanent child support, modification of child support, child custody, attorney fees and contempt entered on 5 December 2014. On appeal, Mother raises numerous arguments regarding multiple aspects of the order. We affirm the order's provisions addressing child custody, with the exception of Decrees 4 and 6, and we must vacate and remand portions of the remainder of the order for recalculation of child support and arrears, establishment of definite purge conditions,

additional findings of fact regarding Mother's ability to comply with purge conditions, and additional findings of fact regarding the award of attorney fees.

I. Factual and Procedural Background

Plaintiff Mike Dewayne Lueallen ("Father") and defendant Monica Georgett Lueallen ("Mother") were married in 2001 and one child, Timothy[1], was born to the marriage. When Timothy was born in 2006, the parties lived in Arkansas, but they moved to North Carolina about six months after his birth, so Timothy spent most of his life in the Union County/Charlotte area. In November of 2011[2], the parties separated and Timothy began to reside primarily with Mother. Both parties had Masters degrees in education and at the time of their separation, both were employed by the Union County Schools.

On 24 May 2012, effective 21 June 2012, Mother resigned from her job in Union County, although she did not yet have another job lined up. She received a job offer from a school in Arkansas on 15 July 2012 and went to Arkansas, taking Timothy with her. In early July, Mother initially told Father that she would be taking Timothy for a "family trip" to Arkansas and that they would return in about a week to 10 days, in time for a camping trip he had planned with Timothy to begin around 20 or 21 July 2012. Father, however, was unable to reach Mother during her Arkansas trip with Timothy, and they had not returned by 21 July 2012. On 21 July 2012, Mother informed Father that there was a job available for her in Arkansas, that she had an apartment, and that " 'our things are in storage.' " He then attempted but was unable to make contact with her or Timothy for about a week. On 25 July 2012, Father filed a complaint in Union County seeking emergency ex parte child custody, child custody, child support, and attorney fees. On the same day, the trial court entered an ex parte custody order granting Father temporary sole custody of Timothy pending further order and requiring Mother to return Timothy to Union County.

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1. This is a pseudonym, to protect the identity of the minor child.

2. We note that Mother's Arkansas complaint alleged that the parties separated on 11 November 2011; her North Carolina answer alleged that the parties separated on 13 September 2011; and the 18 January 2013 visitation order found that the parties separated on 13 September. Mother testified at the 16 January 2013 hearing that they separated on "September 11 through 13th, but officially, permanently, it was in November 11th of 2011." In any event, the exact date of separation is not material for purposes of this appeal.

Father notified Mother that he was coming to Arkansas to get Timothy and arrived on 27 or 28 July 2012. Initially, Arkansas authorities refused to assist him in getting Timothy. He registered the North Carolina ex parte custody order in Cross County, Arkansas, on 30 July 2012, and the order was served on Mother the same day, although it was not filed until 16 October 2012. Mother also filed for and received an "Ex Parte Order of Protection" in Cross County, Arkansas, on the same day. Her domestic violence complaint in Arkansas "described an incident that occurred in October of 2011 in North Carolina" when the "parties [had] decided to separate, with [Father] leaving the home." The Arkansas Court vacated the portions of the Arkansas ex parte order dealing with child custody based upon the previously-issued North Carolina ex parte order, which granted custody of Timothy to Father. Mother later dismissed the Arkansas domestic violence action against Father. Father returned to North Carolina with Timothy.

On or about 3 January 2013, Mother filed her answer and counterclaims for divorce, child custody, child support, post-separation support, equitable distribution, alimony, and attorney fees. On 16 January 2013, the trial court held a hearing on the return of the ex parte custody order. As a result of this hearing, the trial court entered a visitation order on 18 January 2013, pending a hearing on temporary child custody. This order kept the ex parte custody order in effect, scheduled a hearing on temporary custody and support for 11 March 2013, and granted Mother visitation with Timothy in North Carolina every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. On 20 February 2013, the trial court entered another interim order as a result of the same hearing. The 20 February order included more detailed findings of fact, conclusions of law, and decretal provisions than the 18 January 2013 order but ultimately granted the same visitation.

On 13 February 2013, Mother filed a motion for psychological and mental health evaluation, to appoint an expert pursuant to Rule 706, and to appoint a Guardian ad Litem ("GAL") for the child. Mother alleged that Father had been diagnosed with bipolar disorder and depression, that he was not taking medications as prescribed, and that he had "extreme mood swings" from being "gregarious and outgoing" to "openly belligerent and hostile." She alleged that Father was mentally unstable and unable to care for the child.

On 11 March and 22 April 2013, the trial court held a hearing on temporary custody, temporary child support, Mother's motion for psychological evaluation and appointment of GAL, and attorney fees. The court entered its order from this hearing on 25 June 2013. The order continued

Mother's alternate weekend visitation, set out a detailed visitation for various holidays, and granted Mother three weeks of summer visitation, but did not allow Mother to remove Timothy from North Carolina. The order set temporary child support, requiring Mother to pay $574.85 per month, beginning 1 June 2013. The order also denied the remaining motions for psychological evaluation, appointment of GAL, and attorney fees.

Over seven days, beginning on 10 February 2014 and ending on 1 August 2014, the trial court heard the matters of permanent custody, permanent child support, attorney fees, and contempt.[3] The trial court entered its order on these issues on 5 December 2014. Mother filed her notice of appeal from this order on 2 January 2015.

Although we will address the details of the order on appeal below, for purposes of addressing the procedural posture and finality of the 5 December 2014 order, we note that the order included the following requirements, which Mother also challenges on appeal:

> 6. Periodic Reviews shall be conducted on the following schedule and for the following purposes:
>
> a. Review One: Shall be conducted within 30 days of the entry of this order, the specific date is yet to be determined, the purpose of which shall be to determine whether therapy for mother, as ordered herein, has begun.
>
> b. Review Two: Shall be conducted within 60 days of the entry of this order, the specific date is yet to be determined, the purpose of which shall be to determine Mother's progress in therapy and to obtain an initial report from the Mother's therapist regarding her rehabilitation in acknowledging that Father has not physically abused the minor child, has not engaged in substance abuse and to access [sic] her progress in taking responsibility for the damage and anxiety that she has caused in the minor child.

3. On 23 May 2014, Father filed a motion to show cause for failure to pay child support, alleging that Mother had paid only a portion of the amount owed for some months and had paid nothing for the months of April and May 2014. The pending motion by Mother to modify the temporary child support order was also addressed.

> c. Review Three: Shall be conducted within 90 days of the entry of this Order, the specific date is yet to be determined, the purpose of which shall be to determine Mother's progress in therapy and to obtain a report from the Mother's therapist regarding her rehabilitation in acknowledging that Father has not physically abused the minor child, has not engaged in substance abuse and to access [sic] her progress in taking responsibility for the damage and anxiety that she has caused in the minor child. All of this will be taken into account to determine at this final review whether to further restrict or expand visitation.

On 9 February 2015, the trial court held the 30 day review hearing, as required by the 5 December order, to review Mother's progress in therapy and compliance with the order. The trial court found that Mother had "failed to produce evidence that she obtained a mental health evaluation from a licensed psychologist" and that she had only consulted with a "Dr. Sydney Langston" but had not produced evidence of Dr. Langston's credentials. The order noted that Mother continued to be under the requirements of the 5 December order and that she would have to appear for the 60 day and 90 day review hearings.

On 9 April 2015, this Court issued an order granting Mother's petition for writ of supersedeas and motion for temporary stay, providing in pertinent part:

> The petition for writ of supersedeas is allowed, and the 5 December 2014 order of Judge Joseph Williams is stayed insofar as it directs defendant and her child to submit to a mental health assessment and achieve certain goals through therapy and as it requires periodic review hearings to determine whether defendant has attained those goals. Therefor, [sic] decrees four and six of the trial court's order are hereby stayed pending the resolution of defendant's appeal from Judge Williams' order.

II. Interlocutory appeal

[1] Mother acknowledges that the 5 December order is interlocutory because her counterclaim for equitable distribution is still pending.[4]

4. Her other pending claims for post-separation support and alimony have been dismissed voluntarily.

However, she argues that her appeal is timely under N.C. Gen. Stat. § 7A-27(b)(3)(e) (2015), and more specifically, N.C. Gen. Stat. § 50-19.1 (2015), which provides that "[n]otwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for . . . child custody [or] child support . . . if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action." N.C. Gen. Stat. § 50-19.1.

Mother is correct that this order may be immediately appealable, since it adjudicates claims for custody and child support, even if equitable distribution remains unresolved. Yet she fails to address whether the order on appeal "would *otherwise* be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b)[.]" N.C. Gen. Stat. § 50-19.1 (emphasis added). The order, by its own terms, was not final as to Mother's visitation and set hearings to be held in 30, 60 and 90 days to address this issue after her mental health evaluation. We note that this Court has held similar orders, which set follow-up or review hearings to address issues of pending therapy or psychological evaluations, to be temporary, even though the order was entitled as a "permanent" custody order. *See Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) ("Although the 20 April 2005 order was entitled 'Permanent Custody' order, the trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court. Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo. As this Court has previously held, an order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues. In this case, the 20 April 2005 order meets both the second and third prongs of the test. There is no dispute that the trial court did not determine all of the issues before it since it did not decide Ms. Barbour's right to visitation. The order expressly stated that the 'issue of visitation' would be set for hearing only after the ordered psychological evaluations had been completed and specified that the trial court 'retain[ed] jurisdiction to determine the frequency and conditions under which the Defendant and her parents may visit with the minor child. . . .' The order provided for a hearing on 'this issue of visitation to be scheduled not later than July 15, 2005.' This date qualifies as a clear and specific reconvening time after a time interval that was reasonably brief." (citations, quotation marks, and brackets omitted)).

It seems that the order on appeal is quite similar to the order in *Smith*, since it provided for additional hearings, at "clear and specific reconvening time[s]" and did not address all of the issues, *id.*, just as in this case, where the trial court needed additional hearings to consider Mother's mental health evaluation and its effect upon her visitation. Here, however, another panel of this Court has previously ordered the relevant provisions of the 5 December 2014 order stayed, pending this appeal. As we are bound by that ruling, we will address Mother's appeal. *See*, *e.g.*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In addition, if we were to dismiss Mother's appeal, it would only add to the delay in establishing a final custodial schedule, much to Timothy's detriment.

III. Discussion

On appeal, Mother raises multiple issues with the trial court's order in relation to custody, child support, civil contempt, and attorney fees. We address the issues raised regarding each in separate sections below.

A. Custody

Mother raises at least six issues on appeal regarding the custody portion of the order, and we will address the second and third issues first, since they challenge the adequacy of the trial court's findings of fact and evidentiary support for the findings. If the trial court's findings are inadequate or not supported by evidence, they cannot support its conclusions of law, and the order would fail for that reason alone.

1. Recitations of testimony

Mother identifies 17 findings of fact, out of the 209 findings made by the trial court, which she argues are entirely or partly recitations of testimony which do not resolve the disputes raised by the conflicting evidence presented. She also argues that the order is "written in an unwieldly, haphazard style," citing to *Peltzer v. Peltzer*, 222 N.C. App. 784, 789, 732 S.E.2d 357, 361 (2012), in which we noted that an order was "written in a style perhaps best described as stream of consciousness." Here, Mother notes the repeated use of the words "testified," "indicated," "told," "asserts," and "believes" in those findings.

[2] We first address Mother's argument regarding the "haphazard" style of the order. This order is nothing like the equitable distribution order in *Peltzer*, in which findings were all mixed together and did not

"address the identification, classification, and valuation of the property and the distributional factors in any logical or organized manner[.]" *Id.* In this order, by contrast, the findings of fact are set out in separate sections entitled as follows: "Parties, Jurisdiction and Background"; "Arkansas Issues"; "DSS Involvement"; "School"; "Child Support (Permanent Support, Contempt and Motion to Reduce)"; "Difficulty in Mother Returning the Child"; "Miscellaneous"; "Attorney Fees"; and "Arrangements at Time of Hearing." Furthermore, in *Peltzer*, despite the haphazard style, we searched through the order and found that the trial court had made all of the findings required by the issues in the case and ultimately affirmed the majority of the order, other than remanding "for clarification of one of the trial court's findings of fact[.]". *Id.* at 798, 732 S.E.2d at 367. We do not require that orders have any particular style or organization, although a well-organized order is easier for everyone to understand. In any event, this order is reasonably well-organized. Thus, we reject this portion of Mother's argument.

[3] We also reject Mother's argument that the trial court's findings are merely recitations of evidence. She is correct that some of the findings recite portions of testimony of various witnesses and that the order uses the words noted above. In the interest of brevity, we will not quote large portions of the nineteen-and-a-half page, single-spaced, small-font order. Moreover, we note that Mother does not challenge the vast majority of the 209 findings.

Most of Mother's objections are from the portion of the order dealing with "DSS Involvement." The order does recite some of the testimony from social workers who interviewed Timothy and the parties regarding various reports of abuse. Since there were four DSS investigations during the course of the case, this evidence was extensive. The transcript of the entire trial comprises more than 1400 pages, and the Rule 9(d) supplement including exhibits from trial has 889 pages. To summarize very briefly, the order makes many findings which indicate repeated, persistent efforts by Mother to obtain custody of Timothy by accusing Father of being physically abusive, mentally unstable, and a "druggie." Therapists and social workers have had concerns that Mother was "coaching" Timothy to report abuse or bad behavior by Father. Although the findings of fact are certainly not entirely favorable to Father either, overall the trial court entirely rejected Mother's claims of child abuse, drug abuse, or uncontrolled mental illness. The trial court also very definitely resolved any conflicts in the evidence and determined that Mother was intentionally trying to alienate Timothy from Father. For example, the following findings are not challenged by Mother, at least as recitations of testimony:

178. Ms. Lueallen called Charlotte Mecklenburg Schools about two children being left unattended at Mr. Lueallen's football practice.

179. On April 20th, Ms. Lueallen texted Mr. Lueallen, "are you going to kill yourself and [Timothy] when you lose in court like you promised?" On December 24, Ms. Lueallen texted Mr. Lueallen, "maybe you are like Anakin Skywalker, are you at least a [sic] good a father as Vader?"

180. Ms. Lueallen paid a private investigator to go through Mr. Lueallen's trash, and paid for two drug tests on Mr. Lueallen.

181. Defendant Mother's efforts to destroy the Plaintiff Father and re-obtain custody have been persistent and on-going since September of 2013 and the child has demonstrated deterioration psychologically as a result.

182. Ms. Lueallen has incurred $70,000.00 to $80,000.00 in attorney's fees, including the Arkansas lawyer, private investigator and two North Carolina lawyers and has paid the lawyers $10,000.00 to $20,000.00.

183. Further, Mother's advancement of false claims of abuse have necessarily increased the costs of litigation, the number of witnesses necessary for trial to defend such accusations and the length of the trial as well.

184. The Court finds as a conclusion of law that the Defendant Mother has acted in bad faith.

. . . .

209. The Plaintiff Father has not physically abused the minor child.

The trial court also includes under "Conclusions of Law" in the order what are probably better characterized as ultimate findings of fact:

11. Plaintiff Father has never physically abused the minor child.

12. Defendant Mother's false belief that Plaintiff physically abused the child, and her baseless and false

> belief that Plaintiff Father is a "druggie" and an "alcoholic" has created an environment of investigation, physical, psychological and emotional that has created anxiety in the child and has not been in the child's best interest.

Overall, the findings of fact are not simply recitations of testimony, and they definitively find ultimate facts " 'sufficient for the appellate court to determine that the judgment [was] adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)). In addition, the findings " 'reflect a conscious choice between the conflicting versions of the incident[s] in question which emerged from all the evidence presented.' " *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) (quoting *In re Green*, 67 N.C. App. 501, 505 n. 1, 313 S.E.2d 193, 195 n. 1 (1984)). Mother's argument is without merit.

2. Evidentiary Support for Findings

[4] Mother also argues that "many findings lack competent evidentiary support." Mother identifies several findings which she claims are unsupported. First, she argues that "no competent evidence" supports Finding of Fact No. 181, which was as follows:

> 181. Defendant Mother's efforts to destroy the Plaintiff Father and re-obtain custody have been persistent and on-going since September of 2013 and the child has demonstrated deterioration psychologically as a result.

Her argument consists of noting portions of the testimony that are favorable to her and her interpretations of the evidence. She makes the same argument regarding Finding of Fact No. 183, and we reject it for the same reasons. Although there was conflicting evidence on many facts, as noted above, the trial court rejected Mother's interpretations of the evidence. The trial court evaluated the credibility and weight of the evidence and made findings accordingly.

> [A]s is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. Here, each parent testified to his

> or her version of the events which led to the above crucial findings of fact. The fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court. The findings are based largely on defendant's competent, and apparently credible, testimony and are thus binding on this Court.

Woncik v. Woncik, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (citations omitted).

Her other objections are mainly arguments that certain findings misstated evidence in minor ways. For example, she notes that in Finding of Fact No. 180, the trial court found that she paid for two drug tests of Father, but the evidence shows that *she paid* for only one and that DSS paid for the other. There is no dispute that he had two drug tests, both negative, and both inspired by Mother's claims that he was abusing drugs. Who paid for one of the tests is not dispositive. And even if she is correct and we were to ignore this particular finding, the remaining 208 findings would fully support the trial court's order. Her other arguments as to a few other findings are similar, noting minor misstatements in portions of findings or her favorable interpretations of various bits of evidence. We find that all of the findings of fact regarding custody were more than adequately supported by the evidence.

3. Decree Provisions 4 and 6

[5] Now that we have established that the findings of fact are sufficient, we will address Mother's first argument regarding custody, which is that "Decrees four and six of the custody decision contravene established precedent." She argues that Decree 4 "subjects [Mother] to a mandatory mental health evaluation/therapy process, the goal of which is to force her to believe the trial court's determinations that [Father] never abused substances or [Timothy.]" She also notes that the decree "commands [Timothy's] therapist to 'wholeheartedly' accept such determinations as true and thereby assess, *inter alia*, '[w]hat effect, if any the continued contact or exposure to [Mother], especially her belief that [Father] abused the child and abused substances, has had on [Timothy.]"

Mother cites *Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011) in support of her argument, noting that in *Peters*, this Court "vacated a decree equivalent to Decrees 4 and 6." The *Peters* case is factually somewhat similar to this one, in that after cooperating with each other regarding joint custody for approximately two years, the mother and father engaged in an extended, extremely contentious custody

dispute. *Id.* at 4-5, 707 S.E.2d at 729. The mother accused the father of sexually abusing the children and continued to insist that the children were being sexually abused even after investigations by law enforcement and DSS and an evaluation by a private therapist found the accusations to be unfounded. *Id.* at 5-7, 707 S.E.2d at 729-30. After a three-week trial, with over 24 witnesses, "including the parties, relatives and friends, school officials, law enforcement officers, DSS personnel, the boys' former and current therapists, and several expert witnesses[,]" the trial court's order addressed the "two central issues: (1) whether [the father] abused his sons and (2) whether [the mother's] actions in connection with her allegations of abuse were abusive and caused damage to the children." *Id.* at 7-8, 707 S.E.2d at 730. The trial court definitively found that the father had not sexually abused the children and that the mother's continued insistence that he had and her actions based upon this belief were abusive and had damaged the children. *Id.* at 8, 707 S.E.2d at 731.

The relevant portion of the order challenged in *Peters* was as follows:

> 5. Defendant/Mother shall obtain mental health treatment by a provider who shall read this Order in full, shall commit to wholeheartedly accepting that the findings contained herein constitute the reality of Frank and Dennis's lives and Defendant/Mother's role in fabricating sex abuse allegations, even though she may have genuine belief that such events occurred, and shall work towards Defendant/Mother's rehabilitation in acknowledging that Plaintiff/Father has not sexually abused the minor children and in taking responsibility for the damage she has caused to her sons. Defendant/Mother's therapy may include any other areas that the provider identifies.
>
> . . . .
>
> 7. The minor children shall continue in therapy with Dr. Curran and Ms. Duncan, who shall read this order in its entirety and commit to accepting it wholeheartedly as the facts constituting the false allegations of sexual abuse with respect to Frank and Dennis. Dr. Curran and Ms. Duncan shall determine what type of therapy the minor children need in light of these findings.

Id. at 9-10, 707 S.E.2d at 731.

The order in *Peters* also provided for future review of the mother's visitation based upon consideration of her progress in therapy and

compliance with the court's order. *Id.* at 10, 707 S.E.2d at 732. This Court concluded:

> [T]he trial court abused its discretion when fashioning [mother's] therapy. [Mother] is required by the 6 March 2009 order to acknowledge that [father] did not sexually abuse their children and accept as true the trial court's conclusion that she harmed her children. Thus, [mother] must force herself to believe that she implanted false images of sexual abuse in her children. Presumably, she must prove to a medical professional or counselor that she genuinely believes the trial court findings were correct before being certified as rehabilitated, which may be a prerequisite to obtaining significant visitation or any level of custody in the future. We hold this is an unwarranted imposition under these facts. Our objection to this requirement is that it mandates [mother] and the therapist attain a standard based upon [mother's] beliefs rather than her behavior. It would have been appropriate to require [mother] to demonstrate to the court that she would not engage in any behavior that suggests to the children that they were sexually abused. We believe this is best achieved through non-disparagement requirements and prohibitions on discussing these matters with the children, which are enforceable through the contempt powers of the trial court, including incarceration. It was an abuse of discretion to require [mother] to change her beliefs and prove to a counselor that such a change has in fact occurred. We therefore vacate paragraph 5 of the decretal portion of the 6 March 2009 order ("Decree 5") and remand the order to the trial court to enter a new order based upon [mother's] and her agents' ability to comply with existing court orders and demonstrate behavior that prevents harm to her children.

Id. at 21, 707 S.E.2d at 738-39.

The similarity of the provisions of this order and those in *Peters* is perhaps no coincidence. Father's counsel asked the trial court in the closing argument to "look at these cases and to seriously consider restricting Ms. Lueallen's access to supervised therapeutic settings," and then specifically identified *Peters* as a similar case factually, such that similar restrictions and therapy requirements should be imposed. Unfortunately, the trial court's order relied a bit too heavily upon

the wording of the challenged decrees from *Peters*. We agree that the provisions of Decrees 4 and 6 are substantially the same as the decree provisions vacated in *Peters*, and thus we must also vacate these provisions of the order. But this Court's additional observations in *Peters* also apply to this case:

> However, we note that [mother's] conduct placed the trial court in a difficult position. The court specifically ordered the parties not to disparage one another or to discuss the case with the children. It found, based on competent evidence, that [mother] willfully ignored these rulings, which were designed to protect the integrity of the judicial process and to protect the children from harm. The trial court likely concluded non-disparagement requirements and other tools would have been of little future value as a restraint on [mother.] The court's skepticism was justified, not only by [mother's] actions in taking the children to therapy with Dr. Tanis before a guardian *ad litem* was appointed, but also by her affidavits in which she documented her conversations with the children about the specific topics the court had restrained her from discussing with the children.
>
> Nevertheless, we hold it was error to require [mother] prove to her therapists that her beliefs about the factual underpinnings of the case had changed. While the trial court properly vested authority in medical professionals to determine when supervised visitation was appropriate, the court went too far in dictating the specifics of the therapists' work. [Mother's] actual behavior -- and not her subjective beliefs over what occurred in the case -- should have been the critical focus for evaluating when visitation was appropriate.

Id. at 22, 707 S.E.2d at 738-39.

Mother is correct that the trial court cannot order her to "believe" that Father is not physically abusive and that he does not abuse drugs. Yet what a trial court can, and must, do is make findings of fact regarding events which happened in the past and order parties to take certain actions based upon those facts. In nearly every disputed case, one party claims that an event happened, and the other party claims that the event either did not happen or happened differently than claimed by the other party. The trial court must determine which of the competing versions

of the past event is correct, and based upon that determination must order the appropriate action. In a certain sense, every court order requires all of the parties to the case to accept a particular version of the past events, at least to the extent that the parties must *act* in accord with the order or suffer consequences of contempt or other penalty.

On remand, the trial court shall "reform the therapeutic requirements placed on [Mother] in accordance with this opinion." *Id.* at 29, 707 S.E.2d at 743. The trial court's order may not require Mother or a therapist to "wholeheartedly accept" or believe anything and cannot evaluate Mother's progress by her beliefs, but it can require them to conform their behavior and speech when dealing with Timothy fully in accord with the trial court's findings and conclusions. The trial court properly ordered Mother to have a "mental health evaluation from a licensed psychologist" to assess any need for additional therapy. In addition, the trial court ordered that Timothy continue with his current therapist and that Mother read the order and "commit to accepting it wholeheartedly as the facts constituting the false allegations of physical and substance abuse with respect to the minor child[.]"

On remand, the trial court may again order a mental health evaluation of Mother and continuing therapy for Timothy, without the offending language identified in *Peters*. As a practical matter, we would note that any mental health evaluation of Mother will be useless to the trial court if Mother simply repeats her allegations again to the psychologist and the psychologist accepts Mother's claims as true. In fact, if the psychologist accepts Mother's claims as true, the psychologist will be bound by law to make yet another report to DSS of Father's alleged abuse, since a report is *required* by N.C. Gen. Stat. § 7B-301(a) (2015). Mother even acknowledged that she was aware of this legal duty to report any allegations of abuse based upon her training as a teacher. And testimony of Timothy's therapist, Kristin Montanino, reveals that several of the DSS investigations began based upon reports which the therapist made because of what she heard from either Timothy or Mother.

Additional reports of allegations of abuse based upon the same things would simply perpetuate the cycle of DSS investigations needlessly, to Timothy's detriment. The trial court in *Peters* was attempting to end a similar cycle of investigations of repeated, unfounded allegations of sexual abuse. If Timothy's therapist were to accept Mother's version of the facts, she would also be legally bound to make additional reports to DSS and to conduct therapy accordingly, which would likely only add to the harm to Timothy. Thus, it is entirely appropriate for the trial court to require an evaluator or therapist for either party or the child to

read the court's orders so that they will be aware of the background in which the evaluation or therapy has been ordered, and they will be able to make an informed professional judgment about whether there is any need for a new report of abuse to DSS[5]. It is also appropriate for the trial court to order that a particular therapist who is conducting therapy based upon Mother's version of the facts instead of those established by the trial court to cease treating the child, to avoid further confusion and harm. And although Mother may continue to believe anything she likes, the trial court can take into account Mother's continued insistence on her version of the facts and the futility of any evaluations or therapy based upon her version of the facts, which unfortunately could result in a visitation order that restricts Mother's visitation even more.

4. Abuse of Discretion in Custody Order

[6] Mother argues that the "custody decision manifests an abuse of discretion" mainly because "the trial court stripped [Mother] of all legal custody -- and nearly all physical custody -- of [Timothy] based solely on her beliefs about [Father's] conduct."

"A trial judge's decision will not be upset in the absence of a clear abuse of discretion if the findings are supported by competent evidence." *Phillips v. Choplin*, 65 N.C. App. 506, 511, 309 S.E.2d 716, 720 (1983). Furthermore,

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. 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.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

As we have determined above, the trial court's findings of fact were supported by the evidence. Mother also argues very briefly -- just three sentences, with one cite to *Peters* -- that the findings of fact do not support the trial court's conclusion that it is in Timothy's "best interest for

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5. In particular, any new therapist who is not familiar with the history of this family needs to be able to determine if some information from Mother or Timothy is related to an incident or issue already addressed by the court's order, or if something new and different has happened that may actually need to be reported. The therapist is not required to "believe" anything but does need to be fully aware of the prior allegations and the trial court's determinations regarding those allegations.

[Father] to have sole legal custody" and "primary physical custody." Mother points out evidence favorable to her, and the trial court made findings regarding much of this evidence. She did travel from Arkansas to visit many times and consistently ate lunch with Timothy at school. The trial court found that Timothy "seemed to enjoy" these lunch visits -- although the trial court also noted that she "sometimes violated the seating policy" but would move when asked. The trial court also noted that "[i]t was unusual that on about fifty (50) percent of occasions [Timothy] sat on his mother's lap."

Mother's argument also notes that Father "frequently holds long hours as a football coach" and notes other evidence negative to him. Again, we will not quote large portions of the 209 findings of fact, but the findings do support the trial court's conclusion. Mother's argument asks us to re-weigh the voluminous evidence and to draw inferences in her favor instead of Father's, but that is the trial court's role, not ours. The order includes extensive findings regarding the strengths and weaknesses of both parties as parents and regarding the effects of the protracted bickering and strife and repeated investigations of alleged abuse on Timothy. The trial court did address Mother's beliefs about Father but based its order on her actions -- which are most likely motivated by her beliefs, as are most of any person's actions -- that "created an environment of investigation, physical, psychological and emotional that has created anxiety in the child and has not been in the child's best interest." The trial court, in its discretion, weighed all of the evidence and determined that Father is a "fit and proper person to have primary physical custody" and "sole legal custody" of Timothy and that this arrangement would be in his best interest. We cannot discern any abuse of discretion in the trial court's ruling.

B. Child support

[7] Mother's next arguments address the child support order. Mother first argues that "the trial court wrongfully imputed income to [Mother.]" The trial court ordered Mother to pay $616.68 per month as permanent child support, based upon Worksheet A of the North Carolina Child Support Guidelines. As Mother argues, the trial court "seemingly imputed income to her in the annual amount of $47,000.00," since she was unemployed at the time of trial. Mother also notes that the record does not include a child support worksheet which shows the child support calculation, and from the findings in the order, it is unclear exactly how the trial court calculated the obligation.

Before we address the argument as to imputation of income, we note that we also have been unable to determine exactly what numbers

the trial court used to set the child support obligation. As this Court has previously noted, "[t]he better practice is for an appellant to include the Guidelines worksheet in the record on appeal." *Hodges v. Hodges*, 147 N.C. App. 478, 483 n.1, 556 S.E.2d 7, 10 n.1 (2001). We do not know whether Mother or the trial court is responsible for the missing worksheet, since we have no brief from Father; but in any event, we cannot review the calculation without sufficient information. The trial court's findings of fact regarding the numbers needed to set child support were as follows:

	Monthly amount	Finding No.
Father's monthly income	$4210.87[6] or $3590.91	102 or 95
Health insurance premium costs	243.27	98
Work-related day care costs	$113.00	97[7]
Mother's income	$3916.67	106 (Mother "anticipates if hired in a teaching position she would earn $47,000.00 per year.")

The findings of fact are supported by the evidence, but when we calculate child support using these numbers in Worksheet A based upon the Child Support Guidelines in effect at the time of the trial, we do not get a child support obligation for Mother of $616.68 or any number close enough that we can trust our calculation to be the same as the trial

6. Some of the confusion comes from the length of the trial, which began on 10 February 2014, during the 2013-14 school year. The trial court's Finding of Fact No. 95 found "[Father's] current income is $3590.91 per month." (Emphasis added). This was Father's income during the trial. The trial ended on 1 August 2014. Finding of Fact No. 102 states that "[Father's] salary *will be* $48,492.20 per year plus $2,038.30 as an assistant coach." (Emphasis added.) He was to begin a new position with the Charlotte-Mecklenburg schools as of 19 August 2014, with an annual income for the 2014-15 school year of $48,492.20. Thus, by the time of the entry of an order, Father would be receiving the greater income.

7. In Finding of Fact No. 97, the trial court found that Father pays $35.00 per week for afterschool care. We have assumed 4.3 weeks per month, for nine months of the school year, to calculate a monthly total, but we also realize that since Father is a teacher and coach his need for after-school care may vary from the usual.

court's, whether we use the greater or lesser income for Father from the findings of fact. We are therefore unable to review the trial court's calculation of child support and must remand for the trial court to re-calculate child support and to set out the values used in the calculation. The trial court should also attach Worksheet A to any order regarding child support issued on remand.

1. Imputed Income

[8] We now return to the question of whether the trial court erred by imputing income to Mother. Even if the exact numbers used in the child support calculation are uncertain, the trial court did clearly impute income to Mother, since she was unemployed and had no income at the time of trial.

The North Carolina Child Support Guidelines state:

> If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.

The primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or

> (8) intentionally leaving his employment to go into another business.
>
> The situations enumerated . . . are specific types of bad faith that justify the trial court's use of imputed income or the earnings capacity rule.

Mason v. Erwin, 157 N.C. App. 284, 288-89, 579 S.E.2d 120, 123 (2003) (citations and quotation marks omitted).

Mother argues that the trial court's imputation of income "rests entirely upon the finding that she last applied for a job in Mecklenburg County three years' prior." Mother also notes evidence that she "persistently pursued employment after her substitute teaching job" ended in May 2013 and that she had some brief periods of temporary employment. Mother is correct that there was evidence of her efforts to obtain a new job, but the evidence also supports the trial court's determination that she was acting in disregard of her child support obligation. The determination was based only in part on the fact that Mother had not applied for a job in Mecklenburg County in the past three years.

The trial court identified other factors as well. And the trial court may have considered her failure to apply for jobs in Mecklenburg County particularly telling, since she alleged in her verified motion to modify child support, filed on 3 July 2013, that she was "*currently actively seeking employment* as a teacher in both the elementary and middle school levels *in both Union County and Southern Mecklenburg County*." (Emphasis added). At trial over a year after she filed this verified motion, she had actually *not* sought employment in Mecklenburg County in "three years" as found by the trial court -- contrary to her motion. In addition, there was extensive testimony at trial regarding Mother's educational and professional qualifications and her work history. It was not unreasonable to expect her to seek employment in Mecklenburg County, based on her own verified statement that she was actually doing so. In addition, she had taught in the Mecklenburg County schools in the past, before taking her more recent teaching job in Union County which she resigned prior to her move to Arkansas.

Here, the order also notes at least two of the factors identified by *Mason* which can support the trial court's conclusion that Mother acted in bad faith and intentionally suppressed her income and imputation of income. One factor is that a parent " 'intentionally leav[es] his employment to go into another business' " *Id.* at 289, 579 S.E.2d at 123 (quoting *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002)). Here, the trial court found that Mother "resigned her employment with Union

County Schools . . . effective June 21, 2012." She quit this job "without having another job lined up." She also left her job in Arkansas to move back to North Carolina. She did get a job after that, but it was temporary, and she had minimal income from a brief "customer service job" and as a substitute teacher. In addition, the trial court considered that Mother was " 'refusing to seek or to accept gainful employment.' " *Id.* (quoting *Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519). The trial court made the following findings of fact and related conclusion of law:

> 106. Ms. Lueallen has interviewed for jobs and anticipates if hired in a teaching position she would earn $47,000.00 per year.
>
> . . . .
>
> 115. Ms. Lueallen last applied for a job at Charlotte Mecklenburg Schools three (3) years ago.
>
> . . . .
>
> 117. The Defendant Mother has had the means and ability to comply with the prior orders of the court, has failed to look for a job in the largest county neighboring the county of residence of the Defendant Mother and the court finds that she has failed to exert the necessary effort to obtain employment and the court finds that she has willfully suppressed her income to avoid her child support obligation.
>
> . . . .
>
> Conclusions of Law:
>
> . . . .
>
> 8. The Defendant Mother has had the means and ability to comply with the prior orders of the court, has failed to look for a job in the largest county neighboring the county of residence of the Defendant Mother and the court finds that she has failed to exert the necessary effort to obtain employment and the court finds that she has willfully suppressed her income to avoid her child support obligation.

As noted by *Mason*, "[t]he primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Id.* (quotation marks omitted). The trial court made several findings about

Mother's failure to pay any child support at all during some time periods when she did receive income or unemployment compensation. The trial court also found that Mother had "regularly eaten at fast food restaurants" during some months when she paid no child support.

Mother could have paid some amount of child support during these months, even if far less than required by the temporary child support order, but she chose to pay nothing, which is relevant to determining her motivation and bad faith. The trial court found further that Mother "has incurred $70,000.00 to $80,000.00 in attorney's fees, including the Arkansas lawyer, private investigator, and two North Carolina lawyers and has paid the lawyers $10,000.00 to $20,000.00." In fact, Mother testified that she had paid $10,000.00 to $20,000.00 of the fees, totaling up to $80,000.00; her mother had paid "in the ballpark" of $50,000.00 to $60,000.00, but she had not obtained any financial assistance from anyone to pay any child support. The trial court may well have doubted Mother's motivations when she paid up to $20,000.00 in attorney fees and obtained assistance to pay up to $80,000.00, during a time when she went many months without paying even one dollar toward her child support obligation.

The trial court also made findings which more directly address Mother's motivations:

> 100. Ms. Lueallen has told Mr. Lueallen, "I am a mom and moms don't pay child support."
>
> 101. In regards to Ms. Lueallen reducing her child support, she has stated, "I've not got unemployment since December so child support should be $50.00 per month.["]
>
> . . . .
>
> 207. In the past, when [Timothy] has been placed in the custody and care of Ms. Lueallen she has demanded that Mr. Lueallen pay babysitting fees.

The trial court also concluded, in regard to bad faith:

> 14. The Court finds as a conclusion of law that the Defendant Mother has acted in bad faith.

The findings support the trial court's conclusions that Mother was willfully suppressing her income to avoid her child support obligation and that she was acting in bad faith. The trial court properly imputed income to Mother. On remand, when recalculating child support as

noted above, the trial court should use the imputed income, which we believe to be $47,000.00 annually, but the trial court should make the actual amount used clear in its findings and calculations.

2. Amount of Child Support Arrearage

[9] Mother next argues that "the findings of fact do not support the arrearage decree." The trial court set the total child support arrearages at $7,314.43, and this number includes $616.68 which "came due on November 1, 2014." We also note that the trial ended on 1 August 2014. It is impossible for the trial court's determination as to arrears accrued *after* the trial ended to be based upon the evidence presented *at* trial, nor could it be supported by the record on appeal. On remand, the order may address any arrears accrued up to the last day of trial, based on the evidence presented at trial. We also realize that there may have been communications between counsel and the trial court regarding the November child support payment and an agreement to include this month to avoid the expense of an additional hearing or order. Unfortunately, our record does not reflect any such agreement, and we have no brief from Father, so the trial court can correct this calculation on remand.

[10] Mother also argues that five of the factual findings of amounts of child support owed and paid in various months do not add up to the amount ordered as arrears, and the months after April 2014 seem to have been omitted. We are not entirely sure if any months were omitted from the trial court's calculations, since one again, we cannot get the math to work.

By our calculations, based upon the trial court's findings of fact, the arrears owed as of the last day of trial would be $6797.75, and the trial court did specifically and erroneously include at least one month after the trial ended. On remand, the trial court should clearly set forth the calculation of arrears. We would suggest that a table showing the calculation would be helpful. Purely as a practical matter, it is easier to avoid mathematical errors when the numbers can be totaled in columns instead of having to hunt for numbers paid and owed and dates scattered throughout 19 single-spaced, small-font pages of findings.

C. Civil Contempt for Failure to Pay Temporary Child Support

[11] In addition to establishing permanent custody and support, the trial court also heard Father's motion to show cause for failure to comply with the order in the child support action, filed on 23 May 2014. An

order to show cause was issued to Mother, requiring her to appear on 2 June 2014 for a hearing. The motion alleged that Mother owed arrears of $4,498.35 as of 13 May 2014. The trial court heard the motion along with the other matters during the trial.

1. Failure to Pay

Mother argues that "the trial court reversibly erred in holding [Mother] in civil contempt" because her failure to pay was not willful, based upon her periods of unemployment.

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.
>
> However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted).

Mother's primary argument regarding civil contempt is that the evidence did not support the trial court's finding that she had the ability to comply with the subject order yet willfully failed to do so. She argues that she was "unemployed for significant periods of time after her substitute teaching position at New Town Elementary School ended in May 2013" and that although she received some unemployment compensation and earnings from temporary jobs intermittently, the income did not allow her to pay her living expenses and her temporary child support obligation of $574.85. Thus, she argues that her failure to pay was not willful and that she did not have the ability to comply.

The temporary child support order was entered on 25 June 2013, although it was based upon a hearing which ended on 22 April 2013. Mother was ordered to pay $574.85 beginning on 1 June 2013. In the temporary child support order, the trial court found that Mother was

employed at New Town Elementary School[8] "through the rest of this year as a contract teacher filling in for a teacher who is out on maternity leave." Thus, by the time the temporary order was entered by the court, Mother's temporary job at New Town Elementary had already ended, in May 2013. On 3 July 2013, Mother filed a motion to modify child support, alleging that her job had ended so she was receiving unemployment compensation. She also alleged that she "is currently actively seeking employment as a teacher in both the elementary and middle school levels in both Union County and Southern Mecklenburg County school districts in the hopes of obtaining a job and maximizing her income potential." The order on appeal, in addition to finding her in contempt, specifically denied this motion to modify.

As discussed above, we have already determined that the trial court's findings were supported by the evidence. The trial court properly concluded that Mother had "willfully suppressed her income to avoid her child support obligation." In addition, we have determined that the trial court properly imputed income to Mother and concluded that she acted in bad faith based on her failure to make reasonable efforts to obtain a new full-time position.

The trial court's conclusions of law regarding Mother's willful failure to pay child support and her ability to comply are supported by the findings of fact.

> Our State's case law reveals a well-established line of authority which holds that a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order. A contrary rule would permit a supporting spouse to avoid his or her obligations by the simple means of expending assets as he or she pleased, and then pleading inability to pay support, thereby insulating him or herself from punishment by an order of contempt.

Shippen v. Shippen, 204 N.C. App. 188, 190-91, 693 S.E.2d 240, 243-44 (2010) (citations and quotation marks omitted).

For these reasons, Mother's argument is without merit.

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8. One finding in the temporary order states that New Town Elementary is in Arkansas, but from the evidence and other findings we believe that this was a clerical error, as the evidence shows that New Town Elementary is in Union County, North Carolina.

2. Purge Conditions

[12] Mother next argues that the purge conditions of the order are not supported by the findings of fact and conclusions of law. The trial court ordered that Mother "shall purge herself of said contempt by payment of an additional $75.00 per month through Centralized Collections, which shall also be applied towards her arrears."[9] The order does not specify when the purge payments end.

As noted above, we are remanding for the trial court to recalculate the child support obligation and child support arrears. For this reason alone, we would have to vacate this portion of the order, since the amounts may be different on remand and the trial court would need to set new purge conditions, based upon appropriate findings of fact and a conclusion of law as to Mother's ability to purge herself of contempt. As also noted above, we are not entirely certain of the income which the trial court imputed to Mother.

This Court recently vacated an order which did not set any ending date for payments to purge contempt in *Spears v. Spears*, __ N.C. App. __, 784 S.E.2d 485 (2016). In *Spears*, the order held the defendant in contempt and required the defendant to make purge payments of an additional $900.00 per month "over and above" the ongoing child support and alimony obligations set by the order. *Id.* at __, 784 S.E.2d at 488. The *Spears* plaintiff countered that

> the absence of an ending date for the monthly payment of $900.00 "over and above" the February 2013 Order's obligations indicates that this additional payment is simply a monthly payment towards the arrears of $12,770.80, which would end on a definite date when the arrears were paid in full. (Plaintiff contends that the $900.00 monthly payments would satisfy the first purge condition in "just over 14 months" since "$12,770.80 delinquency ÷ $900.00 additional payment = 14.189 months)." This is a reasonable argument, but it might be more convincing if the amount paid each month would divide evenly by a number of months. By plaintiff's logic, the order implies that defendant must pay $900.00 for fourteen months and 18.98 percent of that amount in the fifteenth month, or $170.80.

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9. On top of that, the order *also* required Mother to pay $100.00 per month toward arrears, in addition to her ongoing child support obligation of $616.68. Thus, the order required a total monthly payment of $791.68.

> Even if this was the trial court's intent, the order is impermissibly vague as written. Accordingly, we hold that the trial court erred in failing to establish a definite date by which defendant could have purged himself of the contempt. We also note that in the Order on Purge Condition Noncompliance, the trial court repeated this error when it ordered that defendant's "civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court."

Id. at __, 784 S.E.2d at 501 (citations omitted).

Here, as in *Spears*, the purge conditions are impermissibly vague. Even if the $75.00 per month is applied toward arrears, the ending date is uncertain. We vacate the purge conditions and direct that the trial court enter new conditions on remand, consistent with this opinion.

D. Attorney Fees

[13] Finally, Mother argues that "the trial court reversibly erred in awarding [Father] $20,000.00 in attorneys' fees" because "the findings of fact do not support the award." The trial court's findings of fact regarding attorney fees are limited as they address only the total amounts billed by Father's counsel in North Carolina and Arkansas; Father's inability to pay all of his attorney fees and that he had to borrow money; and that he "brought this action in good faith and does not have the means and ability to defray the costs of this action, which has been greatly increased due to the false allegations made by [Mother.]"

The order fails to make any findings regarding the reasonableness of the attorney fees as required by law. Although the trial court found that Father was acting in good faith and has insufficient means to defray the expense of the suit, as required by N.C. Gen. Stat. § 50-13.6, the order failed to make any findings as to " 'the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.' " *Smith*, 195 N.C. App. at 255, 671 S.E.2d at 586 (quoting *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986)). It is necessary that the record contain findings regarding these factors in order to determine whether an award for attorney fees is reasonable, and "[i]f these requirements have been satisfied, the amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Id.* (quotation marks and brackets omitted).

The parties offered detailed affidavits regarding attorney fees, so on remand the trial court must also make additional findings of fact addressing " 'the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers' " in support of its award of attorney fees. *Id.* (quoting *Cobb*, 79 N.C. App. at 595, 339 S.E.2d at 828).

IV. Conclusion

For the reasons stated above, we affirm the portions of the trial court's order addressing custody, with the exception of Decree provisions 4 and 6, which must be vacated and rewritten on remand. In addition, we vacate portions of the order regarding calculating child support and arrears and remand for recalculation of those amounts and so that the trial court may set out in more detail the numbers used in making those calculations. We also find that the purge conditions in the order are impermissibly vague and therefore must be redefined more precisely on remand. Finally, we remand for additional findings of facts regarding the award of attorney fees.

On remand, since portions of the order on appeal are vacated and the trial court will be entering a new order -- and must be able to make findings and conclusions as to Mother's present ability to comply with the obligations set by the order, including any purge conditions for contempt -- the court shall, upon timely written request from either party, hold an additional hearing to address the order on remand. Evidence and argument presented at this hearing shall be limited to evidence necessary for the purposes as noted in this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and DIETZ concur.

MANNISE v. HARRELL

[249 N.C. App. 322 (2016)]

ASHLEY MANNISE, PLAINTIFF
v.
STEPHEN J. HARRELL, DEFENDANT

No. COA16-42

Filed 6 September 2016

1. Appeal and Error—preservation of issues—notice of appeal—after oral ruling, before entry of order

Defendant's notice of appeal was treated as a petition for writ of certiorari and the writ was issued where defendant filed his notice of appeal after the trial court's oral ruling, but before the written order was entered.

2. Appeal and Error—interlocutory appeals—motions to dismiss for lack of jurisdiction denied

In a case arising from a Domestic Violence Protective Order, an appeal from the denial of defendant's motion to dismiss for lack of personal jurisdiction was properly before the Court of Appeals, but the appeal from the denial of the motion to dismiss for lack of subject matter jurisdiction was not. N.C.G.S. § 1-277(b) allows for the immediate appeal of the denial of a Rule 12(b)(2) motion, but not for the immediate appeal of the denial of a Rule 12(b)(1) motion.

3. Jurisdiction—personal—one telephone call—no evidence of location

The trial court erred in a case arising from a Domestic Violence Protective Order by denying defendant's motion to dismiss for lack of personal jurisdiction where the evidence did not provide the trial court with any basis for asserting personal jurisdiction. The trial court found personal jurisdiction as a result of a single phone call, but plaintiff's complaint was wholly silent on the issue of plaintiff's location when she received the alleged threat, or whether it was communicated by phone or otherwise.

4. Domestic Violence—protective order—personal jurisdiction

Plaintiff was required to prove that personal jurisdiction existed over defendant in an action concerning a Domestic Violence Protective Order.

Appeal by defendant from order entered 26 October 2015 by Judge Paul A. Holcombe, III in Harnett County District Court. Heard in the Court of Appeals 9 August 2016.

Carver Law Firm, PLLC, by Baccuhus H. Carver, for plaintiff-appellee.

Levy Law Offices, by Joshua N. Levy, for defendant-appellant.

TYSON, Judge.

Defendant, Stephen J. Harrell, appeals from the trial court's order, which denied his motion to dismiss Ashley Mannise's complaint ("Plaintiff"). We reverse the trial court's order.

I. Background

Plaintiff and Defendant are the unmarried parents of a child, who was five years old when this action commenced. On 8 September 2015, Plaintiff filed a *pro se* Complaint and Motion for a Chapter 50B Domestic Violence Protective Order in the Harnett County District Court. Plaintiff asserted she was a resident of Harnett County. She listed Defendant's address in Butler, Pennsylvania.

Plaintiff alleged Defendant had threatened her life on 6 September 2015, two days prior to the filing of the complaint, because she was "moving out of state with [their] son." She asserted Defendant had hit her, yelled at her, and made her cry in front of the child in the past. Plaintiff also alleged Defendant had beat her with a chair and chased her around the house with a gun in October 2013, while her children were present. Plaintiff's complaint does not allege she was a resident of North Carolina at the time of any of these allegations, or any actions took place while she or Defendant were physically present in North Carolina.

An Affidavit as to Status of Minor Child was attached to the complaint. The affidavit states the parties' child resided with Plaintiff in Pennsylvania from August 2012 until September 2015, and with Plaintiff in Lillington, North Carolina from 6 September 2015 until the filing of the complaint two days later.

Based upon these allegations, the trial court issued an Ex Parte Domestic Violence Order of Protection on 8 September 2015. *See* N.C. Gen. Stat. § 50B-2(c)(5) (2015) ("Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later.").

The trial court found Defendant had placed Plaintiff in fear of imminent serious bodily injury on 6 September 2015. The court stated, "[t]he

allegations in the Complaint are incorporated herein by reference." The court did not make any factual findings that any of the alleged events occurred within North Carolina, or while Plaintiff was a resident of North Carolina.

On 15 September 2015, Defendant filed a motion pursuant to Rules 12(b)(1) and 12(b)(2) to dismiss Plaintiff's complaint. Defendant argued the trial court did not have personal jurisdiction over him under Rule 12(b)(2), because he did not live in North Carolina during any times referenced in the complaint, and had not taken any action to subject himself to the jurisdiction of the North Carolina courts. Defendant also asserted Plaintiff failed to allege Defendant had taken any action or made any contacts while either party was physically present in North Carolina.

Defendant's motion also alleged the trial court lacked subject matter jurisdiction under Rule 12(b)(1). He argued Plaintiff made no allegations regarding any actions by Defendant within North Carolina, or any injury she suffered while in North Carolina.

In support of his motion to dismiss, Defendant filed an affidavit and stated he was a resident of North Carolina from 1998 until August 2012. Plaintiff and Defendant both moved together to Pennsylvania in August 2012, where they resided together until November 2013, when they ended their relationship. Defendant's affidavit states he has not been a resident of North Carolina since August 2012, when he became a resident of Pennsylvania.

On 26 October 2015, the trial court denied Defendant's motion to dismiss, and concluded North Carolina's courts have personal and subject matter jurisdiction over the parties. Even if personal jurisdiction is lacking, the court concluded Defendant's motion to dismiss should be denied "to the extent that the plaintiff should be allowed to seek a prohibitory order serving to protect her from further acts of domestic violence but without any provisions requiring the defendant to undertake any actions." Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his motions to dismiss Plaintiff's complaint, where the trial court lacked personal and subject matter jurisdiction.

III. Notice of Appeal

[1] Neither party has raised an issue regarding Defendant's notice of appeal. Defendant's motion to dismiss was heard and orally ruled upon

on 15 September 2015. Thereafter, on 7 October 2015, Defendant filed notice of appeal. The trial court's written order was signed and filed on 26 October 2015, more than a month after Defendant had filed notice of appeal. Defendant did not file an amended notice of appeal. The trial court's order states, "Date Entered: 15 September 2015[,] Date Signed: 26 October 2015." Defendant filed notice of appeal subsequent to the date the order was orally rendered, but before the order was reduced to writing, filed, and entered.

Rule 3 of the North Carolina Rules of Appellate Procedure governs the notice of appeal in civil cases. The rule provides the appellant must file and serve notice of appeal "within thirty days after *entry* of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure," or "within thirty days after *service* upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C. R. App. P. 3(c)(1) and (2) (2015) (emphasis supplied).

In civil cases, a judgment is "entered" when it is "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2015). " 'When [the trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal.' " *Griffith v. N.C. Dep't of Corr.*, 210 N.C. App. 544, 549, 709 S.E.2d 412, 416-17 (2011) (quoting *Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001)). " 'The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction.' " *Id.* at 549, 709 S.E.2d at 417 (quoting *Worsham v. Richbourg's Sales & Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996)).

Here, the trial court's order was "entered" when it was reduced to writing, signed, and filed with the clerk of court on 26 October 2015. An entered order did not exist when Defendant filed notice of appeal on 7 October 2015. *See id.* Defendant did not file a subsequent or amended notice of appeal following entry of the order.

On 13 October 2015, the trial court entered the following order: "Defendant filed a Notice of Appeal on 10-7-2015 as to the Court overruling defendant's Motion to Dismiss on 9-15-2015 (oral rendering). Although the written order has not been signed, defendant's intention is clear and the parties agree to continue the case to 2-2-2016." Defendant has failed to take timely action to perfect his appeal pursuant to Appellate Rule 3, and his appeal is not properly before this Court. N.C. R. App. P. 3(c).

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a) (2015). Defendant has not filed a petition for writ of certiorari.

In the exercise of our discretion, we invoke Rule 2 to suspend the Rules of Appellate Procedure, treat Defendant's notice of appeal and brief as a petition for the issuance of a writ of certiorari to review the issues Defendant has raised in his brief, and issue the writ. N.C. R. App. P. 2; *see Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 545, 701 S.E.2d 325, 338-39 (2010) (electing to treat the record and briefs as a petition for the issuance of a writ of certiorari where consideration of the issue on the merits would expedite the ultimate disposition of the case).

IV. Interlocutory Appeal

[2] Plaintiff instituted this purported action on 8 September 2015 by the filing of a complaint and motion for a Chapter 50B domestic violence protective order. Later that day, the district court entered an *ex parte* domestic violence protective order, effective until 15 September 2015. Defendant filed his motion to dismiss on 15 September 2015. On that date, the court denied Defendant's motion, but did not rule upon Plaintiff's complaint.

Defendant appeals from the trial court's interlocutory order, which denied his motion to dismiss Plaintiff's complaint for lack of personal and subject matter jurisdiction. Defendant argues on appeal the trial court lacked subject matter jurisdiction, because Plaintiff attempts to plead a claim for custody of the parties' child, and North Carolina is not the home state of the child. "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007).

Defendant acknowledges his appeal is interlocutory, but asserts the district court's order is immediately appealable to this Court pursuant to N.C. Gen. Stat. § 1-277(b). Defendant's statement is partially correct.

The appeal from the trial court's denial of Defendant's motion to dismiss for lack of personal jurisdiction is properly before us. N.C. Gen. Stat. § 1-277(b) (2015) ("Any interested party shall have the right of *immediate appeal* from an adverse ruling as to the jurisdiction of the court over the *person* or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." (emphasis supplied)).

It is well-established N.C. Gen. Stat. § 1-277(b) allows for the immediate appeal of a denial of a Rule 12(b)(2) motion, but not for the immediate appeal of a denial of a Rule 12(b)(1) motion for lack of subject matter jurisdiction. *See, e.g.*, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). Defendant's issue regarding subject matter jurisdiction is interlocutory and not immediately appealable. In light of our holding, we need not address any issue of subject matter jurisdiction.

V. Personal Jurisdiction

[3] Defendant argues the trial court erred by denying his motion to dismiss. Defendant asserts the record evidence does not provide the district court any basis to assert personal jurisdiction over him. We agree.

A. Standard of Review

> "When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record;' . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694- 95, 611 S.E.2d 179, 183 (2005)(quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights. *Id.* at 141, 515 S.E.2d at 48 (stating that "it is this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants' due process rights").

Deer Corp. v. Carter, 177 N.C. App. 314, 321-22, 629 S.E.2d 159, 165 (2006).

B. Analysis

A two-prong analysis is employed to determine whether North Carolina courts may exercise personal jurisdiction over a non-resident defendant, consistent with constitutional due process. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process

clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986).

North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, provides for a court's assertion of personal jurisdiction. The statute provides, in pertinent:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to [Rule 4] of the Rules of Civil Procedure under any of the following circumstances:
>
> (1) Local Presence or Status. -- In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State; or
>
> b. Is a natural person domiciled within this State; or
>
> c. Is a domestic corporation; or
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1) (2015). The statute also sets forth circumstances under which North Carolina courts may assert personal jurisdiction in actions claiming injury to person or property, or for wrongful death. N.C. Gen. Stat. § 1-75.4(3)-(4) (2015).

The degree of contacts required for North Carolina courts to exercise personal jurisdiction over an out of state individual defending a claim for a domestic violence protective order is an issue of first impression in our Court. The facts asserted in Plaintiff's complaint do not comply with any provision set forth in the long-arm statute to enable the trial court to invoke personal jurisdiction over Defendant. *Id.*

Chapter 50B contains no provision that requires the underlying act or acts of domestic violence to have occurred in this State. Courts in other jurisdictions have taken various approaches to this issue. The trial court's order cites and sets forth two different bases to find personal jurisdiction from other jurisdictions. The court found:

> 8. The plaintiff alleged in paragraph 4 of her complaint that the defendant threatened her life. When taken in

> conjunction with the plaintiff's statements on the Affidavit as to Status of Minor Child, it is reasonable to infer that the threat was received in North Carolina, as this was her first day of residence in this state. Further, counsel for the plaintiff forecast that the threat was made over the telephone after the plaintiff was physically in the State of North Carolina.

The court concluded it had acquired personal jurisdiction over Defendant and cited an opinion of the New Jersey Superior Court, Appellate Division, *A.R. v. M.R.*, 351 N.J. Super. 512, 520, 799 A.2d 27, 32 (2002) ("In light of the parties' historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge, the telephone calls were tantamount to defendant's physical pursuit of the victim here.").

In the alternative, the trial court concluded:

> 3. [E]ven if personal jurisdiction does not exist, the Motion to Dismiss should still be denied – at least to the extent that the plaintiff should be allowed to seek a prohibitory order serving to protect her from further acts of domestic violence but without any provisions requiring the defendant to undertake any actions. *See Spencer v. Spencer*, 191 S.W.3d 14, 19 (Ky. Ct. App. 2006) ("In our view, the distinction made by New Jersey's highest court between prohibitory and affirmative orders represents the fairest balance between protecting the due process rights of the nonresident defendant and the state's clearly-articulated interest in protecting the plaintiff and her children against domestic violence."); *accord Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001).

1. Phone Call to North Carolina

As the first basis for its denial of Defendant's motion to dismiss, the court found personal jurisdiction exists as a result of a single phone call to Plaintiff, which her counsel represented to the court occurred while she was present within North Carolina. Plaintiff's complaint is wholly silent on the issue of her physical location when she received Defendant's alleged threat, or whether it was transmitted by telephone or otherwise.

The complaint states, "Sunday Sept. 6, 2015 he threatened my life because I was moving out of state with our son, we don't have a court

custody agreement." According to the Affidavit of Status as to Minor Child, Plaintiff began living in North Carolina on 6 September 2015, the day she received the threat. Plaintiff's complaint fails to allege whether she was present in Pennsylvania, North Carolina, or somewhere in between when she allegedly received Defendant's threat.

Plaintiff carries the prerequisite burden of proving *prima facie* that jurisdiction exists. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 616, 532 S.E.2d 215, 218 (citation omitted), *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). Plaintiff did not present any testimony or file an affidavit in response to Defendant's motion to dismiss.

The trial court found it is "reasonable to infer" Plaintiff was present in North Carolina when she received the threat, but Plaintiff submitted no evidence, direct or indirect, regarding her physical location on 6 September 2015, when she alleged Defendant threatened her. The only evidence before the court was Defendant's uncontroverted affidavit, which states:

> 5. On September 6, 2015, Ms. Manisse informed me that she was leaving Pennsylvania with our son, [C.H.]. Pursuant to the terms of our custody arrangement, Ms. Manisse is not allowed to leave the State of Pennsylvania with [C.H.]. Additionally, I have had regular custody of [C.H.] on a weekly basis pursuant to the terms of the custody agreement since my relationship with Ms. Mannise ended.
>
> 6. When I informed Ms. Manisse that the terms of the custody arrangement prohibited her from leaving Pennsylvania with [C.H.], she informed me that she would contact me again shortly. When Ms. Manisse contacted me via telephone later that day, she informed me that she was in West Virginia. I did not find out that Ms. Manisse had relocated to North Carolina until I was served with a copy of the Complaint in the above-captioned action by a local sheriff in Pennsylvania.

The record does not show the trial court conducted an evidentiary hearing. In determining it was "reasonable to infer" Plaintiff was in North Carolina, the trial court relied upon a "forecast" provided by Plaintiff's counsel, rather than the sworn and unchallenged affidavit that is part of Defendant's motion and the record evidence.

> If the exercise of personal jurisdiction is challenged by a defendant, *a trial court may hold an evidentiary hearing*

> *including oral testimony or depositions* or may decide the matter based on affidavits. If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Id. at 615, 532 S.E.2d at 217 (emphasis supplied) (internal citations omitted).

On the complaint and record before us, no evidence shows and it is purely speculative that Defendant had any contacts with Plaintiff while she was present in North Carolina. Defendant's unchallenged affidavit states no contacts occurred. Furthermore, while the trial court relies on the rationale of the New Jersey Superior Court case of *A.R.* to assert personal jurisdiction over Defendant, the record contains no findings of "the parties' historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge." *A.R.*, 315 N.J. Super. at 520, 799 A.2d at 32.

2. Entry of a Domestic Violence Protective Order Absent Personal Jurisdiction

[4] The trial court also found that "even if personal jurisdiction does not exist, the Motion to Dismiss should still be denied." The trial court cites cases in other jurisdictions, in which courts have issued domestic violence protective orders absent a finding of personal jurisdiction. These courts have drawn a distinction between "affirmative" and "prohibitive orders." The Kentucky Court of Appeals opinion in *Spencer*, cited by the trial court, follows the reasoning of the Superior Court of New Jersey in *Shah v. Shah*. *Spencer v. Spencer*, 191 S.W.3d 14, 18-19 (Ky. Ct. App. 2006). The Kentucky Court explains:

> In its opinion, the [Superior Court of New Jersey] drew a distinction between a prohibitory order that serves to protect the victim of domestic violence, and an affirmative order that requires that a defendant undertake an action.
>
> The former, which allows the entry of an order prohibiting acts of domestic violence against a defendant over whom no personal jurisdiction exists, is addressed not to the defendant but to the victim; it provides the victim the very protection the law specifically allows, and it prohibits the defendant from engaging in behavior already specifically

> outlawed. Because the issuance of a prohibitory order does not implicate any of defendant's substantive rights, the trial court had jurisdiction to enter a temporary restraining order to the extent it prohibited certain actions by defendant in New Jersey.
>
> An affirmative order, on the other hand, involves the court attempting to exercise its coercive power to compel action by a defendant over whom the court lacks personal jurisdiction.

Id. at 18-19 (citing *Shah v. Shah*, 184 N.J. 125, 875 A.2d 931 (2005)). We decline to adopt the rule or reasoning of the New Jersey and Kentucky courts.

The entry of a North Carolina domestic violence protective order involves both legal and non-legal collateral consequences. "[C]ollateral legal consequences may include consideration of the order by the trial court in any custody action involving Defendant." *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001). Pursuant to N.C. Gen. Stat. § 50-13.2(a) (2015), the trial court must consider "acts of domestic violence" when determining the best interest of the child in a custody proceeding. Furthermore, " 'a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order].' " *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999)).

A domestic violence protective order may also place restrictions on where a defendant may or may not be located, or what personal property a defendant may possess or use. The entry of a domestic violence protective order must be consistent and compatible with North Carolina's long-arm statute, and also comport with constitutional due process. *Tom Togs*, 318 N.C. at 364, 348 S.E.2d at 785.

Here, the trial court restricted Defendant from any place where Plaintiff works, the child's daycare or school, and "any place where the plaintiff and/or the child is/are located." Because the issuance of a domestic violence protective order implicates substantial rights of Defendant, including visitation with and the care, custody, and control of his minor son, or access to the schools he is attending, Plaintiff is required to prove personal jurisdiction over Defendant. To hold otherwise would violate Due Process and "offend traditional notions of fair

play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945).

VI. Conclusion

Plaintiff failed to plead or prove and the trial court failed to find any contacts exist to establish or exercise personal jurisdiction over this out of state Defendant. The order of the trial court is reversed.

REVERSED.

Judges BRYANT and INMAN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
MISSION BATTLEGROUND PARK, DST; MISSION BATTLEGROUND PARK LEASECO, LLC, Lessee; LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the Register Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; LAT BATTLEGROUND PARK, LLC, Defendants

No. COA16-125

Filed 6 September 2016

1. Eminent Domain—motion to exclude expert testimony

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by ruling upon NCDOT's motion to exclude expert testimony without conducting a voir dire.

2. Eminent Domain—exclusion of sound and noise demonstration

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by excluding a sound and noise demonstration prepared by defendants' acoustical expert.

3. Eminent Domain—juror misconduct

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err when it did not hold an evidentiary hearing on the issue of juror misconduct and when it denied defendants' motion for a new trial.

4. Eminent Domain—special jury instruction

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by giving the jury a special instruction. Defendants failed to show that the instruction was likely to mislead the jury or was prejudicial error.

Appeal by defendants from judgment entered 30 July 2015 and orders entered 24 September 2015 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker and Assistant Attorney General Phyllis A. Turner, for the North Carolina Department of Transportation.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley and Matthew Nis Leerberg, for defendant-appellants.

TYSON, Judge.

Defendants appeal from judgment entered upon a jury's verdict returned on just compensation. We find no error.

I. Background

Landmark at Battleground Park ("Landmark") is a 240-unit apartment complex located on Drawbridge Parkway in Greensboro, North Carolina. The named Defendants are the current owner, former owner, mortgage holder, and lessee of Landmark.

On 11 March 2013, the North Carolina Department of Transportation ("NCDOT") condemned a 2.193 acres portion of Landmark's property for construction of a portion of "the Greensboro Urban Loop." The elevated highway was constructed near and on an angle relative to the front entrance of the property.

Landmark is owned by Defendant LAT Battleground Park, LLC ("LAT Battleground"). LAT Battleground purchased the property from Defendant, Mission Battleground Park DST, for $14,780,000.00, with knowledge of and during the pendency of the condemnation.

Prior to the highway construction, the apartment complex was described as "tucked away" from the road and situated "in the woods" on 32.76 acres. A heavily wooded tree buffer existed adjacent to the road. Landmark's secluded location was asserted to provide a market

advantage for prospective tenants. The outdoor amenities, including pools, volleyball and tennis courts, and wooded areas are "main selling points" for potential residents. Drawbridge Parkway was a low traffic volume, two-lane roadway with a posted thirty mile-per-hour speed limit prior to the construction. Drawbridge Parkway was relocated on two lanes closer to the complex on property taken as part of this condemnation.

The highway construction eliminated the wooded buffer in front of the property, part of which was located on the Drawbridge Parkway's right-of-way. The elevated six-lane highway runs at an angle in front of the property, thirty-five to forty feet above the ground. Evidence presented showed a portion of the highway was constructed over LAT Battleground's property.

The highway plans include construction of a 15-foot noise wall, rising from the highway to fifty to fifty-five feet in front of Landmark. The construction plans also include another thirty-five foot noise wall on Drawbridge Parkway, directly across the street from Landmark.

The parties did not agree upon the amount of damages and compensation owed to Landmark for the property taken. NCDOT deposited $276,000.00 with the Guilford County Clerk of Superior Court as its estimate of just compensation. Landmark claimed NCDOT's estimate was grossly inadequate, and asserted just compensation for the appropriation and damages ranged between $3,100,000.00 and $3,700,000.00.

NCDOT filed a complaint in Guilford County Superior Court to obtain a determination of just compensation due. The cause was tried before a jury on 29 June 2015. Defendants' evidence tended to show damages of $3,169,175.00 incurred from the construction of the highway project across a portion of the property.

NCDOT presented two expert witnesses. One expert witness testified Defendants' damages were $276,000.00, the amount of the deposit with the clerk of court. NCDOT's other expert witness testified Defendants' damages were $1,271,850.00. The jury returned a verdict, and determined $350,000.00 was just compensation for damages arising from the taking of the property. LAT Battleground appeals.

II. Issues

LAT Battleground argues the trial court erred by: (1) excluding James Collins' expert opinion testimony on fair market value; (2) excluding a sound and noise demonstration by LAT Battleground's acoustical expert, Dr. Noral Stewart; (3) declining to hold a hearing on the issue of juror misconduct and denying LAT Battleground's motion for a new trial

based upon juror misconduct; and (4) giving a special jury instruction requested by NCDOT.

III. Evidentiary Rulings

A. Standard of Review

The trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). The standard of review for a trial court's evidentiary ruling is abuse of discretion. *Marley v. Graper*, 135 N.C. App. 423, 425, 521 S.E.2d 129, 132 (1999). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (citation and emphasis omitted).

B. Opinion Testimony and Report of James Collins

1. Preservation of Error

[1] NCDOT argues LAT Battleground did not preserve the trial court's ruling on the admissibility of Mr. Collins' testimony and evidence for appellate review, because NCDOT did not call Mr. Collins as a witness at trial. We disagree.

Pursuant to Rule 103 of the Rules of Civil Procedure:

> (a) Effect of erroneous ruling. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . . .
>
> (2) Offer of proof. -- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2015).

LAT Battleground made an offer of proof of the substance of Mr. Collins' testimony, which appears in the record. This issue was preserved under the plain language of Rule 103, and is properly before us.

See GE Betz, Inc. v. Conrad, 231 N.C. App. 214, 232, 752 S.E.2d 634, 648 (2013) ("A motion *in limine* is typically insufficient to preserve for appeal the admissibility of evidence; however, a party may preserve the exclusion of evidence for appellate review by making a specific offer of proof."). This argument is overruled.

2. Requirement of *Voir Dire*

LAT Battleground argues the trial court erred by ruling upon NCDOT's motion to exclude Mr. Collins' opinion and evidence without conducting a *voir dire*. It asserts the absence of a *voir dire* deprived the court of the opportunity to understand the nature and scope of Mr. Colllins' testimony before deciding to exclude it.

LAT Battleground cites no binding precedent which requires the trial court to conduct a formal *voir dire* hearing prior to ruling on a motion *in limine*. LAT Battleground cites *Floyd v. Allen*, 2008 N.C. App. LEXIS 2000, *20-21, 2008 WL 4779737, *7 (N.C. Ct. App. Nov. 8, 2008), an unpublished opinion of our Court, in which the Court held it was error to exclude expert testimony when the trial court ruled on the motion within fifteen minutes, and without considering the expert's deposition or other evidence of his anticipated testimony.

Here, the record shows the trial court heard arguments of counsel and considered Mr. Collins' 124-page report, which included his credentials, research, methodology, and opinion. The trial court took the matter under advisement during the overnight recess, far different than the facts present in *Floyd*. The information presented to and considered by the trial court was sufficient to allow the court to properly rule upon NCDOT's motion *in limine* without holding a formal *voir dire*. This argument is overruled.

3. Trial Court's Ruling on N.C. Gen. Stat. § 93A-83

N.C. Gen. Stat. § 93A-83, a provision of the regulatory Real Estate License Law, provides a licensed real estate broker in good standing "may prepare a broker price opinion or comparative market analysis and charge and collect a fee for the opinion," if the list of requirements in subsection (c) of the statute are met. N.C. Gen. Stat. § 93A-83(a) (2015). The terms "broker price opinion" and "comparative market analysis" are statutorily defined as

> an estimate prepared by a licensed real estate broker that details the probable selling price or leasing price of a particular parcel of or interest in property and provides a varying level of detail about the property's condition,

> market, and neighborhood, and information on comparable properties, but does not include an automated valuation model.

N.C. Gen. Stat. § 93A-82 (2015).

The statute also prohibits a licensed broker from preparing an appraisal. The statute states:

> Notwithstanding any provisions to the contrary, a person licensed pursuant to this Chapter may not knowingly prepare a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law. A broker price opinion or comparative market analysis *that estimates the value of or worth a parcel of or interest in real estate rather than sales or leasing price shall be deemed to be an appraisal and may not be prepared by a licensed broker* under the authority of this Article, but may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board. *A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.*

N.C. Gen. Stat. § 93A-83(f) (2015) (emphases supplied).

The statute sets forth eleven enumerated "required contents" of a broker price opinion or comparative market analysis. N.C. Gen. Stat. § 93A-83(c) (2015). Included in these requirements is a disclaimer, which states as follows:

> "This opinion is not an appraisal of the market value of the property, and may not be used in lieu of an appraisal. If an appraisal is desired, the services of a licensed or certified appraiser shall be obtained. This opinion may not be used by any party as the primary basis to determine the value of a parcel of or interest in real property for a mortgage loan origination, including first and second mortgages, refinances, or equity lines of credit."

N.C. Gen. Stat. § 93A-83(c)(10) (2015).

LAT Battleground retained Mr. Collins, a licensed real estate broker and certified property manager ("CPM"), to provide an independent analysis of a "broker price opinion or comparative market analysis"

of Landmark before and after the taking. N.C. Gen. Stat. § 93A-83(a). Mr. Collins opined the fair price for Landmark before the taking was $15,338,000.00, and a fair price after the taking of $11,603,733.00, a difference of $3,734,276.00. Mr. Collins explained his opinion and market analysis in a 124-page report.

On the morning of trial, NCDOT moved to exclude the testimony and report prepared by Mr. Collins under the provisions of N.C. Gen. Stat. § 93A-83. NCDOT argued Collins' report failed to meet the statutory requirements for a broker price opinion or comparative market analysis, violated the restrictions imposed by the statute regarding a broker price opinion or comparative market analysis, and violated Rule of Evidence 702.

The trial court determined Mr. Collins' report violated N.C. Gen. Stat. § 93A-83(f), because it "purports to offer a fair market analysis before and after the taking that was determined on history bases." The court further stated the report "repeatedly refers to a fair market valuation and such references may not be offered at trial." The court allowed Mr. Collins' testimony before the jury, but limited him to offering an opinion on sales and leasing prices for the property.

LAT Battleground chose not to call Mr. Collins as a witness. LAT Battleground presented the testimony of Michael Clapp, a certified appraiser. Mr. Clapp testified the fair market value of the property before the taking was $13,944,250.00, and the fair market value after the taking was $10,775,075.00, a difference of $3,169,175.00.

NCDOT's certified appraiser, Rod Meers, testified the fair market value of Landmark before the taking was $14,835,100.00, and the fair market value after the taking was $14,559,050.00, for a difference of $276,050.00. Another certified appraiser, J. Thomas Taylor, testified for NCDOT that the fair market value of Landmark before the taking was $14,743,975.00, and the fair market value after the taking was $13,472,125.00, for a difference of $1,271,850.00. The jury did not adopt the exact value opinions of any of the appraisers in determining its verdict of just compensation.

Mr. Collins' report repeatedly states it is an opinion of the "fair market value" of the property, before and after the taking, rather than the "probable selling price," which would be permitted under the statute. Under the plain language of the statute, Mr. Collins, a licensed real estate broker, who is not also a licensed appraiser, is not permitted to prepare "a valuation appraisal." N.C. Gen. Stat. § 93A-83(f). The trial

court properly held Mr. Collins was bound by the restriction set forth in the statute in limiting his testimony. This assertion of error is overruled.

C. Exclusion of the Sound Demonstration

[2] LAT Battleground argues the trial court abused its discretion by excluding a sound and noise demonstration prepared by Dr. Noral Stewart. We disagree.

Dr. Stewart was tendered and accepted as an expert witness in the areas of acoustics, noise control, and environmental noise. LAT Battleground sought to introduce into evidence a sound demonstration as part of Dr. Stewart's testimony to show the purported increase in the noise levels in the apartment complex before and after the taking and construction.

The test for determining whether a demonstration is admissible "is whether, if relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, under Rule 403 of the Rules of Evidence." *State v. Witherspoon*, 199 N.C. App. 141, 149, 681 S.E.2d 348, 353 (2009) (citation omitted). The sounds Dr. Stewart used for the demonstration was "pink noise," which is a broadband sound, rather than highway noise. Dr. Stewart opined that the noise levels in Landmark would be up to four times louder as a result of the taking, and was attempting to show various decibel levels of sound through this demonstration.

Defendants informed the trial court that their experts had relied upon estimates of increased noise in determining their values, but had not heard Dr. Stewart's sound demonstrations. The court performed a Rule 403 balancing test, and determined: (1) Defendant's valuation experts did not consider the sound demonstrations in formulating their opinions of value; (2) the demonstration was of a sound that was not similar to highway noise; (3) the noise generated was based on an average, inflated by ten percent; and, (4) a potential tenant or resident "would not hear an average," and excluded the demonstration.

Based upon these considerations, LAT Battleground has failed to show the trial court abused its discretion in excluding Dr. Stewart's sound demonstration. This argument is overruled.

IV. Juror Misconduct

[3] LAT Battleground argues the trial court erred by failing to hold an evidentiary hearing on the issue of juror misconduct and by denying their motion for a new trial. We disagree.

After the jury's verdict was announced, counsel for LAT Battleground spoke with Jurors Number Five and Six. Both jurors disclosed to counsel that "extraneous" information was before the jury during deliberations. Juror Number Six told the jury that through his work as a civil engineer, he knew that NCDOT was spending millions of dollars constructing "noise walls" at Landmark. Evidence of the planned construction of noise walls was in evidence and before the jury, but an estimated cost of the noise barrier walls had not been introduced at trial.

The trial concluded on 7 July 2015. The trial court's judgment was entered on 30 July 2015. On 10 August 2015, LAT Battleground filed a motion for a new trial under Rule 59(a)(2), based upon juror misconduct. On 2 September 2015, LAT Battleground filed a request for an evidentiary hearing on the issue of juror misconduct.

A. Standard of Review

"[A] motion for a new trial is addressed to the sound judicial discretion of the trial judge and is not reviewable in the absence of an abuse of discretion." *Smith v. Price*, 315 N.C. 523, 533, 340 S.E.2d 408, 414 (1986) (citation omitted).

B. Analysis

Rule 606(b) of the Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2015) (emphasis supplied).

Extraneous information is defined as

> Information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced into evidence. It does not include

> information which a juror has gained in his experience which does not deal with the defendant or the case being tried.

State v. Rosier, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988). "When 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." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991).

In ruling on LAT Battleground's motion for a new trial, the court relied solely on the affidavit of Patrick Kane, Esq., the attorney for LAT Battleground who spoke with Jurors Number Five and Six after the trial. Mr. Kane's affidavit states that he spoke with the two jurors, and learned that the jury had heard from Juror Number Six that the cost of the noise barrier walls was "millions of dollars." Juror Number Six told Mr. Kane that his work involves designing roadways, and he has extensive experience in condemnation of properties for roadway construction, and had consulted on projects involving NCDOT in the past.

The trial court found that the statement made by Juror Number Six that the sound walls "cost millions of dollars" was general, vague, and related to a tangential matter. The court determined that the juror's statement was not "extraneous information," and declined to conduct an evidentiary hearing. The court noted LAT Battleground learned of Juror Number Six's statement to the jury on the same day as the verdict, but failed to take any steps to address the issue for over a month.

Our courts have distinguished between "external" influences on jurors, which may be used to attack a verdict, and "internal" influences on a verdict. *See State v. Quesinberry*, 325 N.C. 125, 133-35, 381 S.E.2d 681, 687 (1989), *cert. granted and judgment vacated in light of McKoy*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *death sentence vacated and remanded for new sentencing*, 328 N.C. 288, 401 S.E.2d 632 (1991) (holding juror consideration of the possibility of the defendant's parole was an "internal influence," "general information," and a "belief" or "impression," and did not constitute grounds to award a new trial).

Jurors do not leave their general opinions, knowledge, and life experiences at the door of the courthouse. Evidence was presented to show construction of noise barrier walls in front of Landmark was planned and included as part of the highway project. Evidence was also presented to show the size, scale, length, and heights of the noise barrier walls. The trial court could fairly conclude most jurors would generally

understand that substantial costs are incurred in erecting the immense concrete highway noise barrier walls.

Juror Number Six's statement constituted tangential and non-specific "general information." LAT Battleground did not show a "substantial reason to fear that the jury ha[d] become aware of improper and prejudicial matters" during deliberations, to rise to an abuse of discretion to deny an evidentiary hearing. *Black*, 328 N.C. at 196, 400 S.E.2d at 401. The statement of Juror Number Six during deliberations was not prejudicial "extraneous information" to warrant a new trial under Rule 606(b). This argument is overruled.

V. Special Jury Instruction

[4] LAT Battleground argues the trial court erred by giving the jury an inapplicable special instruction. We disagree.

A. Standard of Review

This Court reviews a jury instruction to determine if an error occurred and, if so, whether "such error was likely, in light of the entire charge, to mislead the jury." *Boykin v. Kim*, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005) (citation omitted).

B. Analysis

Defendants introduced an animation and testimony to show the wetland area owned by the City of Greensboro across the street from Landmark was a "feature" that added value to their property. The land across the street was not owned by Defendants, belonged to the City of Greensboro, and was not part of the condemnation at issue. The City's property consisted of undeveloped woodlands and wetland. LAT Battleground argues the law requires "that view from the property be considered in the 'after' valuation."

LAT Battleground asserts reversible error from the following jury instruction:

> Fair market value should not include the diminution in value of the remainder of the property caused by the acquisition and use of the adjoining lands of others for the same undertaking.

NCDOT acquired only a portion of LAT Battleground's tract of property. Our Supreme Court has explained:

> If only a portion of a single tract is taken, the owner's compensation for that taken includes any element of value

> arising out of the relation of the part taken to the entire tract. *United States v. Miller*, 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276. "The rule supported by better reason and the weight of authority is that the just compensation assured by the 5th Amendment to an owner a part of whose land is taken for public use, does not include the diminution in value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. 368, 69 L. Ed. 328, 45 S. Ct. 115.

Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 401, 137 S.E.2d 497, 505 (1964). The Court further stated:

> No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner. The theory behind this denial of recovery is undoubtedly that such owner may not be considered as suffering legal damage over and above that suffered by his neighbors whose lands were not taken.

Id. at 402-03, 137 S.E.2d at 506.

LAT Battleground relies heavily on this Court's decision in *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 237 S.E.2d 854 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978). In *Brown*, an eight-acre portion of the landowners' 52.2 acre tract was taken for construction of a "controlled access highway facility." *Id.* at 267, 249 S.E.2d at 855. The trial court excluded all evidence of the effect of traffic noise from the highway on the landowners' remaining property, and instructed the jury not to consider such effect. *Id.*

This Court held the exclusion of the effect of noise on the remaining property was error, and stated:

> Noise or any other element of damages to the remaining lands is compensable only if it is demonstrably resultant from the use of the particular lands taken. "If only a portion of a single tract is taken the owner's compensation for that taking includes *any element of value arising out of the relation of the part taken to the entire tract.*" (Emphasis added) *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 281, 87 L.Ed. 336, 344 (1943).

Id. at 269, 249 S.E.2d at 856 (added emphasis in original). This language in *Brown* pertains to circumstances in which the physical taking is of

a portion of a parcel, and the remaining portion of property not taken is damaged thereby, also referred to as damage to the "remainder." *Id.* Here, LAT Battleground argues its residual or remaining property not physically taken was damaged by actions of NCDOT on the City of Greensboro's property across the street.

LAT Battleground argues the trial court's instruction was error, because the destruction of the "view" from Landmark of the City of Greensboro's wetlands across the street should be included in just compensation. LAT Battleground conceded at oral argument that Landmark would not be entitled to just compensation if the City of Greensboro had damaged the "view" from Landmark by removing all of the trees on the wetlands across the street, by building a concrete wall there, or making other affirmative use of the City's property. As noted above, the undeveloped 2.193 acres portion taken from Landmark's 32.76 acres parcel was primarily used to relocate the existing two lane Drawbridge Parkway closer to the improved portions of Landmark's remaining parcel. A portion of the removed wooded buffer apparently was also located on the existing right of way for Drawbridge Parkway, and not on Landmark's property.

The special jury instruction provided was a clear and correct statement of law. LAT Battleground has failed to show the instruction was likely to either mislead the jury or was prejudicial error. This argument is overruled.

VI. Conclusion

The trial court did not abuse its discretion in limiting Mr. Collins' testimony and evidence of "fair market value" of the property before and after the taking due to the restrictions set forth in N.C. Gen. Stat. § 93A-83. LAT Battleground has failed to show the trial court abused its discretion by excluding the sound demonstration prepared by Dr. Stewart, LAT Battleground's acoustical expert.

The trial court did not err in denying LAT Battleground's motion for a new trial based upon juror misconduct. LAT Battleground has failed to show the trial court's jury instruction, that other owners' properties taken did not impact LAT Battleground's property, included a misstatement of law or was likely to mislead the jury. We also reject LAT Battleground's final contention that "cumulative errors" warrant a new trial.

NO ERROR.

Judges BRYANT and INMAN concur.

SANCHEZ v. COBBLESTONE HOMEOWNERS ASS'N OF CLAYTON, INC.

[249 N.C. App. 346 (2016)]

TATITA M. SANCHEZ, PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1281

Filed 6 September 2016

1. Associations—homeowners' association—return of assessments—no contract implied in fact

The trial court did not err in concluding that no contract implied in fact had been created between plaintiff and defendant homeowners' association. Plaintiff was entitled to a return of assessments paid in the amount of $4,000.00.

2. Associations—homeowners' association—assessments—estoppel

The trial court did not err by failing to conclude that plaintiff was estopped from denying the obligation to pay assessments. The only potential benefit accepted by plaintiff and found as fact by the trial court was that plaintiff rarely, if ever, used the tennis courts or swimming pool.

Judge DILLON dissenting.

Appeal by Defendant from order entered 13 May 2015 by Judge O. Henry Willis, Jr. in District Court, Johnston County. Heard in the Court of Appeals 23 May 2016.

No brief for Plaintiff-Appellee.

Jordan Price Wall Gray Jones & Carlton, by J. Matthew Waters and Hope Derby Carmichael, for Defendant-Appellant.

McGEE, Chief Judge.

This appeal is a companion case to four other related cases involving substantially the same facts, COA15-1280, COA15-1282, COA15-1302, and COA15-1303. The plaintiffs in all these cases own homes in a community known as the Cobblestone Subdivision ("the subdivision"). Cobblestone Homeowners Association of Clayton, Inc., a homeowners association ("Defendant Association"), was created in order to maintain certain subdivision common areas and to handle the financial requirements of said

management. The common areas relevant to this appeal were a pool and tennis courts, which were regulated and maintained by Defendant Association, and which were, pursuant to Defendant Association's covenants, allegedly open to all residents of the subdivision who paid the regular homeowners association fees or dues ("the dues").

Tatita Sanchez ("Plaintiff") owned a home ("the property") in the subdivision, and was regularly paying dues Defendant Association assessed until she received a letter on or about 30 July 2014 from the then counsel for Defendant Association. In that letter, Defendant Association informed Plaintiff that, as a result of an earlier mistake, Plaintiff and certain other homeowners[1] in the subdivision were not members of Defendant Association. The letter further informed Plaintiff and similarly situated homeowners that, if they wanted to continue enjoying the pool, tennis courts and other benefits and responsibilities of membership in Defendant Association, they would have to execute a "Supplemental Declaration" to bring themselves and their properties within Defendant Association's authority, and continue to pay the dues.

Plaintiff decided not to join Defendant Association, and requested return of the dues she had been erroneously charged over the years. Defendant Association refused to reimburse Plaintiff for dues already paid, so Plaintiff filed a complaint in small claims court on 31 October 2014, seeking reimbursement. The magistrate in small claims court ruled in favor of Plaintiff by judgment entered 1 December 2014, and Defendant Association appealed to district court. Plaintiff's action was heard on 20 April 2015, and the trial court again ruled in favor of Plaintiff by order entered 13 May 2015. Defendant Association appeals.

I. Standard of Review

This matter was decided by the trial court sitting without a jury.

> "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts."
>
> . . . . The trial court's conclusions of law, by contrast, are reviewable *de novo*.

Lake Toxaway Cmty. Ass'n, Inc. v. RYF Enters., Inc., 226 N.C. App. 483, 487, 742 S.E.2d 555, 559 (2013) (citations omitted). Because Defendant

1. Including Plaintiffs in the companion cases.

Association does not contest any of the trial court's findings of fact in this matter, they are binding on appeal. *Id.* at 489, 742 S.E.2d at 560. Our review is therefore limited to determining whether the trial court's findings of fact support its conclusions of law. *Id.* at 487, 742 S.E.2d at 559. Our review is further limited to those arguments Defendant Association brings forth on appeal. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. App. R. 28(b)(6) (2016).

II. Analysis

On appeal, Defendant Association contends that "the trial court erred as a matter of law in concluding that [Plaintiff] was entitled to a return of assessments paid in the amount of $4,000.00." We disagree.

Defendant Association's contention is based upon two specific arguments: (1) "The trial court erred in concluding that no contract existed between [Plaintiff] and [Defendant Association] given the facts established an implied in fact contract existed between the parties[,]" and (2) "the trial court erred in failing to conclude that [Plaintiff] was estopped from denying the obligation to pay assessments to [Defendant Association.]" We limit our review to these two specific arguments, and address each argument in turn.

A. *Contract Implied in Fact*

[1] Defendant Association first argues "the trial court erred in concluding that no contract existed between [Plaintiff] and [Defendant Association] given the facts established an implied in fact contract existed between the parties." We disagree.

Though somewhat couched in terms of "unjust enrichment," the argument made by Defendant Association is actually restricted to the presence or absence of a contract implied in fact that would have bound Plaintiff to pay the dues. Defendant Association put its argument to this Court in the following manner:

> Where the facts establish that [Plaintiff] received benefits from [Defendant Association], and [Plaintiff] had clear knowledge of such benefits and services being provided by [Defendant Association], an implied in fact contract exists between [Plaintiff] and [Defendant Association]. If the evidence demonstrates that [Plaintiff] consciously accepted the benefits and services provided by [Defendant Association], the trial court cannot conclude that [Plaintiff]

> unjustly enriched [Defendant Association] by paying [the dues]. (Citation omitted).[2]

At trial Defendant Association argued, *inter alia*, that, because there existed a contract implied in fact between the parties, the trial court could not base any remedy upon the theory of unjust enrichment. Unjust enrichment may be found when there exists a contract implied in *law*, and recovery based upon unjust enrichment is improper when an actual contract – such as a contract implied in *fact* – exists.[3]

> *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. "A quasi contract or a contract implied in law is not a contract." An implied [in law] contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment.

Whitfield v. Gilchrist, 348 N.C. 39, 42, 497 S.E.2d 412, 414–15 (1998) (citations omitted). In fact, the mere existence of a contract implied in law would make any consideration of the equitable remedy of unjust enrichment improper. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citation omitted) ("If there is a contract between the parties the contract governs the claim and the law will not imply a contract [in law].").[4]

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2. The dissenting opinion references a quote found in the "Standard of Review" section of Defendant Association's argument: "'The findings of fact in this matter simply do not support the trial court's conclusion of law that [Plaintiff's] payment of assessments to [Defendant Association] unjustly enriched [Defendant Association].'" Though Defendant Association does make this statement in its brief, it does not cite any law laying out the elements of unjust enrichment in its brief, and does not make any direct argument that Plaintiff failed to satisfy her burden of presenting evidence in support of all the required elements. This is because Defendant Association's argument does not depend on whether the elements of unjust enrichment were established.

3. "Although the terms of an implied in fact contract may not be expressed in words, or at least not fully in words, the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a 'real' contract or genuine agreement between the parties." *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 36, 604 S.E.2d 327, 333 (2004).

4. In *Lake Toxaway*, discussed in detail below, this Court held that an implied in fact contract existed which obligated the defendant to pay property maintenance fees. This

Our review of this argument is entirely limited to whether or not a contract implied in fact existed between Plaintiff and Defendant Association. If such a contract existed, Plaintiff was thereby obligated to pay the dues, and the trial court's order should be reversed. If no such contract existed, the trial court should be affirmed because Defendant Association makes no further argument on appeal.[5]

This Court has stated:

> [A] contract implied in fact . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts[.] With regard to contracts implied in fact, . . . one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

Lake Toxaway, 226 N.C. App. at 488, 742 S.E.2d at 560 (citation omitted). Defendant Association contends that the actions of Plaintiff and Defendant Association created a contract implied in fact for the payment of the dues in exchange for the benefits of membership in Defendant Association.

The trial court made the following relevant findings of fact and conclusions of law:

> 3. At or about the time that [P]laintiff acquired the property, [P]laintiff was informed and believed that said property was subject to said covenants and that the property was a part of and subject to the rules of [D]efendant [Association].
>
> 4. In accordance with the rules and covenants, Plaintiff paid periodic dues . . . to [D]efendant [Association] from at

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Court further held that absent payment of those fees, the defendant would be unjustly enriched. Having held that a contract existed between the parties, the additional holding related to unjust enrichment was legally incorrect unless viewed as an alternative holding should its finding that a contract implied in fact existed be overturned. *See Ellis Jones, Inc. v. W. Waterproofing Co.*, 66 N.C. App. 641, 646–47, 312 S.E.2d 215, 218–19 (1984). We view these holdings as alternative holdings. Further, in *Miles*, also discussed in detail below, though the plaintiffs argued that there was "insufficient evidence of unjust enrichment for the court to grant a directed verdict in favor of [the] defendant under the theory of an implied contract[,]" this Court determined that the implied contract was one of fact, not law, and therefore damages were based upon breach of that contract, not unjust enrichment. *Miles*, 167 N.C. App. at 34, 37, 604 S.E.2d at 332, 34.

5. Excepting Defendant Association's argument concerning estoppel, which we consider below.

> or about the time Plaintiff was notified of said [dues] until approximately July 30, 2014.
>
> 5. By letter from the attorney for the Defendant [Association] dated July 30, 2014, [P]laintiff was notified that the property was not and had never been subject to the covenants. The requirement that the aforesaid periodic [dues] be paid was a condition of the covenants.
>
> 6. Plaintiff rarely, if ever, used the tennis courts or swimming pool, which were the main two amenities offered by [D]efendant [Association].
>
> 7. Plaintiff, without legal obligation has paid to [D]efendant [Association] periodic [dues] payments in the total sum of $4,000.00.
>
> 8. Plaintiff was not aware of nor had any reasonable way of knowing that there was no legal obligation to pay periodic dues . . . until [P]laintiff received the letter referred to in paragraph 5 above.
>
> 9. Defendant [Association] had no legal right to require or receive payments from [P]laintiff.[6]
>
> CONCLUSIONS OF LAW
>
> . . . .
>
> 3. No contract or other legal obligation existed between the parties as would require Plaintiff to pay periodic dues . . . to Defendant [Association].
>
> 4. Plaintiff's payments to defendant resulted in [D]efendant [Association] being unjustly enriched in the total amount of the payments made.

As Defendant Association does not challenge the findings of fact, nor argue that the trial court should have made additional findings of fact, we restrict out analysis to whether those findings support the

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6. The findings of fact include no reference to Plaintiff attending a homeowner's meeting, being provided with a key to the pool, nor that she called Defendant Association on occasion concerning homeowner's issues. In its brief, Defendant Association did improperly attempt to argue that Plaintiff contacted Defendant Association regarding a homeowner's issue. We restrict our review to those facts actually found as fact in the trial court's order.

trial court's conclusion that no contract existed between Plaintiff and Defendant Association requiring payment of the dues. *Lake Toxaway*, 226 N.C. App. at 489, 742 S.E.2d at 560. The findings establish the following: (1) Plaintiff was informed that the property was subject to covenants requiring her to pay periodic dues; (2) Plaintiff was in fact not obligated to pay the dues, and did not have any reason to know she was not legally obligated to pay the dues until informed pursuant to the 30 July 2014 letter from Defendant Association; (3) based upon Defendant Association's erroneous assertions and requests, Plaintiff paid $4,000.00 to Defendant Association as "dues;" and (4) Plaintiff "rarely, if ever, used the tennis courts or swimming pool, which were the main two amenities offered by [D]efendant [Association]."

Defendant Association argues that this Court's opinions in *Lake Toxaway* and *Miles* require that we find a contract implied in fact existed between Plaintiff and Defendant Association. In *Lake Toxaway*, developer Lake Toxaway Company ("LTC") developed certain real property ("the development") which included a man-made lake ("the lake") and individual building lots. *Lake Toxaway*, 226 N.C. App. at 485-86, 742 S.E.2d at 558. In 2000, the defendant purchased a lot ("the lot"), located within the development. *Id.* at 485, 742 S.E.2d at 558. Access to the lake was granted by deed to certain property owners within the development, but LTC contended that lake privileges were not specifically granted appurtenant to the lot. *Id.* at 486, 742 S.E.2d at 558. The plaintiff was the property owners association for the development. *Id.* The plaintiff and LTC entered into an agreement in December 2003 whereby the plaintiff became responsible for maintaining certain common areas within the development, including the lake and the rights-of-way for the private roads that provided access to the individual parcels of property in the development, including the lot. *Id.* The plaintiff delivered an invoice to the defendant in 2008, demanding the defendant pay an amount representing its *pro-rata* share of the costs of maintaining the roads and the lake for the 2008-09 fiscal year. *Id.* The defendant refused to pay, and the plaintiff initiated an action to determine the rights and obligations of the parties. *Id.* The trial court ruled that a contract implied in fact had been created by the actions of the plaintiff and the defendant. *Id.* at 487, 742 S.E.2d at 559.

Upon review of the trial court's ruling, this Court noted: "It is uncontested that plaintiff's upkeep, repair, and maintenance of the dam, Lake Toxaway, roads, and common areas have conferred a measurable benefit on defendant." *Lake Toxaway*, 226 N.C. App. at 491, 742 S.E.2d at 561. This Court then held:

> Since August 1965, when [the lot] was first deeded by LTC, subsequent owners of the [lot,] including defendant, have used [the lake] continuously for boating and other recreational purposes. *See Snyder*, 300 N.C. at 218, 266 S.E.2d at 602 (stating that "[a]cceptance by conduct is a valid acceptance"). [The d]efendant has also used the private roads, containing multiple points of access, within [the development]. [The d]efendant benefits from having the availability of well-maintained and secured private roads to and from the [lot] and for travel within [the development], in addition to a well-maintained and secure [lake] and dam.
>
> We agree with the trial court that:
>
> > [w]ith knowledge of the services provided by the [p]laintiff in maintaining and managing the operations and care of the private roads, roadsides, and [the lake], [the d]efendant agreed by its conduct . . . in using or claiming the right to use the private roads and lake so maintained and managed by the [p]laintiff to pay for the maintenance, repair and upkeep of the roads, roadsides, and lake.
>
> Because the uncontested findings of fact support the trial court's conclusion that implicit in [the] defendant's acceptance of the benefits of using the roads and the lake, was an agreement to pay for the upkeep, maintenance and repair of the roads and lake. Therefore, based on the record before us, we hold that a contract implied in fact existed between the parties.

Id. at 489-90, 742 S.E.2d at 560-61 (citation omitted). The ruling in *Lake Toxaway* was thus based upon the "defendant's *acceptance* of the benefits of *using* the roads and the lake," and other amenities, *Id.* at 490, 742 S.E.2d at 561 (emphasis added), not upon the mere existence of those benefits.

In *Miles*, the covenants of the defendant homeowner's association, Carolina Forest Association ("CFA"), of a subdivision ("Carolina Forest") required all real property owners in Carolina Forest to pay association fees for the purposes of maintenance and upkeep of common roads and recreation areas. *Miles*, 167 N.C. App. at 29, 604 S.E.2d at 329. The covenants included a clause whereby the covenants would

expire on 1 January 1990. CFA believed that the covenants could be extended if the owners of two-thirds of Carolina Forest lots agreed in writing to do so. *Id.* at 29-30, 604 S.E.2d at 329. The owners of just over two-thirds of Carolina Forest lots did agree to extend the covenants, and all the plaintiff lot owners continued to pay the maintenance fees until at least 1997. *Id.* at 30, 604 S.E.2d at 329. In 1998, the plaintiffs filed an action requesting the trial court rule that they were not obligated to pay the maintenance fees based upon an argument that the 1990 "amendment" to the covenants did not bind them. *Id.* at 31, 604 S.E.2d at 329-30. The trial court ultimately determined there existed a contract implied in fact based upon the benefits the plaintiffs' had received. *Id.* at 31, 604 S.E.2d at 330. This Court held:

> Plaintiffs were assessed specific fees for benefits to their unimproved properties. These benefits protected both the access to and the value of their properties, by way of maintaining private roads, recreational facilities, a pool, a guard station, and an administrative office. The record shows that plaintiffs were on clear notice that these benefits were being incurred: Approximately half of them actually voted for the amendments to declaration No. 10 as recorded in 1990, which included consent to pay the assessment fees for the exact benefits at issue in this case. All of the plaintiffs had paid some or all of the fees and assessments up until 1997 and 1998, and were incurring the benefit from the improvements funded by such payments. This conduct is consistent with the existence of a contract implied in fact, and plaintiffs' attempt to stop payment on these known benefits, without more, is tantamount to breach of that contract.

Id. at 37, 604 S.E.2d at 333-34. Unlike in the present case, the plaintiffs in Miles continued to pay the contested fees *after* they were aware of the events which brought the validity of those fees into question.[7] This act of continued payment strongly suggested that the plaintiffs recognized they were receiving a benefit in return for those payments, even if they disputed that the extension of the covenants applied to them. In the present case, Plaintiff immediately ceased paying the association fees

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7. In *Miles*, the plaintiffs continued to pay association fees after 1 January 1990, the expiration date of the covenants absent amendment. If the plaintiffs believed the amendment to the covenants did not obligate them to pay association fees after 1 January 1990, they could have contested their obligations at that time.

once Defendant Association informed her that she was under no legal obligation to continue doing so.

Further, in both *Lake Toxaway* and *Miles*, the trial court ruled that the property owners directly benefitted by the actions of the relevant homeowners associations in maintaining roadways and other common areas. As an obvious example, the property owners in those two cases could not access their properties in any meaningful manner absent the roadways maintained through association fees.[8] For this reason, in both cases this Court held that the trial court had not erred in finding the existence of a contract implied in fact. However, in the present case, the trial court ruled that Plaintiff "rarely, if ever" used the "main amenities" maintained by the association dues collected by Defendant Association.[9] The trial court did not find as fact that Plaintiff benefitted in any other manner from services rendered by Defendant Association. On these facts, we hold that the trial court did not err in concluding that no contract implied in fact had been created between Plaintiff and Defendant Association.

We further note that if a contract had existed between Plaintiff and Defendant Association, Defendant Association would also have been bound by that contract. However, by its 30 July 2014 letter to Plaintiff, Defendant Association, through counsel, informed Plaintiff that the property was "not subject to [Defendant Association's] declaration[.]" Defendant Association informed Plaintiff that, in order to become a member of Defendant Association and be allowed access to the pool or tennis courts, Plaintiff would be required to execute a " 'Supplemental Declaration' . . . where [Plaintiff] agree[d] to be subject to the terms and provisions of [Defendant Association.]" Had there been an enforceable implied in fact contract between Plaintiff and Defendant Association, Defendant Association would not have been able to deny Plaintiff the amenities provided by [Defendant Association] regardless of whether Plaintiff executed any "supplemental declaration." Defendant Association's argument seems to be that there was no contract enforceable by Plaintiff, but that there was a contract enforceable by Defendant Association.

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8. There is no evidence, nor finding of fact, that the dues in the present case went toward maintenance of the subdivision roads or any other common area necessary for Plaintiff to enjoy the property.

9. We note that in companion appeal COA15-1282 the trial court found that Plaintiff Frank Christopher and his family "never used" the pool and tennis courts, and that he was not benefitted by Defendant Association.

This Court is not called upon to make an independent determination of whether Defendant Association was unjustly enriched; we are called upon to determine whether Defendant Association's arguments on appeal have merit. It is not the job of this Court to "create an appeal for" Defendant Association. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Defendant Association bases its argument on cases in which this Court found, by the actions of the parties involved, the mutual agreement necessary to form a contract implied in fact. Specifically, this Court in *Lake Toxaway* found that "the plaintiffs received benefits to their properties and the plaintiffs were on clear notice that these benefits were being incurred[.]" *Lake Toxaway*, 226 N.C. App. at 490, 742 S.E.2d at 560. " 'Whether mutual assent is established and whether a contract was intended between parties *are questions for the trier of fact.*' " *Lake Toxaway*, 226 N.C. App. at 488, 742 S.E.2d at 560 (emphasis added) (citing *Miles*, 167 N.C. App. at 37, 604 S.E.2d at 333–34). The only "benefit" found by the trial court in the present case was that Plaintiff "rarely, if ever, used the tennis courts or swimming pool[.]"[10] We can only conclude that the trial court determined that this "benefit" was insufficient to establish mutual assent between Plaintiff and Defendant Association, and thus no contract between the parties was intended. This was the trial court's determination to make. *Id.* Defendant Association, by its own actions upon discovering Plaintiff's property was not subject to its covenants, indicated that *it* did not believe any contract existed. Had a contract existed, Defendant Association could not have denied Plaintiff access to any of its benefits, so long as Plaintiff continued to pay dues, regardless of whether Plaintiff executed the "supplemental declaration" to bring her and her property within Defendant Association's authority. However, Defendant Association made continued availability of access to its benefits contingent upon Plaintiff executing the "supplemental declaration."

In addition, we are not persuaded by the dissenting opinion's analogy of the facts before us to membership in a health club. When someone joins a health club, that person *executes a contract* requiring fees be paid in return for access to certain facilities. In the present case, we are called upon to *determine whether any such contract existed* between

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10. The dissenting opinion points to evidence indicating that Plaintiff used the pool "on occasion." However, our job is not to find facts based upon the evidence presented at trial, it is to apply the law to the facts found by the trial court based upon that evidence. We note that in four of the five companion cases, including the present case, the trial court used identical language: "Plaintiff rarely, if ever, used the tennis courts or swimming pool[.]" In the fifth companion case, COA15-1282 *Christopher*, the trial court found as fact that Plaintiff Christopher never used these amenities.

Plaintiff and Defendant Association. It is uncontested that those homeowners who *were* contractually obligated to pay dues to Defendant Association were so obligated whether or not they took advantage of any of Defendant Association's benefits.

Assuming *arguendo* some of the trial court's findings are in fact conclusions, as the dissenting opinion contends, we do not see how our analysis would change. Importantly, whether a finding or a conclusion, it is the duty of Defendant Association, as the appellant, and not the duty of this Court, to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to "create an appeal for" Defendant Association. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Defendant Association does *not* argue that the trial court erred in either finding *or* concluding that "Plaintiff was not aware of nor had any reasonable way of knowing that there was no legal obligation to pay periodic dues or association fees until [P]laintiff received the letter" dated 30 July 2014.[11] Defendant Association does *not* argue that Plaintiff was charged with notice as a matter of law through her chain of title that she was not required to pay the dues. Defendant Association makes no mention of, much less argument concerning, the chain of title to Plaintiff's property. Any such arguments have therefore been abandoned. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[ese] [arguments are] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6) (2005)." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). We are not called upon to determine the equities involved in this case, we are called upon to render a legal opinion on the issue of whether there existed between Plaintiff and Defendant Association a contract implied in fact that obligated Plaintiff to pay the dues.

The dissenting opinion would hold that *access* to benefits alone is sufficient to meet the requirements set forth in *Lake Toxaway* and *Miles*, irrespective of whether those available benefits were actually enjoyed. We believe the law requires something more.

B. *Estoppel*

[2] In Defendant Association's second argument, it contends the trial court erred in "failing to conclude that [Plaintiff] was estopped from denying the obligation to pay assessments[.]" We disagree.

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11. We note that this is not a conclusion by the trial court concerning Plaintiff's legal obligation to pay, it is a finding related to Plaintiff's understanding of what her obligations were.

Defendant Association cites to this Court's opinion in *Reidy v. Whitehart Ass'n*, 185 N.C. App. 76, 648 S.E.2d 265 (2007), for the proposition that Plaintiff should be equitably estopped from denying

> the validity of [Defendant Association], at least until July 2014. [Plaintiff] accepted membership within [Defendant Association] at the closing of the purchase of her home and paid her first assessments then. . . . .[12] [Plaintiff] at all times had the right to enter and use the pool and tennis courts, and used the pool on one occasion. [Plaintiff] paid quarterly assessments as she believed she was required to do under the covenants and as a member of [Defendant Association], without objection.

As this Court stated in *Reidy*: " 'Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument.' " *Reidy*, 185 N.C. App. at 80, 648 S.E.2d at 268-69 (citation omitted). The only potential benefit "accepted" by Plaintiff and found as fact by the trial court was that "Plaintiff rarely, if ever, used the tennis courts or swimming pool[.]" We hold the trial court did not err in failing to find Plaintiff was estopped from accepting the validity of "Defendant Association" or the validity of any "obligation to pay assessments to [Defendant Association.]"

AFFIRMED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

I do not believe that the trial court's findings support its conclusion that the HOA was unjustly enriched by its receipt of dues from Homeowner from 2002-2014. Rather, as the HOA argues, the findings support a conclusion that the parties had a contract, implied-in-fact, whereby the parties agreed – as evidenced by their conduct – that the

12. Defendant Association argues certain alleged facts that are not included in the findings of fact for the 13 May 2015 order. Our review is limited to the facts as found by the trial court in its order. *Lake Toxaway*, 226 N.C. App. at 489, 742 S.E.2d at 560.

HOA would allow Homeowner access to amenities/benefits in return for the dues paid by Homeowner. *See Revels v. Miss Am. Org.*, 182 N.C. App. 334, 337, 641 S.E.2d 721, 724 (2007) ("With regard to contracts implied in fact, . . . one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.").

As shown by the uncontradicted evidence in the record, the trial court essentially found that (1) Plaintiff ("Homeowner") purchased her home in 2002 believing she would be part of the Defendant homeowners' association (the "HOA"), allowing her access to the HOA amenities in exchange for her payment of dues;[1] (2) Homeowner paid the HOA dues for a number of years; (3) the HOA provided Homeowner access to amenities;[2] (4) in 2014, the HOA sent Homeowner a letter which informed Homeowner that the HOA had learned that Homeowner's home was not included as part of the recorded HOA declarations, but that the HOA was willing to execute the necessary paperwork for filing to include her home in the declarations.[3]

I do not agree with the majority that the trial court's finding that Homeowner "rarely, if ever" used the HOA amenities has any bearing: The implied-in-fact contract was that Homeowner was paying for *access* to the HOA amenities; *the actual number of times* Homeowner took advantage of her right of access is not relevant.[4] The trial court essentially found that Homeowner was provided this benefit of access, stating that the HOA provided a swimming pool and tennis courts. *See Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 37, 604 S.E.2d 327, 333-34 (2004) (holding that an implied-in-fact contract existed where plaintiffs, who were lot owners in a subdivision, received benefits to their properties and that plaintiffs were on notice that these benefits were being

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1. This finding is supported by Homeowner's admission that she believed she would be part of the HOA when she bought her home; that the appraisal ordered by her lender states that the home she was buying included the right to access HOA amenities (swimming pool and tennis courts); and that the HOA accounting reflects dues she paid to the HOA as part of her 2002 closing.

2. This finding is supported by Homeowner's admission that the HOA provided her with a key to the HOA pool; that she used it on occasion (though not often); and that she attended at least one HOA meeting.

3. The letter identified in the trial court's finding is part of the record.

4. The trial court's "rarely, if ever," phrase is imprecise. The record, however, is uncontradicted. Homeowner admitted that the HOA provided her with a key to the pool; that she did use the pool on a few occasions; that she did call the HOA on occasions about HOA issues; and that she attended at least one HOA meeting.

incurred).[5] The effect of the presence of an implied-in-fact contract, here, is similar to an express contract to join a health club: The dues are earned by the club whether the member uses the facilities thirty times each month, or never. Accordingly, I respectfully dissent.

While I agree with the majority that the HOA is bound by the trial court's *findings*, I note that many of the statements designated as "findings" are actually mislabeled conclusions of law. For instance, the trial court's statement that the HOA "had no legal right to require or receive payments from [Homeowner]" is clearly a legal conclusion.

Also, the trial court's statement that "[Homeowner] … had [no] reasonable way of knowing that there was no *legal obligation*" to pay assessments is a conclusion of law. Whether Homeowner had a legal obligation to pay dues is a question of law. And the statement that Homeowner had no reasonable way of knowing that her home was not part of the HOA declaration is incorrect *as a matter of law*. Specifically, our Supreme Court has long recognized the bedrock principle that, as a matter of law, "a purchaser [of real estate] is charged with notice of the contents of each recorded instrument constituting a link in [her] chain of title and is put on notice of any fact or circumstance affecting [her] title which any such instrument would reasonably disclose." *Randle v. Grady*, 224 N.C. 651, 656, 32 S.E.2d 20, 22 (1944). *See also Hughes v. N.C. State Highway*, 275 N.C. 121, 130, 165 S.E.2d 321, 327 (1969); *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942); *Holmes v. Holmes*, 86 N.C. 205, 209 (1882); *Harborgate Prop. Owners. Ass'n v. Mt. Lake Shore*, 145 N.C. App. 290, 293-94, 551 S.E.2d 207, 210 (2001).[6]

Finally, I note that the HOA states in its brief that "[t]he findings of fact in this matter simply do not support the trial court's conclusion of law that [Homeowner's] payment of assessments to [the HOA] unjustly enriched [the HOA]." Assuming that this statement is sufficient to preserve our consideration beyond the HOA's arguments concerning an implied-in-fact contract and estoppel, I note that the Supreme Court has held that an unjust enrichment occurs where a party to a contract

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5. I note that the HOA also argues "estoppel." I agree that *alternatively* Homeowner is estopped from claiming a refund of her dues. The findings showed that she acted as if she were a member of the HOA and had access to the HOA amenities.

6. Any suggestion that the HOA has failed to challenge the mislabeled conclusions of law would be overly technical. Though the HOA may not have referred to the trial court's mislabeled conclusions *expressly*, the HOA's main argument is that the Homeowner *did* have a legal obligation to pay dues, based on a contract, implied-in-fact, in return for the years of access she had to the HOA amenities.

which is technically unenforceable "expends money as contemplated by the contract, and the other party to the contract consciously receives or accepts the benefits thereof and then fails or refuses to perform his part of the special contract[.]" *Wells v. Foreman*, 236 N.C. 351, 354, 72 S.E.2d 765, 767 (1952). Here, Homeowner did expend money. The trial court's findings, however, also reveal that the HOA did not fail or refuse to perform its part of the agreement, but in fact recognized Homeowner as a member of the HOA and provided her with full access to its amenities. Therefore, based on *Wells*, the HOA has *not* been unjustly enriched.

KEITH SAUNDERS, Plaintiff
v.
ADP TOTALSOURCE FI XI, INC., Employer, and LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, Carrier Defendants

No. COA15-1390

Filed 6 September 2016

Jurisdiction—subject matter—superior court reviewing Industrial Commission—reweighing facts—attorney fees

The superior court, under its limited appellate review, lacked jurisdiction under N.C.G.S. § 90-97(c) to reweigh the Industrial Commission's factual determinations or to award attorney fees from attendant care medical compensation to be paid to a third party medical provider. The order of the superior court purporting to order attorney fees to be paid from medical compensation awarded by the Commission was vacated.

Appeals by plaintiff and defendants from order entered 4 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 7 June 2016.

The Sumwalt Law Firm, by Mark T. Sumwalt, Vernon Sumwalt and Lauren H. Walker; and Grimes Teich Anderson, LLP, by Henry E. Teich for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, Paul C. Lawrence and Kari L. Schultz, for defendants.

TYSON, Judge.

The superior court's order awarded Plaintiff's attorneys a 25% contingent attorney's fee, payable from retroactive third party attendant care medical compensation awarded by the Industrial Commission. The Industrial Commission had denied a deduction of attorney's fees from the medical compensation award. We vacate the superior court's order for lack of subject matter jurisdiction, and remand.

I. Background

Plaintiff sustained two compensable injuries to his lower back on 6 March 2010 and 7 July 2010. He underwent back surgery in October 2010, but his condition failed to improve. Plaintiff developed left foot drop and reflex sympathetic dystrophy, or complex regional pain syndrome. Defendants did not dispute the payment of disability benefits and have compensated Plaintiff.

Plaintiff retained Henry E. Teich, Esq. to represent him before the Industrial Commission, and on 3 November 2010 he entered into a contingency fee agreement ("the fee agreement") with Mr. Teich. The fee agreement provided Mr. Teich's law firm a contingency fee of "25% of any recovery as Ordered by the North Carolina Industrial Commission." Plaintiff's claim or condition presented no issues of attendant care medical compensation or home modification when the fee agreement was executed.

Plaintiff's condition continued to decline. He and Mr. Teich subsequently amended the fee agreement to provide for a contingency attorney's fee of 25% of any award for ongoing temporary total disability benefits. By order of the Industrial Commission filed 23 April 2012, Mr. Teich began receiving additional compensation of 25% of Plaintiff's temporary total disability compensation, every fourth weekly check, in accordance with the amended fee agreement.

Plaintiff's physical condition further deteriorated to the point where his treating physician concluded he was unable to perform activities of daily living or otherwise live independently. Plaintiff's medical providers prescribed attendant care medical services for him. Defendants received notice of Plaintiff's request for attendant care services in January 2012. A month later, Defendants agreed to provide the recommended attendant care to Plaintiff for a three-month period upon the condition that Defendants be permitted to take the pre-hearing depositions of two of Plaintiff's providers without an order by the Commission. Plaintiff's partner, Glenn Holappa, who is not medically certified or trained, assumed the role as Plaintiff's primary attendant caregiver. Defendants discontinued payment for attendant care medical services after the initial three-month period because Plaintiff failed to allow the promised depositions,

and because Plaintiff's physician had ordered attendant care subject to a re-evaluation of Plaintiff's condition after three months.

With the knowledge and approval of Plaintiff and Mr. Holappa, and to assist Mr. Teich, Mark T. Sumwalt, Esq. and his law firm were associated to litigate Defendants' discontinuance of attendant care services to Plaintiff. Attorneys Teich and Sumwalt extensively litigated issues pertaining to attendant care medical compensation, home modifications, equipment needs, prescription medications, psychological treatment, and other medical services before the Industrial Commission.

On 23 December 2013, the Deputy Commissioner issued an Opinion and Award, which awarded retroactive attendant care medical compensation for the time period from 8 May 2012 to 23 December 2013, payable to Plaintiff or Mr. Holappa. The Deputy Commissioner also approved an attorney's fee of 25% of the award of the retroactive attendant care medical services provided. Defendants appealed to the Full Commission.

On 23 February 2015, the Full Commission issued an Opinion and Award, which awarded retroactive medical care compensation to Mr. Holappa, for six hours per day, seven days per week, at a rate of $10.00 per hour from 8 May 2012 until the date of the award. The Full Commission awarded ongoing attendant care medical compensation provided through a home healthcare agency for eight hours per day, seven days per week, until further order of the Commission. The Commission also awarded Plaintiff for his "out of pocket expenses for prescription medications prescribed for treatment of his depression and anxiety" and ordered "Defendants shall pay for all treatment related to Plaintiff's psychological condition with a provider or providers to be agreed upon by the parties."

Plaintiff's counsel did not seek an attorney fee for this additional medical care, treatments, and compensation the Commission awarded. The Commission further determined there is no evidence before the Commission of a fee agreement between Plaintiff's counsel and any of Plaintiff's medical providers, including Mr. Holappa.

The Commission concluded, "to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase 'any recovery,' could be interpreted to include medical compensation, it is unreasonable under the facts of this case." The Commission ordered no additional attorney's fee for Plaintiff's counsel to be paid from the past attendant care or other medical compensation Defendants were ordered to pay to Mr. Holappa, but ordered Plaintiff's attorney would continue to receive every fourth check from Plaintiff's disability award as a result of their efforts.

After the Industrial Commission declined to award further fees to Attorneys Teich and Sumwalt for medical compensation, Plaintiff and Mr. Holappa indicated to the attorneys their intention to pay them 25% of the medical compensation recovered, without involving the Commission or the courts. Mr. Teich and Mr. Sumwalt acknowledged and informed them it would be unlawful for an attorney to accept the voluntary or further payment of attorney's fees without approval by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(b) (2015).

On 9 March 2015, Plaintiff purported to appeal the Industrial Commission's decision to the Buncombe County Superior Court by petition for judicial review pursuant to N.C. Gen. Stat. § 97-90(c). Defendants moved to intervene in the superior court proceeding, which was granted. The superior court reversed the decision of the Industrial Commission, and awarded attorney's fees to be paid from the medical compensation award for retroactive attendant care. The court ordered 25% of the amount ordered by the Commission for attendant care medical care compensation to be paid directly to Plaintiff's counsel. Both parties appeal from the superior court's order.

II. Issues

Defendants argue the superior court did not have subject matter jurisdiction under N.C. Gen. Stat. § 97-90 to review the Commission's denial of attorney's fees from medical compensation. In the alternative, and presuming N.C. Gen. Stat. § 97-90(c) would permit the superior court's review under these facts, Defendants argue the superior court erred by engaging in fact finding, exceeding the proper standard of review, and reversing the Full Commission's decision to deny attorney's fees arising out of payment of medical compensation.

Plaintiff argues: (1) the superior court erred by granting Defendants' motion to intervene; and, (2) this Court is without subject matter jurisdiction to hear Defendants' appeal without standing.

III. Defendants' Standing to Appeal

Plaintiff argues Defendants' appeal should be dismissed, because Defendants do not have standing before this Court to challenge the superior court's order. We disagree.

A. Standard of Review

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Whether a trial court has

subject-matter jurisdiction is a question of law, reviewed de novo [sic] on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). Plaintiff's cross appeal also provides this Court with jurisdiction to review the superior court's order and the existence of any jurisdiction for the superior court to enter it. This Court may also raise and review issues of jurisdiction *sua sponte*. *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008).

B. Defendant's Assertion of Right to Direct Medical Treatment as a Basis for Standing

The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as which govern appeals from the superior court to the Court of Appeals in ordinary civil actions.

> Under N.C. Gen. Stat. 1-271 . . . , [a]ny party aggrieved is entitled to appeal in a civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Adcox v. Clarkson Bros. Constr. Co., 236 N.C. App. 248, 252, 773 S.E.2d 511, 515 (2014) (citation and internal quotation marks omitted).

Standing consists of three main elements:

> "(1) 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Estate of Apple v. Commercial Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)). "The issue of standing generally turns on whether a party has suffered injury in fact." *Id.* Further, "[i]t is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate

or threatened injury' will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)).

Defendants argue they have standing to appeal, both as parties before the Industrial Commission and as admitted intervenors in the superior court action. They assert the deduction of Plaintiff's attorney's fee from the award of medical compensation infringes upon Defendants' right to direct medical treatment for its injured employee. We agree.

The employer is statutorily required to provide "medical compensation" as statutory benefits to an injured employee "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]" N.C. Gen. Stat. § 97-2(19) (2015); *see also* N.C. Gen. Stat. § 97-25 (2015).

The Workers' Compensation Act and case law presume the injured worker will heal, recover from the injuries, for which he is receiving medical care, and return to work. *See Effingham v. Kroger Co.*, 149 N.C. App. 105, 114-15, 561 S.E.2d 287, 294 (2002) ("Temporary disability benefits are for a limited period of time. There is a presumption that [the employee] will eventually recover and return to work. Therefore, the employee must make reasonable efforts to go back to work or obtain other employment." (internal citations and quotation marks omitted)).

N.C. Gen. Stat. § 97-2(19) specifically defines "medical compensation" to include "attendant care services prescribed by a health care provider authorized by the employer[.]" Both parties also stipulated during oral arguments that payment for attendant care services to any provider constitutes medical compensation. *Id.*

"[A]n employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable." *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 623-24, 540 S.E.2d 785, 788 (2000). Under N.C. Gen. Stat. § 97-25, "the employer has the right to direct the medical treatment for a compensable injury. This includes the right to select the treating physician." *Kanipe*, 141 N.C. App. at 624, 540 S.E.2d at 788. The employer has the statutory duty to provide reasonable, complete, and quality medical compensation arising in a compensable claim to an injured employee. *Id.*

Having both the duty and right to direct medical care and treatment provided to their injured employee, Defendants have a continuing

interest in the pool of resources available for medical care and benefits for their employees' injuries and assuring the medical providers do not reduce care and are fully compensated for services they render to an injured employee. Defendants have shown their "legal rights have been denied or directly and injuriously affected" by the superior court's purported *de novo* award of attorney's fees from funds stipulated as medical compensation, and have standing to challenge that order before this Court. *Adcox*, 236 N.C. App. at 252, 773 S.E.2d at 514-15; *see also Palmer v. Jackson* (*Palmer I*), 157 N.C. App. 635, 579 S.E.2d 908 (2003).

C. Alternative Basis for Defendants' Standing

Even if Defendants' right to direct medical treatment would not provide them with standing to appeal to this Court, Defendants in this case have also demonstrated by their argument before the Commission, wherein they disputed the nature and amount of attendant care compensation to which Plaintiff is entitled, shared issues of fact and law in common with their argument before the trial court opposing the award of attorney's fees for that attendant care.

Defendants argued before the Commission that Plaintiff's seeking an award for attendant care provided by a family member, including an award of attorney's fees from that compensation, infringed upon his employer's right to direct his medical treatment. Defendants disputed the amount of past attendant care medical compensation to which Plaintiff is entitled and argued that a family member providing attendant care – as opposed to a third-party provider – may have a pre-existing obligation to provide care and is not subject to the same accountability as a third-party provider, who is required to document the hours and nature of care as well as the employee's ongoing condition.

The Commission apparently agreed with Defendants' argument and found that for a period ending with the date of the award, it was reasonable and necessary for Plaintiff to receive assistance from Mr. Holappa for six hours a day, as opposed to the eight hours a day requested for the reasons "that Mr. Holappa is frequently out of the home and that some of what he does in the home are tasks which he would otherwise do as a member of the household . . . ."

The Commission further found that going forward from the date of the award, it was reasonable and necessary for Plaintiff to receive assistance from a third-party attendant care agency for the following reasons:

> Care from a home health care agency as opposed to a family member is preferable and medically necessary because

> it is provided under the direction of a registered nurse and clinical director, who will ensure that the patient's medical needs are being met and who can make recommendations for a greater level of care, i.e., CNA, if that is medically necessary. Moreover, when care is provided by a home health care agency, they are required to generate reports which show how the patient is doing and what service they are providing. These types of records in turn would permit plaintiff's doctors to make informed recommendations regarding plaintiff's ongoing care.

In awarding Plaintiff compensation for ongoing attendant care provided by a third-party provider only, the Commission protected the employer's interest in directing the employee's medical care. This case, in which the employer had initially agreed to provide attendant care and withdrew ongoing compensation because of disputed issues of fact regarding the selection of attendant care provider and the nature and amount of care needed, involves factual and legal issues in common between medical compensation for attendant care and attorney's fees ordered by the superior court to be paid from that compensation.

IV. Intervention

Plaintiff has cross-appealed, and argues the superior court erred by allowing Defendants to intervene in the superior court action. "A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved." N.C. Gen. Stat. § 1-271 (2015). Plaintiffs argue Defendants did not have a right to intervene in the superior court action. Defendants counter-argue Plaintiff did not have a right to seek review or a *de novo* ruling from the superior court under these facts.

A trial court's order allowing intervention as a matter of right is reviewed *de novo*, whereas permissive intervention is reviewed under an abuse of discretion standard. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999); *Harvey Fertilizer & Gas Co. v. Pitt Cnty.*, 153 N.C. App. 81, 86, 568 S.E.2d 923, 926 (2002). Defendants argued before the superior court that they met the criteria for both permissive intervention and intervention as of right, and the superior court's order is unclear upon which grounds of intervention it allowed Defendants' motion. Under either standard, the superior court properly allowed Defendant to intervene.

Rule 24 of the North Carolina Rules of Civil Procedure provides for intervention as a matter of right when the intervenor shows: (1) it has an

interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (2015); *Virmani*, 350 N.C. at 459, 515 S.E.2d 675 at 683. Rule 24 allows for permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). For the reasons stated above, and as a proper party before the Commission, the trial court appropriately recognized Defendants' interests in the purported action pending before it, and correctly allowed Defendants to intervene.

Furthermore, this Court has previously validated the employer's interests in the proceeding in superior court when the plaintiff appropriately appeals under N.C. Gen. Stat. § 97-90. *See Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 798 (2012) ("The proper procedure for addressing the issue of attorney's fees pursuant to Section 97-90(c) would have been for the full commission to make its findings and conclusions, and then *either party* who desired review could appeal that decision to the superior court." (emphasis supplied)).

Defendants lawfully intervened as parties before the superior court. An appeal lies of right directly to this Court "[f[rom any final judgment of a superior court, . . . including any final judgment entered upon review of a decision of an administrative agency[.]" N.C. Gen. Stat. § 7A-27(b)(1) (2015). Defendants are "parties aggrieved" and their appeal is appropriately before us. N.C. Gen. Stat. § 1-271. Furthermore, Defendants' intervenor status before the superior court would be rendered meaningless, if they were denied the right to appeal from the superior court's decision on the very issue for which intervention was permitted.

V. Superior Court's Review of the Award of Attorney's Fees

Defendants argue the superior court was without jurisdiction under the limited purposes of N.C. Gen. Stat. § 97-90(c) to review the Industrial Commission's denial of attorney's fees from the award of attendant care medical compensation and to order attorney's fees to be paid from that medical compensation.

"Fees for attorneys and charges of health care providers for medical compensation under [the Workers' Compensation Act] shall be subject to the approval of the Commission[.]" N.C. Gen. Stat. § 97-90(a) (2015). Plaintiff's counsel correctly realized that it is a criminal offense for an attorney to receive a fee for his or her representation of a client in a

worker's compensation claim without approval by the Commission. N.C. Gen. Stat. § 97-90(b) (2015).

A. N.C. Gen. Stat. § 97-90(c)

N.C. Gen. Stat. § 97-90(c) provides the superior court with appellate authority to review the Industrial Commission's determination of the "reasonableness" of the award of attorney's fees. The statute provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file *notice of appeal* to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by *filing written notice of appeal* within 10 days after receipt of such action by the full Commission, *appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal* said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. . . In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, *appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides*; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after *notice of appeal has been filed*, transmit its findings and

> reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; *provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action.*

Id. (emphases supplied).

The statute further provides "the *appealing* attorney shall notify the Commission and the employee of any and all proceedings before the superior court *on the appeal*, and either or both may appear and be represented at such proceedings." *Id.* (emphases supplied). This language supports our interpretation that the statute solely applies to an appellate reasonableness review of a fee award on a contract between the claimant-employee and his attorney previously reviewed by the Full Commission, and not a *de novo* hearing.

B. *Brice v. Salvage Co.*

A review of the legislative history of N.C. Gen. Stat. § 97-90(c) helps show the General Assembly's purpose and intent in its enactment. In *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958), the superior court had reviewed the Industrial Commission's award of an attorney's fee. This opinion was issued prior to the establishment of the Court of Appeals in 1967 and the establishment of our comprehensive jurisdiction to review direct appeals from the Industrial Commission. *Id.*

N.C. Gen. Stat. § 97-90 at that time did not include any language to grant jurisdiction to the superior court to review an attorney's fee award by the Commission. The superior court had determined the fee awarded by the Commission was inadequate to reasonably compensate the attorney for services rendered, struck the Commission's award, and awarded a higher attorney's fee. *Id.*

The Supreme Court held the statute gave the Commission exclusive power to approve attorney's fees in the exercise of its discretion, and the superior court had no jurisdiction to hear evidence on the question of attorney's fees, or to modify or strike the Commission's award. *Brice*, 249 at 83, 105 S.E.2d at 445-46.

The General Assembly amended N.C. Gen. Stat. § 97-90 in 1959 to add subsection (c), in response to the *Brice* decision. *See Palmer I*, 157 N.C. App. at 632, 579 S.E.2d at 906 ("[Section] 97-90(c) was enacted to rectify the specific problem of the trial court not having jurisdiction over attorneys' fees in a workers' compensation cases [sic]."). By amending the statute, the General Assembly gave the superior court the limited

appellate authority to review the reasonableness of attorney's fees arising in a fee contract between an employee and his attorneys, and as presented to and reviewed by the Industrial Commission. The plain language of subsection (c) and the case and legislative history behind the General Assembly's amendment of the statute, shows it applies only to circumstances as set forth in *Brice*: fee disputes between the client and his attorney regarding fair compensation for indemnity claims and awards in light of the attorney's services rendered. *Id.*

The statute further provides guidance to the Commission in determining a reasonable attorney's fee:

> The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

N.C. Gen. Stat. § 97-90(c). The inclusion of these guiding factors into the statute further supports the conclusion that the superior court's appellate power to review the Commission's award of attorney's fees is limited to the question of reasonableness of the fee awarded by the Commission in light of the services rendered to the employee by agreement with his attorney.

Here, the Industrial Commission's Opinion and Award states:

> 7. When there is a request for an attorney fee out of compensation to be awarded by the Commission, the Commission has the duty to consider the reasonableness of the fee pursuant to N.C. Gen. Stat. 97-90, even in the absence of an assignment of error by defendants. In the case at bar, the Full Commission finds and concludes that the fee agreement between plaintiff and plaintiff's counsel is reasonable, as is the attorney fee plaintiff's counsel has received and will continue to receive from plaintiff's ongoing indemnity compensation. However, "[m]edical and hospital expenses which employers must provide pursuant to N.C.G.S. § 97-25 are not a part of 'compensation' as it always has been defined in the Workers' Compensation Act." *Hyler v. GTE Products Co.*, 333 N.C. 258, 264, 425

> S.E.2d 698, 702 (1993) (citation omitted). "[T]he relief obtainable as general 'compensation' is different and is separate and apart from the medical expenses recoverable under the Act's definition of 'medical compensation.' " *Id.* at 265, 425 S.E.2d at 703. There is no evidence of a fee agreement between plaintiff's counsel and any of plaintiff's medical providers, including Mr. Holappa. The Full Commission concludes that to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase "any recovery," could be interpreted to include medical compensation, it is unreasonable under the facts of this case. The Full Commission therefore declines to approve an attorney fee for plaintiff's counsel out of the medical compensation which defendants have been ordered to pay Mr. Holappa.

The Industrial Commission's decision is based upon two theories: (1) medical compensation is separate and apart from indemnity compensation under *Hyler* and N.C. Gen. Stat. § 97-25; and, (2) no evidence of a fee agreement between Plaintiff and any medical provider, including Mr. Holappa, was presented to the Commission.

The superior court found:

> 8. Mr. Holappa, through Plaintiff's counsel, submitted an affidavit to [the superior court] in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.

The superior court considered evidence, the purported "fee agreement" between Plaintiff's attorney and Mr. Holappa, which was not considered before the Industrial Commission. Plaintiff's counsel took the indemnity and disability fee contract between Plaintiff and Mr. Teich, added an affidavit, which had never been considered by or ruled upon by the Industrial Commission, and argued for the first time before the superior court that these documents "created" an implied third party contract between Plaintiff's counsel and Mr. Holappa.

Plaintiff's counsel did not petition the superior court for appellate review of the "reasonableness" of the Industrial Commission's decision related to the "agreement for fee or compensation" between Plaintiff and his attorneys referenced in the Full Commission's Opinion and Award,

but instead presented a theory and a purported "fee contract," which was never presented to or reviewed by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(c).

The application of a statute must be limited to its "express terms, as those terms are naturally and ordinarily defined." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988). The narrow scope of N.C. Gen. Stat. § 97-90(c) permits the superior court on appellate review to consider the factors set forth in the statute in reviewing the Commission's determination of the "reasonableness" of a fee agreement. The statute does not give the superior court authority to look beyond the evidence presented before the Commission or to take new evidence. *See Blevins v. Steel Dynamics*, No. 09-540, 2010 N.C. App. LEXIS 291 (N.C. Ct. App. Feb. 16, 2010) (unpublished) (unanimously holding the superior court had no original jurisdiction under N.C. Gen. Stat. § 97-90(c) to determine or award attorney's fees in the absence of findings and reasoning provided by the Commission, and vacating and remanding to the superior court for further remand to the Industrial Commission).

Furthermore, the superior court in its order apparently found facts and ruled far beyond an appellate review of the "reasonableness" of the attorney's fee, for legal services rendered to the injured worker by his attorney. The superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation. This determination is outside the scope the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion." *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 908.

Jurisdiction over "all questions" arising under the Workers' Compensation Act is vested solely in the North Carolina Industrial Commission. *Id.* The Workers' Compensation Act contains very few exceptions to this rule, which are specifically set forth in the Act. None of these exceptions apply here. The superior court acted beyond its statutory and appellate jurisdiction by entering an order based upon evidence not presented to the Commission, and by its *de novo* review and order of the lawfulness of the award of an attorney's fee from the Commission's award of medical compensation. *Id.*

The Industrial Commission, and not the superior court, interprets and enforces the provisions of the Worker's Compensation Act and Rules of the North Carolina Industrial Commission, subject to appellate review by this Court. *Id.* The superior court's purported adjustment and set-off from the amount of medical compensation due a medical provider is without any authority and substantially and impermissibly intrudes into both the jurisdiction of the Industrial Commission under the Workers' Compensation Act and the appellate authority of this Court. *Id.*

VI. Conclusion

Our Court has jurisdiction to hear the issues raised by both parties' appeals. Defendants have shown they have suffered, or stand to suffer, a "concrete and particularized[,] . . . actual or imminent," injury. *Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16 (citation and quotation marks omitted). We also have jurisdiction to review the superior court's order by virtue of Plaintiff's cross-appeal. Furthermore, this Court can review issues of jurisdiction of the lower courts *sua sponte*. *Xiong*, 193 N.C. App. at 652, 668 S.E.2d at 599.

With limited exceptions specifically set forth in the Act, the Industrial Commission is the sole arbiter of "any questions" under the Workers' Compensation Act. N.C. Gen. Stat. § 97-91. N.C. Gen. Stat. § 90-97(c) does not provide the superior court with jurisdiction to interpret the provisions of the Workers' Compensation Act to determine whether attorney's fees can lawfully be deducted from an award of attendant care medical compensation awarded by the Commission to a third party medical provider, or to adjust the Commission's award of medical compensation. *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 90. *See also Blevins*, No. 09-540, 2010 N.C. App. LEXIS 291 (N.C. Ct. App. Feb. 16, 2010).

This Court, not the superior court, is the appropriate and exclusive tribunal to review the Commission's ruling under these circumstances. *Id.* The superior court also acted beyond the scope of its statutory and limited appellate review of the reasonableness of the Commission's fee award by taking and considering new evidence, which was not presented to the Commission.

Under the present comprehensive statutory framework of appellate review of the Commission's decisions before this Court, and the particular historical circumstances which gave rise to the amendment of N.C. Gen. Stat. § 90-97 adding subsection (c) after *Brice*, and prior to the establishment of the Court, the reasonableness review by the superior court under subsection (c) may have become an obsolete relic. In light

of the precedents, statutory history, and the primary appellate jurisdiction being vested in this Court upon its creation, we refer this issue to the General Assembly and request their review of the risks of inconsistent rulings inherent within the multitude of judicial districts, and the continuing need for this limited appellate review by the superior court of the reasonableness of the Commission's attorney's fee awards.

The superior court, under its limited appellate review, was without jurisdiction under N. C. Gen. Stat. § 90-97(c) to re-weigh the Commission's factual determinations under these facts, or to award, *de novo*, attorney's fees from attendant care medical compensation to be paid to a third party medical provider. The order of the superior court purporting to order attorney's fees to be paid from medical compensation awarded by the Commission is a nullity and is vacated. We remand to the superior court for further remand to the Industrial Commission for further proceedings as necessary.

VACATED AND REMANDED.

JUDGE BRYANT concurs.

JUDGE INMAN concurs in result only.

STATE OF NORTH CAROLINA
v.
CHRISTINA RENEE ALLEN

No. COA16-271

Filed 6 September 2016

Criminal Law—plea agreement—clerical error

The classification of defendant's ten-day sentence in the original written order as "Intermediate Punishment" was an inadvertent clerical error. The case was remanded for correction consistent with defendant's plea agreement. The modified order was vacated and defendant's motion for appropriate relief was dismissed as moot.

Appeal by defendant from judgment entered 11 August 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 24 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

TYSON, Judge.

Christina Renee Allen ("Defendant") appeals from judgment entered after she pled guilty to felony failure to appear and misdemeanor obtaining a controlled substance by fraud. We remand for correction of the clerical error in the original written order to reflect Defendant's plea agreement. We vacate the modified order as it concerns the error contained within the original written order.

I. Factual Background

On 9 July 2012, Defendant was indicted on one felony count of obtaining a controlled substance by fraud. She failed to appear in court as scheduled on 10 September 2012 and was arrested approximately two years later.

On 11 August 2015, Defendant pled guilty pursuant to a plea agreement to one count of misdemeanor obtaining a controlled substance by fraud and one count of felonious failure to appear. The plea agreement provided:

> The State agrees to a *community punishment*. The defendant shall be placed on supervised probation, the length of which will be determined by the Court. The defendant shall submit to a period or periods of confinement in the local confinement facility pursuant to N.C.G.S. 15A-1343(a1)(3), with the scheduling of said periods of confinement to be in the discretion of the probation officer. All other terms and conditions of probation shall be in the discretion of the Court.

(emphasis supplied).

At the beginning of the hearing, the trial court restated that "the plea arrangement is that [Defendant] will plead to community punishment" and asked the prosecutor to "educate [the court] a little bit" on the requirements under N.C. Gen. Stat. § 15A-1343(a1)(3) and the role of the probation officer. At that point, the prosecutor stated that the statute allows "a period or periods of confinement in a local confinement

facility for a total of no more than six days per month during any three separate months during the period of probation" and that "the six days per month confinement provided for in this subdivision may only be imposed as two- or three-day consecutive periods."

Later during the hearing, Defendant stipulated to the factual basis supporting her plea agreement and to the contents of the sentencing worksheet. After the facts supporting the plea agreement were summarized, the trial court again reiterated the requirements of jail confinement under "community punishment" to ensure its understanding. The trial court stated, "I know the Court can in a community or intermediate punishment order jail confinement . . . to two or three days, no more than six days per month for any three separate months."

The trial court then asked the prosecutor "to educate [the court] again" and requested clarification regarding the prosecution's request for periods of confinement. The prosecutor requested specific periods of confinement "to be imposed at the discretion of the probation officer," which was consistent with the plea agreement. Defendant's counsel further requested that the confinement be "no more than a couple weekends in this particular situation."

The trial court accepted Defendant's plea agreement and sentenced Defendant to "*community punishment* of between 6 and 17 months and the defendant will serve ten days in the local jail at the discretion of the probation officer within the next 60 days." (emphasis supplied). However, when the trial court's AOC-CR-603C form order was reduced to writing, Defendant's ten-day sentence was included on page two as "Special Probation – G.S. 15A-1351" under "Intermediate Punishments." It was not included under "Community and Intermediate Probation Conditions – G.S. 15A-1343(a1)." This occurred despite the fact that at the top of page one of the form, the court indicated that it was sentencing Defendant to "community" punishment. The written order was filed 11 August 2015. Defendant filed her notice of appeal on 20 August 2015.

Pursuant to the original written order's inclusion of "intermediate punishment," Judge Marvin P. Pope, Jr. signed a modified order requiring Defendant serve her ten-day sentence from 1 September 2015 to 10 September 2015. Like the original written order, the modified order indicated that it was modifying "Special Probation – G.S. 15A-1344(e)" under the "Intermediate Punishments – Contempt" section of the form.

Although the modified order was signed the same day as Defendant had filed notice of her appeal, it was not filed until 28 August 2015. The record does not indicate whether the courtroom clerk made any

notation of the rendering of the trial court's modified order in the court minutes kept for 20 August 2015.

Along with her brief, Defendant contemporaneously filed a Motion for Appropriate Relief and requested this Court to vacate the modified order based on the trial court's lack of subject matter jurisdiction to enter the modified order.

II. Issues

Defendant alleges the trial court erred in the original written order by sentencing Defendant to intermediate punishment in contravention of the accepted plea agreement. Defendant also argues the trial court lacked subject matter jurisdiction to enter the modified order after her appeal had been entered. She has filed a Motion for Appropriate Relief requesting that the modified order be vacated on that ground.

III. Standard of Review

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). N.C. Gen. Stat. § 15A-1444 (2015) governs a defendant's right to appeal from judgment entered upon a guilty plea and limits it to specific circumstances. This includes when a sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(2) (2015).

Generally, "[w]hen a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (internal quotation and citation omitted), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 709 (2007); *see* N.C. Gen. Stat. § 15A-1444(a1) (2015). When this Court is confronted with statutory errors regarding sentencing issues, such errors "are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citations omitted).

If the alleged sentencing error is only clerical in nature, "it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (internal quotations and citation omitted). Rule 60 of the North Carolina Rules of Civil Procedure provides:

> 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.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2015). A clerical error is defined as, "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quotation marks and citation omitted).

IV. Original Written Order

"It is the responsibility of the trial judge to accept or reject a tendered plea negotiated between the district attorney and defendant." *In re Fuller*, 345 N.C. 157, 160, 478 S.E.2d 641, 643 (1996); *see State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980) (holding a plea agreement involving a recommended sentence must be approved by the trial judge before it becomes effective). "Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly." N.C. Gen. Stat. § 15A-1023(b) (2015).

In 2011, the General Assembly created new "community punishment" conditions a trial court may order during sentencing. *See* N.C. Gen. Stat. § 15A-1343(a1) (2015). Community punishment is defined by statute as "[a] sentence in a criminal case that does not include an active punishment or assignment to a drug treatment court, or special probation as defined in G.S. 15A-1351(a). It may include any one or more of the conditions set forth in G.S. 15A-1343(a1)." N.C. Gen. Stat. § 15A-1340.11(2). One such condition is:

> Submission to a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods. When a defendant is on probation for multiple judgments, confinement

> periods imposed under this subdivision shall run concurrently and may total no more than six days per month.

N.C. Gen. Stat. § 15A-1343(a1)(3) (2015).

Here, the trial court accepted Defendant's plea agreement in which the parties had agreed to "community punishment," including a period or periods of confinement pursuant to N.C. Gen. Stat. § 15A-1343(a1)(3). Based upon the agreement, the trial court required Defendant to "serve ten days in the local jail at the discretion of the probation officer within the next 60 days." Although this ten-day sentence could have been served pursuant to the requirements of "community punishment" under N.C. Gen. Stat. 15A-1343(a1)(3), the order reducing the trial court's statements to writing incorrectly indicated that the sentence was "Special Probation – G.S. 15A-1351" under "Intermediate Punishment."

Defendant argues that the original written order's classification of the ten-day sentence was unlawful pursuant to N.C. Gen. Stat. § 15A-1444(a2)(2) and this Court should vacate the judgment and remand for resentencing. The State contends the order simply contained an inadvertent clerical error made when the judgment was reduced to writing. The State asserts that the appropriate remedy is to remand for correction of the clerical error with instruction that the trial court indicate the periods of confinement under the appropriate section of the form.

The record before this Court shows the mistake in sentencing was purely a clerical error on the original written order. First, the trial court and prosecutor clearly stated at the beginning of the hearing that the plea agreement contained "community punishment." Second, the trial court indicated at the hearing that it was sentencing Defendant to community punishment and correctly stated the requirements for the periods of confinement as being "two or three days, no more than six days per month for any three separate months." Third, the top of the first page of the original written order indicated that the trial court sentenced Defendant to "community punishment," not intermediate.

Finally, although the sentence was under "Intermediate Punishment" on page two of the form, the ten days could have been served in compliance with the requirements of N.C. Gen. Stat. § 15A-1343(a1)(3). For example, Defendant could have served five days over two weekends each month during the 60 days following the order.

Taken together, these facts demonstrate the entry of Defendant's sentence under "Intermediate Punishment" was a clerical error. We remand to the trial court for correction of the clerical error regarding

Defendant's sentence pursuant to her plea agreement. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696-97.

V. Modified Order

The modified order sentenced Defendant to ten consecutive days of confinement under the "Intermediate Punishments – Contempt" portion of the form. This sentence directly conflicts with the requirements found in N.C. Gen. Stat. § 15A-1343(a1)(3), as agreed to by the parties in the plea agreement, and accepted by the sentencing judge. The State, in its brief, admits that "the probation modification order carried forward, and essentially repeated the clerical error reflected on the judgement when it was reduced to writing." Since the modified order was made pursuant to the clerical error contained in the original written order and we remand the original written order for correction of the error, the modified order imposing a sentence not allowed under community punishment is vacated.

VI. Conclusion

The classification of Defendant's ten-day sentence in the original written order as "Intermediate Punishment" was an inadvertent clerical error made when the order was reduced to writing. We remand for correction of the clerical error in the original written order to be consistent with Defendant's plea agreement with community punishment. We vacate the modified order as it was made pursuant to the clerical error contained within the original written order. Defendant's motion for appropriate relief is dismissed as moot.

REMANDED FOR CORRECTION OF CLERICAL ERROR IN PART; VACATED IN PART.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DOMINIC IAN CLEVINGER, DEFENDANT

No. COA15-1292

Filed 6 September 2016

1. Evidence—videotaped interrogation—failure to show prejudice

The trial court committed harmless error, if any, in a robbery with a dangerous weapon case by admitting the challenged portions of a videotaped interrogation. Although the statements in the video were not relevant to the nonhearsay purposes for which they were offered, defendant failed to show prejudice to warrant a new trial.

2. Robbery—dangerous weapon—failure to instruct—common law robbery

The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on the elements of common law robbery. Defendant was either guilty of robbing the business by the threatened use of the chef's knife, or he was not guilty at all.

Appeal by defendant from judgment entered 4 November 2014 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Ann W. Matthews, for the State.

Jarvis John Edgerton, IV for defendant.

ELMORE, Judge.

A jury found Dominic Clevinger (defendant) guilty of robbery with a dangerous weapon. On appeal, defendant contends that the trial court erred in admitting prejudicial statements by a detective during defendant's interrogation, and in failing to instruct the jury on the elements of common law robbery. We conclude that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: On 11 June 2013, Crystal Lynn McDade was working as the manager and cashier at

the Stanleyville Business Center (SBC). The SBC was an Internet sweepstakes café where customers could purchase Internet time to play games and win cash prizes. McDade had brought her fifteen-year-old daughter, Alyssia Hicks, to work with her that morning.

Around 9:00 a.m., McDade observed a man walk into the SBC to use the restroom and leave a few seconds later. She thought it was unusual because "he did not purchase anything" and "did not speak to anyone . . . . We don't usually have people [ ] walk off the street to use the restroom." Around 10:30 a.m., the same man returned to the SBC and approached McDade at the cashier's station. He handed her a twenty-dollar bill and began patting himself down, searching for his driver's license. He told McDade that he could not find his license and left to look for it in his car.

The man returned a few seconds later and dropped a plastic Dollar General bag on the counter in front of McDade. He grabbed Hicks, jerked her head back, and held a knife to her exposed neck, telling McDade to "put the money in the bag or he was going to slit [Hicks'] throat." At trial, Hicks described the knife as "cold and hard." McDade testified that she saw the knife but could not recall how big it was. McDade opened the register and started pulling out money. Before she could put it into the bag, the man snatched the money and fled the store. Hicks was left with a red mark on her throat where the knife was held, but she was not bleeding.

Officers responded to the scene and took a statement from McDade. She described the suspect as a white male with reddish-brown hair, a slender build, and freckles on his arms and face. He was wearing a red polo-style shirt and long plaid shorts. Sergeant Gomez, one of the responding officers, located a red shirt on the side of the road in a gravel area near the SBC. It was preserved for evidence and sent to the state crime lab for testing, where Agent Hannan obtained DNA samples from the shirt. A few days after the robbery, McDade identified defendant in a photographic line-up as the robbery suspect.

McDade provided Detective Watkins with a series of videos captured that morning on the SBC's surveillance cameras. As he watched the videos, Detective Watkins noticed that, in addition to McDade's description, the male suspect was wearing "a low cut shoe" and "had what appeared to be the end of a belt hanging down the right side of his body that is kind of flapping against his leg as he walked." He also noticed that before the male suspect entered the SBC, a woman wearing a bandana, a t-shirt with writing across the top and a design in the center, and red Capri pants walked into the SBC to use the restroom and leave. Video

surveillance taken earlier that morning from a nearby Target showed the same woman leaving the store with a man who matched the physical description of the male robbery suspect.

After learning from McDade that the male suspect had used what appeared to be a new Dollar General bag during the robbery, Detectives Watkins and Olivo went to a nearby Dollar General to follow up on the lead. When they entered the store, they noticed a woman in a bright green tank-top checking out at the cash register. She caught their attention because of the bright color of her shirt, her tattoos, and her noticeable hairstyle.

The detectives made contact with the assistant manager of the Dollar General to review the surveillance footage taken earlier that day—approximately one hour before the robbery. The video showed the same woman in the bright green tank-top purchasing a three-piece set of chef's knives and a DVD at 9:09 a.m. One minute later, a white male walked into the store, stood next to her at the cash register, picked up the DVD to look at it, and then set it back down. He was wearing a red polo shirt, long plaid shorts, a belt hanging down the right side of his leg, and otherwise matched the physical description of the robbery suspect.

After reviewing the surveillance footage, detectives returned to the front of the store looking for the woman in the green tank-top. The Dollar General cashier, Tiffany Perdue, informed the detectives that the woman had left, but she had spoken to Perdue about tattoos while she was in the store and had given Perdue her telephone number. A reverse search of the number revealed that it belonged to defendant's cousin, Krystal Clevinger. Detective Olivo secured an address for Ms. Clevinger and her photo. He recognized her as the woman in the green tank-top he had seen at Dollar General and on the surveillance video.

The detectives went to Ms. Clevinger's home to ask about her purchase earlier that day at Dollar General. She produced a three-piece set of chef's knives, one of which was missing from the opened package. At that point, Ms. Clevinger agreed to go with the detectives to the public safety center for an interview. She also consented to a search of her vehicle, where the detectives found the DVD she had purchased at Dollar General. The knife set and the DVD packaging were submitted for latent fingerprint examination.

At trial, the State called Cindy Persinger as a witness, with whom defendant and his girlfriend had lived several years ago. Persinger recalled that on 10 June 2013, the day before the robbery, defendant came to her house accompanied by an older woman. Persinger testified

that the woman was wearing a bandana, a white t-shirt, and red Capri pants, and that defendant was wearing a black shirt, plaid shorts, black hat, and was carrying a red shirt over his shoulder. Defendant told Persinger that he was in town from Florida for a "quick visit," and was waiting for his cousin, Ms. Clevinger, to pick him up. Defendant and the woman waited for about three hours until they decided to walk. He called Persinger shortly after leaving her house to tell her that Ms. Clevinger had picked him up as he was walking down the road. When Detective Watkins interviewed Persinger and showed her still images of the male and female suspects in the Target video, she identified them as defendant and the woman who had been at her house.

Defendant was arrested in Florida in October 2013 on an unrelated charge, and extradited to North Carolina on 15 December 2013. Detectives obtained a saliva sample from defendant, which was sent to the state crime lab for testing. A comparison of the DNA results from the red polo shirt found near the SBC matched the predominant profile of defendant's DNA. In addition, defendant's fingerprints were identifiable on both the DVD and the set of chef's knives purchased from Dollar General on the same day as the robbery.

During a video-taped interrogation, defendant repeatedly denied any involvement in the robbery. He filed a motion *in limine* to redact portions of the interrogation video in which Detective Watkins: (1) expressed his opinion that all of the evidence "points to [defendant]"; (2) referenced alleged statements by Ms. Clevinger that defendant had a drug problem; (3) asserted that the "same exact person" seen in the SBC surveillance video is seen with Ms. Clevinger in surveillance footage from other stores; (4) opined that it was defendant on the SBC video and stated that he had "seen the video himself"; (5) referenced alleged statements by Ms. Clevinger that defendant was with her at the other stores; (6) referenced alleged statements by Ms. Clevinger that defendant looked thinner than usual because of his drug use; (7) referenced an alleged statement by Ms. Clevinger that defendant took one of the knives she bought at Dollar General; (8) referenced defendant's prior arrest; (9) told defendant he had phone records and proof that defendant and Ms. Clevinger changed their phone numbers after the robbery; (10) alleged that defendant "called the shit out of [Ms. Clevinger]" while she was being interviewed by law enforcement; and (11) told defendant that he was "one cold dude."

In response to defendant's motion, the State argued that it was not offering the statements for their truth, but to provide "context to defendant's responses" and "to explain how a detective conducts an interview

and interview techniques." Over defendant's objections, the trial court admitted the challenged portions of the video with the following limiting instruction:

> THE COURT: Members of the jury, in the exhibit that you are about to see, Detective Watkins and Olivo interviewed the defendant, Mr. Clevinger, after he had been arrested. During the course of the interview it may be that one of the detectives expresses his opinion that the defendant, Dominic Clevinger, is the person shown in one or more of the surveillance videos.
>
> You are not to consider this opinion evidence for the truth of whether Mr. Clevinger is pictured in the videos. It is your duty to determine whether the defendant is depicted in any of the surveillance videos. You may consider any such statement or opinion only for the impact that opinion or statement may have had on the defendant as an interviewing technique by the detectives.
>
> Officers are permitted to employ investigative and questioning techniques designed to elicit information. During the course of the interview it may be that the detective accuses the defendant of being untruthful or lying to him. You can consider the detective's remarks not for the truth of what the detective is alleging but as an investigative technique designed to elicit information from a suspect.
>
> Similarly, if the detective makes any statements to the defendant about what other people told him or about any alleged evidence against the defendant or what that alleged evidence is, you can consider such statements in the context of interrogation techniques used by law enforcement officers to secure confessions. You are not to consider the statements the detective attributes to others as being made for the truth of those statements because they were not made under oath and admitted at this trial.

The trial court repeated the instruction at the close of the evidence, at which point it also instructed the jury on the elements of robbery with a dangerous weapon. The court declined the State's request to declare the knife a dangerous weapon as a matter of law, leaving the question for the jury, and denied defendant's request for an instruction on the lesser-included offense of common law robbery.

The jury found defendant guilty of robbery with a dangerous weapon, and he pled guilty to an aggravating factor of willful violation of probation or parole. The trial court entered a judgment and commitment in the aggravated range, sentencing defendant to an active term of 140 to 180 months of imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

A. Hearsay and Relevance

[1] First, defendant argues that the trial court erred in admitting the challenged portions of the video-taped interrogation. Defendant contends that no portion of the interview was relevant, and that the State's reasons for admitting the video—to show the detective's interrogation techniques and provide context for defendant's responses—were a pretext to put before the jury what was otherwise inadmissible hearsay and improper lay opinion testimony.

"Preserved legal error is reviewed under the harmless error standard of review." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. Gen. Stat. § 15A-1443 (2009); N.C. R. App. P. 10(a)(1); *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). Where, as here, "the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice." *Id.* at 513, 723 S.E.2d at 331 (citing N.C. Gen. Stat. § 15A-1443(a)). "In such cases the defendant must 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.' " *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a)).

"Hearsay" is a an out-of-court statement "offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2015). "Hearsay is not admissible except as provided by statute or by [the rules of evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). Where an out-of-court statement is offered for a purpose other than to prove the truth of the matter asserted, it is not hearsay because it does not fit the legal definition. *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998); *Long v. Asphalt Paving Co. of Greensboro*, 47 N.C. App. 564, 569, 268 S.E.2d 1, 4–5 (1980). To be admissible, however, the statement must still be relevant to the nonhearsay purpose for which it was offered. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2015) ("Evidence which is not relevant is not admissible.").

"Relevant evidence" is "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 (2015). "In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991) (citing *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401–02 (1978)). While "a 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." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

This Court has previously addressed the admissibility of statements made by law enforcement during video-taped interrogations. In *State v. Miller*, 197 N.C. App. 78, 676 S.E.2d 546 (2009), the defendant argued that "statements attributed to non-testifying third parties, which were contained in the detectives' questions, should have been redacted before the [interrogation] was presented to the jury." *Id.* at 85, 676 S.E.2d at 551. We held that the detectives' questions were relevant to give context to concessions made by the defendant during the interrogation, and to explain the defendant's subsequent conduct in changing his story when confronted with purported statements of others through the detectives' questions. *Id.* at 87, 676 S.E.2d at 552.

Similarly, in *State v. Castaneda*, 215 N.C. App. 144, 715 S.E.2d 290 (2011), the defendant moved to redact portions of a transcript from an interrogation in which the detectives referred to statements from "other witnesses" about events surrounding a homicide, "as well as portions in which the detectives told [the] defendant that his version of events was a 'lie.' " *Id.* at 146, 715 S.E.2d at 292. During his post-arrest interview, the defendant's story shifted significantly in response to a detective's allegations that the defendant was not being truthful. *Id.* at 150, 715 S.E.2d at 295. We held that the statements were admissible to show the effect that they had on the defendant. *Id.* More specifically, as "part of an interrogation technique designed to show [the] defendant that the detectives were aware of the holes and discrepancies in his story," the detectives' statements were relevant because they yielded inculpatory responses from the defendant which were "relevant to the murder charge." *Id.* at 150–51, 715 S.E.2d at 295; *see also id.* at 151, 715 S.E.2d at 295 ("[A]n

interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect." (quoting *State v. Cordov*a, 137 Idaho 635, 641, 51 P.3d 449, 455 (Idaho Ct. App. 2002))).

Finally, in *State v. Garci*a, 228 N.C. App. 89, 743 S.E.2d 74 (2013), *disc. review denied*, 367 N.C. 326, 755 S.E.2d 619 (2014), the defendant initially denied any knowledge of a homicide during an interview with police. *Id.* at 98, 743 S.E.2d at 80. At trial, however, he admitted to killing the victim but claimed he did so in self-defense. *Id.* at 99, 743 S.E.2d at 80. We held that the challenged statements made by the detectives during the interrogation were admissible because the "[d]efendant's credibility was a key issue for the jury to decide," and his willingness "to repeatedly lie, in spite of [the detective's] pressuring interrogation techniques, was highly probative of [the] defendant's credibility." *Id.*

Consistent with its position at trial, the State maintains that Detective Watkins' statements were "relevant and admissible, not for the truth of the matter asserted, but to show the interrogation techniques of the detectives and to provide context for defendant's responses." Its reliance on the above-cited cases, however, is misplaced. First, unlike *Miller*, the evidence was not relevant for the purpose of placing defendant's answers in "context" because defendant made no concessions during the interrogation. Instead, he repeatedly denied any involvement in the robbery, and we cannot agree with the State that defendant's denials were incriminating and, therefore, relevant and admissible. Second, unlike *Castaneda*, the evidence was not relevant for the purpose of showing the detective's interrogation techniques because defendant's responses never changed—much less due to any method used by the detective. And a demonstration of even the most impressive interrogation tactics, standing alone, would not have "made facts of consequence to this case more probable or less probable than they would be otherwise." *Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552. Finally, although we declined to limit *Miller* as allowing an interrogator's statements to be admitted into evidence "only if they caused the defendant to concede the truth or change his story," *Garcia*, 228 N.C. App. at 98, 743 S.E.2d at 80, here, unlike *Garcia*, the evidence was not relevant for the purpose of impeaching defendant's credibility because he did not testify at trial.

While we agree with defendant that the statements were not relevant to the nonhearsay purposes for which they were offered, he has failed to show prejudice to warrant a new trial. We presume that the jury follows the trial court's instructions, *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995) (citation omitted), and in this case, the

court instructed the jury twice that it was not to consider the detective's statements for their truth. Moreover, this was not a situation where the State relied on the detective's statements to develop its central theory or build its case against defendant. *Cf. State v. Canady*, 355 N.C. 242, 249, 559 S.E.2d 762, 766 (2002) (holding that officer's testimony received to explain his subsequent actions was inadmissible hearsay where it went "so far beyond the confines of the instruction" and the State relied on it "as substantive evidence of the details of the murders and to imply defendant had given a detailed confession of his alleged crimes"). In fact, based on the overwhelming evidence against defendant, there appears to have been no need for the State to publish the video to the jury. Surveillance footage captured a male suspect matching defendant's description leaving Target, standing with Ms. Clevinger at Dollar General as she purchased the knife set, and subsequently entering the SBC. Persinger identified the male suspect as defendant, whom she had seen the day before the robbery, and McDade identified defendant as the perpetrator in a photographic line-up. In addition, the DNA results from the red polo shirt found near the SBC matched defendant's DNA profile. Defendant's fingerprints were also found on both the DVD and the chef's knife set purchased from the Dollar General store. In light of this evidence, we are not convinced there is a reasonable possibility that without the video, the jury would have reached a different result. Any error in the admission of the challenged evidence was harmless.

B. Jury Instructions

[2] Defendant also argues that the trial court erred in failing to submit his requested instruction for common law robbery. Because the court left it to the jury to determine if the alleged weapon was a dangerous weapon, defendant contends, it was also required to submit the lesser-included instruction to the jury.

We review *de novo* the trial court's decision regarding its jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). The trial court must "instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). On the other hand, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002); *see also State v. Bailey*, 278 N.C. 80, 86, 178 S.E.2d 809, 812 (1971) ("When there is evidence of defendant's guilt of common law robbery, it is error for the court to fail to submit the lesser offense to the jury." (citations omitted)). If, however, "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718–19 (1980) (citing *State v. Alston*, 293 N.C. 553, 238 S.E.2d 505 (1977)).

Robbery with a dangerous weapon consists of the following elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87(a) (2015). Common law robbery is a lesser-included offense of robbery with a dangerous weapon. *State v. Frazier*, 150 N.C. App. 416, 418–19, 562 S.E.2d 910, 913 (2002). The difference between the two offenses is that robbery with a dangerous weapon is "accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Id.* (quoting *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985)).

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981) (citations omitted). Relevant here, "the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *Id.* at 301, 283 S.E.2d at 726 (citations omitted). "The dangerous or deadly character of a weapon with which [the] accused was armed in committing a robbery may be established by circumstantial evidence." *State v. Rowland*, 263 N.C. 353, 357, 139 S.E.2d 661, 664 (1965) (citation and internal quotation marks omitted).

In support of his argument, defendant relies on *State v. Jackson*, 85 N.C. App. 531, 355 S.E.2d 224 (1987), and *State v. Brandon*, 120 N.C. App. 815, 463 S.E.2d 798 (1995), for the proposition that where the trial court submits to the jury the question of whether a dangerous weapon

was used to commit a robbery, it must also submit an instruction for common law robbery. That may be the rule when there is evidence of common law robbery, but as our Supreme Court has held repeatedly, an instruction for the lesser-included offense is not required when there is no evidence to support it:

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.

State v. Hicks, 241 N.C. 156, 159–60, 84 S.E.2d 545, 547 (1954); *see Peacock*, 313 N.C. at 564, 330 S.E.2d at 196 (holding that common law robbery instruction was not required where "all of the State's uncontradicted evidence, if believed, tend[ed] to compel the conclusion that the vase as wielded by defendant, 'endangered or threatened' the victim's life" and "[t]here was no evidence to support an instruction on a lesser included offense"); *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 382 (1981) ("As a general rule, when there is evidence of defendant's guilt of a crime which is a lesser included offense of the crime stated in the bill of indictment, the defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury." (citations omitted)); *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973) ("In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime."); *State v. Richardson*, 279 N.C. 621, 627, 185 S.E.2d 102, 107 (1971) (rejecting defendant's argument that an instruction on common law robbery was required because "[t]here was no evidence that would warrant or support a finding that defendant was guilty of a lesser included offense"); *State v. Wenrich*, 251 N.C. 460, 460, 111 S.E.2d 582, 583 (1959) ("[T]he court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed."), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987), *overruled by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also State v. Rowland*, 89 N.C. App. 372, 377, 366 S.E.2d 550, 553 ("[T]here is no requirement to

submit the lesser included offense to the jury when there is no evidence to sustain a verdict of defendant's guilt of such lesser offense." (citations omitted)), *disc. review improvidently allowed*, 323 N.C. 619, 374 S.E.2d 116 (1988).

In this case, the circumstantial yet uncontroverted evidence shows that the knife was the same one missing from a new three-piece set of chef's knives purchased hours before the robbery. It also shows that during the robbery, the man identified as defendant grabbed McDade's fifteen-year-old daughter, pulled her head back, and held the knife against her neck as he threatened to slit her throat. The State's evidence was clear and positive as to the dangerous weapon element, and there was no evidence from which a rational juror could find that the knife, based on its nature and the manner in which it was used, was anything other than a dangerous weapon.

Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner. If the jury believed the State's evidence—that defendant robbed the SBC with the missing chef's knife—then it was required to find him guilty of robbery with a dangerous weapon. But if the jury was not convinced that defendant was the robber, then it was required to acquit him altogether. *See State v. Black*, 286 N.C. 191, 196, 209 S.E.2d 458, 462 (1974). On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all. *See State v. Fletcher*, 264 N.C. 482, 485, 141 S.E.2d 873, 875 (1965); *Rowland*, 89 N.C. App. at 379, 366 S.E.2d at 554.

III. Conclusion

Defendant received a trial free from prejudicial error. While we agree that the challenged portions of the interrogation video were not relevant to the nonhearsay purposes for which they were offered, any error in their admission was harmless in light of the trial court's limiting instructions and the overwhelming evidence of defendant's guilt. In addition, the trial court did not err in denying defendant's request for an instruction on the lesser-included offense of common law robbery because there was no evidence to support it.

NO PREJUDICIAL ERROR; NO ERROR.

Judges DAVIS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
WILLIAM CLIFTON CRABTREE, SR.

No. COA15-1124

Filed 6 September 2016

1. Sexual Offenses—vouching for victim's credibility

Where defendant appealed from his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature, the Court of Appeals rejected his argument that the trial court plainly erred by allowing three witnesses to vouch for the child victim's credibility. While one of the witnesses did improperly vouch for the victim's credibility during otherwise acceptable testimony, defendant was not prejudiced. Further, defendant did not receive ineffective assistance of counsel when his attorney did not object to this testimony.

2. Sexual Offenses—jury charge—supported by evidence

Where defendant appealed from his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature, the Court of Appeals rejected his argument that the trial court erred by submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence.

Judge McCULLOUGH dissenting.

Appeal by Defendant from judgments entered 19 March 2015 by Judge Beecher R. Gray in Person County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Natalie Whiteman Bacon, for the State.

Mark Montgomery for Defendant.

STEPHENS, Judge.

Defendant William Clifton Crabtree, Sr., appeals from judgments entered upon his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and

crime against nature. Crabtree argues that the trial court plainly erred by (1) allowing three witnesses to vouch for the child victim's credibility and (2) submitting the first-degree sexual offense charge to the jury on a theory not supported by the evidence. While we agree that one of the State's witnesses impermissibly vouched for the victim's credibility, we conclude that this error did not prejudice Crabtree. We find no error in the trial court's submission of the first-degree sexual offense charge.

Factual and Procedural Background

The evidence at trial tended to show the following: In late April 2013, ten-year-old "L.R."[1] and her two brothers began living with her grandmother and Crabtree, the grandmother's husband of sixteen years. L.R. testified that, shortly thereafter, Crabtree, whom L.R. considered her "grandpa," began making sexual advances towards her, starting with an incident in the family's barn when Crabtree kissed L.R., inserted his tongue into her mouth, and touched her breasts. Crabtree progressed to entering her room at night to "rub his thing on" her. L.R. testified that Crabtree "rubbed his dick on my vagina and white stuff was coming out[.]" Sometimes Crabtree made L.R. put her hand on his "thing" and move it up and down. Crabtree touched the inside of L.R.'s vagina using his fingers and moving them "up and down." L.R. testified that it hurt when Crabtree's fingernails would poke her vagina and she had itching on the inside of her vagina. Crabtree also licked L.R.'s vagina.

L.R. testified that this sexual abuse took place when she was home sick from school and her grandmother was at work and also on a morning following Thanksgiving. L.R. explained that, on the latter occasion, her grandmother had awakened, come to L.R.'s bedroom door, and witnessed Crabtree abusing L.R. In that incident, Crabtree used his hand to rub her vagina and then "he started licking it." According to L.R., Crabtree threatened her with foster care if she told anyone about his abuse.

"D.J.," L.R.'s younger brother, who, like his sister, had known Crabtree as his "grandpa" for his entire life, testified about several instances when he saw Crabtree "do things with [L.R.] that [D.J.] thought [were] weird or strange or inappropriate[.]" D.J. testified that he witnessed Crabtree "lift up her skirt, her nightgown" while they were seated at "the eating table." On another occasion, in the family barn, D.J. saw Crabtree "do something that [he] thought was wrong to" L.R., to wit, Crabtree "had

1. We refer to the child victim and her younger brother by initials in order to protect their identities.

his hand in her pants." The third incident D.J. witnessed took place in L.R.'s bedroom:

> A. I saw him sitting on the edge of the bed. [L.R.] was between his legs. I didn't know what he was doing, but I did see that.
>
> Q. Did you know at this time what anybody was wearing when you saw that?
>
> A. Um, I think he was wearing his underwear, and she was wearing[] her purple nightgown.
>
> Q. Could you see anybody's body parts?
>
> A. No, I did not.
>
> Q. Could you see any private parts of anybody?
>
> A. No, I did not.
>
> Q. Okay. Now, when you saw those things that you thought were weird and wrong, did you say anything about it to anybody?
>
> A. I told my grandma.
>
> Q. When did you tell your grandma?
>
> A. Like the first time I saw it, I told her.
>
> Q. Okay. What did you say?
>
> A. That, um, I think something like that, um, he was messing with [L.R.].

The grandmother testified that, on 29 November 2013, she awoke to find Crabtree was not in their shared bedroom. Looking for her husband, she walked through the house to the doorway of L.R.'s bedroom and saw Crabtree sitting on the side of L.R.'s bed with his hands between L.R.'s legs and L.R.'s hands between his legs. According to the grandmother, "[t]hey was feeling each other up[]" and there was no doubt in her mind that the contact was sexual in nature. The grandmother motioned for L.R. to remain quiet by placing her finger over her mouth because the grandmother wanted to "see what all he was going to do." The grandmother then quietly retreated to her bedroom, unnoticed by Crabtree, but later returned to L.R.'s bedroom and asked Crabtree what he was doing. Crabtree replied that he was "looking for a mouse." After Crabtree left the room, the grandmother spoke with L.R. about what she had just

seen, and L.R. disclosed her past sexual abuse by Crabtree. The grandmother did not confront Crabtree, instead contacting the Person County Department of Social Services ("DSS") and local law enforcement.

Several witnesses testified about the investigation into L.R.'s allegations. Later in December, the grandmother took L.R. to the emergency room ("ER") after she complained of pain and itching in her vaginal area and stated that Crabtree had engaged in intercourse with her. An ER doctor alerted the Child Abuse Medical Evaluation Clinic, an outpatient clinic affiliated with Duke University Hospital, and, on 23 December 2013, Dr. Karen Sue St. Claire, a pediatrician and the medical director of the clinic, began an evaluation of L.R. St. Claire testified as an expert witness. During her initial exam of L.R., St. Claire received L.R.'s medical history from the grandmother while Scott Snyder, St. Claire's child interviewer, interviewed L.R. about the alleged abuse. St. Claire's physical examination of L.R. revealed no physical signs of trauma or infection to L.R.'s vagina or anal area.

St. Claire testified about the clinic's five-tier rating system for evaluating an alleged child victim's description of sexual abuse. St. Claire and Snyder each classified L.R.'s description as level five, the "most diagnostic" category. St. Claire testified that L.R.'s description provided a "clear disclosure" and a "clear indication" of sexual abuse. Snyder was not formally offered or accepted as an expert witness, but offered testimony about his interviews with L.R. Pertinent to this appeal, when asked on re-direct examination about L.R.'s report of a detail regarding an incident of fellatio L.R. was forced to perform on Crabtree, Snyder testified as follows:

> Q Is that correct? Was it remarkable to you when she described the juice hitting the roof of her mouth?
>
> A Umm, remarkable in terms of not typically something that you would hear from a ten-year-old child, and not necessarily something, again trying to understand what may be the reason the child might be saying these things. It is striking in terms of what the child may have seen something happen, but that's more of a experiential statement, in other words something may have actually happened to her as opposed to something seeing on a screen or something having been heard about.

DSS social worker Antoinetta Royster received L.R.'s case in early December 2013 and subsequently interviewed L.R., her family members, and Crabtree. Like Snyder, Royster was neither formally offered nor

admitted as an expert witness. Royster testified about her interviews and then was asked about the process DSS follows in abuse and neglect cases:

> Umm, the family had based upon the recommendations from the CME, the Child Medical Evaluation, one other evaluation was recommended, and that's called a Child Family Evaluation. And with those, it's a lot of times in the abuse and serious neglect cases where the Child Medical Evaluation look[s] more at the physical, but could be physical evidence of abuse and neglect, the Child Family Evaluation look[s] more at the emotional piece of it to basically talk with everyone in the family. And if there is any other thing, any other treatment is needed, they would recommend that to DSS for us to like move on with that, move forward in that direction. They . . . also give what they, not really a diagnosis, but their conclusion or decision about those children that have been evaluated if they were abused or neglected in any way.
>
> Q So and all of those recommendations and treatments have been followed up on—
>
> A Yes.
>
> Q —as you continue to be involved in this case. Is that correct?
>
> A Yes.

Captain A.J. Weaver of the Person County Sheriff's Office also testified on behalf of the State. Weaver testified about his recorded interview with L.R. on 4 December 2013. The recorded interview was introduced into evidence as State's Exhibit 3, published, and played for the jury without objection. In the recording, which was transcribed by the court reporter when it was played for the jury at trial, L.R. disclosed that Crabtree had touched her "private area" with his hands and forced L.R. to "rub" his "private." L.R. also described Crabtree pulling her pants down and licking her "private." L.R. further explained that, after playing with her "private," Crabtree would put his "private" in L.R.'s mouth, go "up and down" until "stuff start[ed] coming out" and went into L.R.'s mouth. L.R. said the latter form of abuse had happened two or three times. Weaver testified that, following his interview with L.R., he sought warrants and arrested Crabtree on 4 December 2013.

On 9 December 2013, a Person County Grand Jury indicted Crabtree on three charges based on the events alleged to have occurred on

29 November 2013: one count of first-degree sex offense against a child under the age of thirteen years, one count of indecent liberties with a child, and one count of crime against nature. Crabtree pled not guilty, and his case came on for trial at the 16 March 2015 session of Person County Superior Court, the Honorable Beecher R. Gray, Judge presiding. Following the close of the State's evidence,[2] Crabtree elected not to present any evidence. At the close of all evidence, Crabtree moved to dismiss the charges against him, and the trial court denied that motion.

On 19 March 2015, the jury returned verdicts finding Crabtree guilty on all charges. The court consolidated the first-degree sexual offense against a child under the age of thirteen years and the crime against nature convictions and entered a judgment sentencing Crabtree to a term of 317-441 months. The court then entered a separate judgment sentencing Crabtree to a concurrent term of 21-35 months for the indecent liberties with a child conviction. Crabtree gave notice of appeal in open court.

Discussion

On appeal, Crabtree argues that (1) the trial court committed plain error in allowing St. Claire, Snyder, and Royster to vouch for L.R.'s credibility, or in the alternative, that Crabtree received ineffective assistance of counsel ("IAC") when his trial counsel failed to object to the challenged testimony; and (2) the trial court committed plain error in submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence. We find no prejudicial error in the admission of the challenged testimony and no error in the submission of the first-degree sexual offense charge.

I. Standard of review

To preserve an issue for review on appeal, a defendant "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." N.C.R. App. P. 10(a)(1). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when

2. The State offered testimony from several other witnesses in addition to those discussed *supra*. The testimony of those witnesses was corroborative of the direct, eyewitness accounts of abuse offered by L.R. and her grandmother.

> the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error review is limited to issues that "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) (citations omitted).

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). Thus, "[u]nder the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

II. Vouching for L.R.'s credibility

Crabtree first argues that St. Claire, Snyder, and Royster improperly vouched for the credibility of L.R. during their testimony. We conclude that neither Snyder nor Royster improperly testified as to L.R.'s credibility. While we agree that St. Claire improperly vouched for L.R.'s credibility in the midst of otherwise acceptable testimony, we conclude that Crabtree was not prejudiced by the impermissible testimony.

"[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted). In child sexual abuse cases, where there is no physical evidence of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony. *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Examples of impermissible vouching for a child victim's

credibility include a clinical psychologist's testimony that a child victim was "believable[,]" *see State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986), and an expert witness's statement, based on an interview with the child, that she "was a sexually abused child." *See State v. Grover*, 142 N.C. App. 411, 414, 543 S.E.2d 179, 181, *affirmed per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (*per curiam*) (citations omitted). Further, the same analysis applies to a witness who is a DSS worker or child abuse investigator because, even if she is "not qualified as an expert witness, . . . the jury [will] most likely [give] her opinion more weight than a lay opinion." *State v. Giddens*, 199 N.C. App. 115, 122, 681 S.E.2d 504, 508 (2009), *affirmed per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010).

Crabtree contends that Snyder and Royster, lay witnesses for the State, improperly vouched for L.R.'s credibility during their testimony. Crabtree cites Royster's statement, in explaining the process of investigating a report of child sexual abuse, that "[St. Claire and her team] give . . . their conclusion or decision about those children that have been evaluated if they were abused or neglected in any way." Read in context as quoted *supra* in the Factual and Procedural Background of this opinion, it is clear that Royster's comment was merely a description of what St. Claire's team are expected to have done before sending any case to DSS for further evaluation. Royster was not commenting directly on L.R.'s case at all, let alone her credibility, and thus the challenged testimony was not inadmissible.

Crabtree also challenges testimony in which Snyder characterized L.R.'s description of performing fellatio on Crabtree as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." As with Royster's remark, Snyder's testimony specifically left the credibility determination to the jury by stating, "something *may* have actually happened to [L.R.] as opposed to something" L.R. learned about from the media or another source. (Emphasis added). Thus, we conclude that Snyder did not improperly vouch for L.R.'s credibility.

In contrast, St. Claire's testimony did include impermissible vouching. We find no fault with St. Claire's description of the five-tier rating system that the clinic uses to evaluate potential child sexual abuse victims based on the particularity and detail with which a patient gives his

or her account of the alleged abuse. However, her statement that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and her reference to the latter category as "clear disclosure" or "clear indication" of abuse, in conjunction with her identification of that category as the one assigned to L.R.'s 23 December 2013 interview, crosses the line from a general description of the abuse investigation process into impermissible vouching. Likewise, St. Claire's testimony that her team's "final conclusion [was] that [L.R.] had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on L.R.'s credibility.

As part of our plain error review, having concluded that the admission of these remarks by St. Claire was error, we must next determine whether they prejudiced Crabtree. After careful consideration, we conclude that they did not.

This Court's opinion in *State v. Ryan* provides a helpful, well-reasoned framework for assessing the prejudice of an expert witness's vouching for an alleged child victim's credibility:

> Under our plain error review, we must consider whether the erroneous admission of expert testimony that impermissibly bolstered the victim's credibility had the prejudicial effect necessary to establish that the error was a fundamental error. This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness.
>
> Notably, a review of relevant case law reveals that [(1)] where the evidence is fairly evenly divided, or [(2)] where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, *especially where the defendant has put on rebuttal evidence*, the error is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge.

223 N.C. App. 325, 336-37, 734 S.E.2d 598, 606 (2012) (citations and internal quotation marks omitted; emphasis added), *disc. review denied*,

366 N.C. 433, 736 S.E.2d 189 (2013). In *Ryan*, this Court found the expert's vouching prejudicial, noting that the defendant testified, denying all of the charges, and his ex-wife also testified on his behalf, while

> the State's evidence consisted of testimony from the child, her family members, her therapist, the lead detective on the case who was an acquaintance of the family, and an expert witness. All of the State's evidence relied in whole or in part on the child's statements concerning the alleged sexual abuse. . . . There was *no testimony presented by the State that did not have as its origin the accusations of the child*. For this reason, the credibility of the child was central to the State's case.

Id. at 337, 734 S.E.2d at 606 (emphasis added). *See also State v. Bush*, 164 N.C. App. 254, 260, 595 S.E.2d 715, 719 (2004) ("In the case at bar, any and all corroborating evidence is *rooted solely in* [*the victim's*] *telling of what happened*, and that her story remained consistent. . . . Therefore, the conclusive nature of [the doctor's] testimony as to the sexual abuse and that [the] defendant was the perpetrator was highly prejudicial. This constituted plain error." (Emphasis added)).

In contrast, this Court has found no prejudice to a defendant where "absent the [impermissible vouching] testimony, the . . . case involve[s] more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses." *State v. Sprouse*, 217 N.C. App. 230, 242, 719 S.E.2d 234, 243 (2011), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012). In *Sprouse*, the defendant contended "that the trial court committed plain error by allowing [a] DSS social worker . . . to testify that there had been a substantiation of sex abuse of [the child victim] by [the] defendant." *Id.* at 241, 719 S.E.2d at 243. Although we agreed that the social worker's "testimony that DSS had substantiated the allegations of abuse" was error, this Court concluded that "the error [did] not rise to the level of plain error . . . ." *Id.* at 243, 719 S.E.2d at 244. In that case,

> [a]side from the testimony of A.B.[, the child victim,] and the witnesses corroborating her testimony, the following evidence was presented at trial: testimony by Raquel[, the defendant's wife,] that shortly after A.B. filed charges against [the] defendant, [the] defendant "manipulat[ed]" Raquel to tattoo his penis in order to "blow [A.B.'s] story out of the water"; [the] defendant asked Raquel to contact Burris[, a female acquaintance,] in an effort to get Burris

> to lie about having seen the tattoo during the time period associated with the allegations by A.B.; photographs of [the] defendant's penis, coupled with Raquel's testimony, showed that he did not have a tattoo as of 2 January 2007, despite the fact that he testified he did have the tattoo as early as 2003 or 2004; and [the] defendant tried to have A.B. killed after charges were filed against him.

Id. at 242-43, 719 S.E.2d at 243-44. Thus, as in Crabtree's case, there was substantial evidence supporting the victim's abuse allegations that was independent of the victim's report.

Similarly, in *State v. Davis*, this Court noted that "it is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008) (citation omitted). Thus, although "admission of [the challenged] statement was error as it improperly vouched for [the victim's] credibility[,]" because evidence independent of the child's account of abuse was before the jury, "we [held] that admission of this statement did not constitute plain error." *Id.*

Here, although there was no physical evidence of sexual abuse, Crabtree presented no evidence, let alone evidence rebutting L.R.'s allegations. More importantly, unlike in *Ryan* and *Bush*, the State's entire case did not rest solely on L.R.'s account of what happened. The criminal charges against Crabtree arose from an incident that was alleged to have occurred on 29 November 2013. As noted *supra*, the grandmother testified that, on that date, she saw Crabtree "sitting on the side of [L.R.'s] bed, and he had his hands between [L.R.'s] legs, and [L.R.] had her hands between his legs. . . . They was feeling each other up." This eyewitness account of Crabtree sexually abusing L.R. is entirely independent of L.R.'s reports of abuse at the hands of her "grandpa," and thus not dependent on L.R.'s credibility. Further, the grandmother also testified that she had been married to Crabtree for twenty years, had loved him during their marriage, and had a son with him. Thus, her testimony that she witnessed her own husband sexually abusing her granddaughter was likely highly persuasive to the jury.

Likewise, L.R.'s brother, D.J., testified that he had seen several "weird" encounters between Crabtree and his sister, including Crabtree "lift[ing] up her skirt, her nightgown" at the dinner table; Crabtree with "his hand in her pants" in the barn; and Crabtree, in his underwear "sitting on the edge of [L.R.'s] bed. She was between his legs." While these incidents were apparently not those for which Crabtree was charged

in this matter, D.J.'s testimony about them bolsters L.R.'s reports that Crabtree had been sexually abusing her for a period of time, and, like the grandmother's testimony, is entirely independent of L.R.'s credibility.

In light of this independent evidence of Crabtree's guilt not based on L.R.'s reports of abuse, the precedent established in *Sprouse* and *Davis* compels our conclusion that "it was not plain error for [St. Claire] to vouch for the credibility of [L.R. because] the case [did] not rest solely on the child's credibility." *See Davis*, 191 N.C. App. at 541, 664 S.E.2d at 25 (citation omitted). Accordingly, Crabtree cannot show he was prejudiced by St. Claire's vouching and, as a result, has failed to establish plain error.

We likewise reject Crabtree's alternative argument that he received IAC in that his trial counsel failed to object to St. Claire's vouching testimony.

> To prevail on a claim of [IAC], a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance *prejudiced his defense*. . . . Generally, to establish prejudice, a defendant *must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.*

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and internal quotation marks omitted; emphasis added), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). In light of our determination that St. Claire's impermissible vouching for L.R.'s credibility was not prejudicial to him, Crabtree cannot establish the second prong of a successful IAC claim.

III. First-degree sexual offense charge

Crabtree also argues that the trial court committed plain error in submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence. Specifically, Crabtree contends that there was no substantive evidence of fellatio presented at trial and, therefore, the trial court erred in instructing the jury that a sexual act for purposes of first-degree sex offense included fellatio as well as cunnilingus and penetration. We disagree.

"[I]t is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence." *State v. Jordan*, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007) (citations omitted), *disc. review denied*,

362 N.C. 241, 660 S.E.2d 492 (2008). Thus, a defendant is entitled to a new trial when "the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence . . . and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict . . . ." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citation omitted). However, "the testimony of a single witness will legally suffice as evidence upon which the jury may found a verdict." *State v. Vehaun*, 34 N.C. App. 700, 704, 239 S.E.2d 705, 709 (1977) (citation and internal quotation marks omitted), *disc. review denied*, 294 N.C. 445, 241 S.E.2d 846 (1978). Further,

> [e]vidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence . . . . Although the better practice calls for the party offering the evidence to specify the purpose for which the evidence is offered, unless challenged there is no requirement that the purpose be specified.

State v. Ford, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (citations and footnotes omitted).

At trial, L.R. gave no testimony describing an instance in which she performed fellatio on Crabtree, and, on appeal, Crabtree asserts that "[t]he only references to fellatio were in the form of alleged out-of-court statements by [L.R.] to [the grandmother], . . . St. Claire, . . . Snyder, and . . . Royster." However, as noted *supra*, the State also presented testimony from Weaver about his 4 December 2013 interview of L.R. A recording of that interview was admitted as "substantive" evidence without objection as State's Exhibit 3 and was published to the jury. The recording includes the following exchange between Weaver and L.R.:

> Q Has he tried to put his private area anywhere else on you?
>
> A In my mouth.
>
> Q He did. When did that happen, do you know?
>
> A My, like whenever he's done with me, he'll like take his private and go in my mouth.
>
> Q When you say done with you, what do you mean by that?
>
> A Like he's done playing, playing with me.

Q Uh-huh.

A Like in my private area, he's done playing.

Q Then he'll put his private area in your mouth?

A (Nods affirmatively.)

Q What happens when that happens? What happens when he does that?

A He'll like go up and down.

Q Uh-huh. And then what happens?

A It like, it's stuff starts coming out.

Q In your mouth?

A (Nods affirmatively.)

Q Okay. All right. All right. How many times has that happened?

A Like two or three.

Q Two or three. Do you remember when that happened?

A Umm, on the Friday morning.

Q On Friday morning that happened?

A Yeah, before my grandma got up.

During a bench discussion with the prosecutor and defense counsel about the DVD which contained the recording and also included an interview of the victim's grandmother, the trial court clarified that, "The only part that's going to be substantive is the interview of [L.R.]." The recording was admitted without objection or limiting instruction, and the only instruction regarding the recording given by the trial court during the jury charge was that the recording could be considered "as evidence of facts it illustrates or shows." L.R.'s recorded description of Crabtree forcing her to perform fellatio on him was thus substantive evidence supporting Crabtree's conviction for first-degree sexual abuse on the basis of fellatio. Crabtree's argument is overruled, and we hold that he received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCullough, Judge, dissents.

From the majority opinion's conclusion that an expert witness's testimony vouching for the credibility of the victim was harmless error, I dissent. As the majority acknowledges, vouching for a victim-witness's credibility is normally not permissible.

Defendant argues that three witnesses improperly vouched for the credibility of L.R. in this case. We agree that the State's expert witness improperly vouched for L.R.'s credibility in the midst of otherwise acceptable testimony. However, we disagree that any other witness improperly testified as to L.R.'s credibility.

"[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); *see also State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986) (a clinical psychologist's testimony as an expert witness that a child victim was "believable" was inadmissible). This Court has also recognized that where no physical evidence of sexual abuse exists, an expert witness's affirmation of sexual abuse of a child amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony. *See State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997) (distinguishing the holdings in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993)). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

The majority acknowledges that the testimony of Dr. St. Claire, in part, constituted inadmissible "vouching." At trial, Dr. St. Claire testified as the State's expert witness regarding L.R.'s interview and physical examination. As noted above, Dr. St. Claire described a five-tier rating system that the clinic uses to evaluate potential child sexual abuse victims based on the particularity and detail with which a patient gives his or her account of the alleged abuse. Upon review of Dr. St. Claire's testimony, I find no fault with Dr. St. Claire's description of the five-tier system apart from Dr. St. Claire's statement that, "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened."

See State v. Grover, 142 N.C. App. 411, 414-19, 543 S.E.2d 179, 181-83 (2001) (an expert witness's conclusion, based only on an interview with the child and with no physical evidence, that "[she] was a sexually abused child" was impermissible testimony). Dr. St. Claire and her team refer to the latter category as "clear disclosure" or "clear indication" and assigned L.R.'s 23 December 2013 interview at the clinic to this category. To be exact, their "final conclusion [was] that [L.R.] had given a very clear disclosure of what had happened to her and who had done this to her."

In cases involving alleged sexual abuse of a child, there is a fine line between expert testimony properly evaluating a diagnosis of the child witness and expert testimony that improperly vouches for the credibility of the child witness. Had Dr. St. Claire not supplemented her description of the five-tier rating system with the comment that a "clear disclosure" signifies near certainty as to the sexual abuse of the child, no improper vouching for the credibility of the child witness would have occurred. However, by testifying that the team is near certain that sexual abuse has occurred when a child's allegations are classified in the "clear disclosure" tier and then testifying that L.R.'s interview was classified as a clear disclosure, Dr. St. Claire effectively testified that the team was near certain that L.R. had been sexually abused. I believe that this testimony crosses that delicate line and amounts to vouching for L.R.'s credibility. Because the State's evidence almost entirely relies on L.R.'s testimony and the corroborative testimony of other witnesses, it is likely that Dr. St. Claire's testimony caused the jury to rely on Dr. St. Claire's opinion of L.R.'s disclosure rather than reach its own conclusion as to the credibility of L.R.'s testimony at trial. Thus, I believe Dr. St. Claire's testimony regarding the certainty of sexual abuse occurring had a probable impact on the jury finding the defendant guilty of first degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature.

The majority recognizes that this portion of Dr. St. Claire's testimony is inadmissible, but concludes that the sexual activity observed by the victim's grandmother along with observations made by the victim's brother provide such overwhelming evidence of guilt that the admission of the expert's improper vouching testimony is harmless beyond a reasonable doubt. I recognize that vouching for the victim's credibility is not always plain error and can be harmless error when the other evidence in the case is very strong. *See State v. Hammet*, 361 N.C. 92, 637 S.E.2d 518 (2006) and *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002).

In the case *sub judice*, however, without the grandmother's and brother's observations there might not have been a conviction, even with the inadmissible expert witness testimony. This victim was an admitted liar. She admitted to lying about sexual activity in order to live with her aunt who would let her do what she wanted. On cross examination L.R. testified as follows:

Q. What grade did you say you were in?

A. Fourth.

Q. What type of grades do you get?

A. Eighties and Nineties and one hundreds.

Q. And have you been told you're pretty smart?

A. Yes.

Q. You said it's more important to tell the truth?

A. Yes.

Q. And you talked to Investigator Weaver about this case; is that correct?

A. Yes.

Q. Do you remember talking to him about 6 months before?

A. Yes.

. . . .

Q. Do you remember talking to them another time about 6 months before?

A. Yes.

Q. Did you tell them that your brothers had raped you?

A. Yes.

Q. Was that the truth or a lie?

A. A lie.

Q. Do you know why you told it?

A. Yes.

Q. Can you tell us why you told that lie?

A. So, I could go and live with somebody else.

Q. That would have been your Aunt Delilah?

A. Yes.

Q. And you loved her a lot?

A. Yes.

Q. Was she your grandmother's sister?

A. Yes.

Q. Did she let you do whatever you wanted?

A. Yes.

Q. Did you like doing that?

A. Yeah.

Q. Now, you had recently moved in with your grandmother, Mildred. Is that right?

A. Yes.

Q. But you didn't like living there so much, did you?

A. Yeah, because of the horses.

Q. You liked the horses.

A. (No response).

Q. But did you tell Officer Weaver that you didn't like all the rules?

A. Yeah.

Q. But you liked living with Aunt Delilah because she let you do what you wanted?

A. Yes, but not all the time.

Q. Not all the time. Okay. And do you remember talking to officers in February of that year, a few months before you talked to Officer Weaver?

A. No.

Q. Do you remember telling the officer in Durham that a black man had had sex with you, too?

A. Yes.

Q. Was that a truth or a lie?

A. A truth.

Q. That was the truth?

A. (Witness nods yes).

Q. Do you know what officer you told? Do you remember who you told about that?

A. No.

Q. Okay. But that was a few months before you talked with Officer Weaver?

A. Yes.

Q. Okay. Does your step-grandfather, Mr. Crabtree, have any physical problems that you know about?

A. Yes.

Q. Can you tell us what they are?

A. Um, my grandma said that he was mentally crazy.

Q. Do you know if he had a heart attack?

A. Yes.

Q. Do you know if he had cancer?

A. No.

Q. Were you able to tell if he had a hard time walking?

A. Yes.

Q. Did he sometimes have a hard time walking?

A. Yes.

Q. Were you able to tell if he had a hard time with his hands sometimes?

A. No.

Q. You couldn't tell it was hard for him to grab ahold of things?

A. No.

Q. Okay. Do you ever remember him having a job?

A. Yeah.

Q. What was his job?

A. Um, cutting wood. Trees.

Q. Was that a long time ago?

A. No.

Q. Is that a few years ago?

A. No.

Q. Was it before he had the heart attack?

A. I guess.

Q. Pardon?

A. I guess.

Q. Okay. You don't live with your grandma, Mildred, any more. Is that right?

A. Yes.

Q. Why is that?

A. Because, um, she couldn't take care of us no more.

Q. Okay. Did you tell people things about her?

A. Yes.

Q. Were they true or were they a lie?

A. Some were a lie.

Q. Why did you tell those lies?

A. Because I didn't want to live with her no more.

Q. So, is it fair to say you told lies in the past when you wanted to move somewhere else?

A. Yes.

With a child under the age of 13 testifying that she had actually accused her own brothers of rape, just to go live with an aunt who had

few rules presents the prosecutor with a very difficult situation. The observations of the grandmother and brother are helpful but they do not constitute a first degree sex offense although they clearly provide sufficient evidence to sustain the indecent liberties charges. Thus, L.R.'s statement about fellatio which is the basis of the first degree sex offense charge depends solely on L.R.'s credibility. Of course, the jury could conclude that any person who would do what the grandmother observed probably did everything else. I prefer to believe that jurors do not jump to such assumptions and base their verdict on the evidence actually introduced at trial.

Consequently, I believe that the observations are important but insufficient to sustain the first degree sex offense charges and that the expert's testimony prejudiced defendant. A young woman under the age of 13 who will accuse her brothers of rape is going to have severe credibility problems. I believe an expert who vouches for the victim's credibility was of great assistance in persuading the jury to believe that she had performed fellatio as she described it to the investigators. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
KENNETH SAMUEL DOWNEY

No. COA16-164

Filed 6 September 2016

Search and Seizure—residence—motion to suppress—drugs

The trial court did not err in a drugs case by denying defendant's motion to suppress the evidence removed from his residence as a result of the 26 February 2013 search. Defendant's contention that the evidence was obtained as a result of a violation of N.C.G.S. § 15A-254 failed as a matter of law. Taken together, the State's evidence was sufficient to support a reasonable inference that defendant committed the crimes charged.

Appeal by Defendant from judgments entered 6 August 2015 by Judge James G. Bell in Superior Court, Richmond County. Heard in the Court of Appeals 8 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for Defendant-Appellant.

McGEE, Chief Judge.

Kenneth Samuel Downey ("Defendant") appeals his convictions for possession of marijuana, possession with the intent to sell and deliver cocaine, intentionally keeping and maintaining a dwelling for keeping or selling a controlled substance, possession of drug paraphernalia, selling cocaine and delivering cocaine. Defendant contends the trial court erroneously denied his pretrial motion to suppress evidence seized from his home during the execution of a search warrant, and further committed plain error by admitting the same evidence at trial. We find no error.

I. Background

Tammy Honeycutt ("Honeycutt") met with Lieutenant Creed Freeman ("Lt. Freeman") and Detective George Gillenwater ("Det. Gillenwater") of the Rockingham Police Department ("RPD") at the police station at approximately 10:00 a.m. on 26 February 2013 to discuss conducting a "controlled buy" of narcotics. A controlled buy is a process in which a confidential police informant, typically wired with an audio or video recording device, purchases an illegal substance or substances from a specific target. Confidential informants usually receive some sort of legal or financial compensation for assisting with a controlled buy. Honeycutt had worked with the RPD as a confidential informant on several prior investigations, and she contacted Lt. Freeman to indicate she "could bust [Defendant], because [Honeycutt's] son had gotten into some trouble and [she] needed some [legal] help." Honeycutt had accompanied a mutual friend to Defendant's residence several times. Honeycutt told Lt. Freeman and Det. Gillenwater she believed Defendant was selling crack cocaine from his home. Both officers regarded Honeycutt as a reliable source.

Before initiating the controlled buy the same morning, and in keeping with RPD protocol, Lt. Freeman searched Honeycutt for contraband and Det. Gillenwater searched Honeycutt's vehicle. At approximately 11:00 a.m., Honeycutt attempted to call Defendant to arrange the drug buy. Defendant did not answer but called Honeycutt five minutes later and, while on speakerphone, told Honeycutt to "come on." Det. Gillenwater recognized Defendant's voice from having "dealt with [Defendant] previously[.]" Honeycutt was given forty dollars in traceable "buy-money" to

use in the planned transaction with Defendant. She was also fitted with a wristwatch audio recording device. According to Det. Gillenwater, that "was the easiest way to try and record [the] transaction[]" because Honeycutt expressed concern Defendant "might notice a video recording device . . . [if] he patted her down." Honeycutt was instructed to drive to Defendant's residence and relay back to the officers as much information as possible, including the address of the home, descriptions and license plate numbers of any vehicles on the premises, and number of people present in the home.

Honeycutt left the police station driving alone in a gold Honda Accord, the same vehicle that Det. Gillenwater had searched. Lt. Freeman and Det. Gillenwater followed Honeycutt in a separate vehicle. The officers were not able to follow Honeycutt all the way to Defendant's residence, but they "were able to see her pull onto Hazelwood [Avenue] and see her pull into [Defendant's] yard," which was located at 114 Hazelwood Avenue. Before getting out of her vehicle, Honeycutt reported the home's address and the presence of two automobiles in the yard through the audio recording device.

A man Honeycutt did not recognize came out of "a little shack in the back of [Defendant's] yard" and approached Honeycutt's car. The man asked Honeycutt if she had called first and, when she responded that she had called, he moved aside so Honeycutt could get out of the vehicle. Honeycutt knocked on the back door of Defendant's residence and Defendant let her inside. Defendant and Honeycutt sat down at a kitchen table where Honeycutt observed "a big pile of what [she] assumed to be crack cocaine" that Defendant appeared to be "in the process of bagging up." Honeycutt also observed weight scales and a revolver on the table. Defendant's front door appeared to be "barricaded shut" and Honeycutt noticed additional "drug paraphernalia stuff, scales, [and] baggies." Honeycutt gave Defendant the marked buy-money in exchange for a baggie of "what [she] assumed to be crack rock." Honeycutt put the baggie in her pocket, left Defendant's residence, and drove back to the police station, where she was patted down and debriefed. She gave Lt. Freeman and Det. Gillenwater the bag of suspected crack cocaine Defendant had sold her. Det. Gillenwater placed the bag into another clear bag, which he sealed with clear packaging tape and labeled with his initials, the date, and the case number. He placed the bag in a locked desk drawer.[1] Honeycutt was paid sixty dollars for participating in the controlled buy.

1. Det. Gillenwater testified that the evidence was stored until it could be mailed to the State Bureau of Investigation. The state crime lab received the evidence on 18 March 2013.

While Lt. Freeman interviewed Honeycutt, Det. Gillenwater prepared an application for a warrant to search Defendant's residence. The warrant was issued and executed that afternoon. Based on Honeycutt's information that Defendant's front door was barricaded shut and that there was a firearm inside the home, members of the RPD SWAT team accompanied Lt. Freeman and Det. Gillenwater to Defendant's residence. Once the SWAT team deemed the house secure, Lt. Freeman and Det. Gillenwater entered through the back door. Defendant was inside. Lt. Freeman began searching the residence and identifying items to be seized, while Det. Gillenwater "wr[ote] down on a piece of notebook paper a general description of [each item]." Det. Gillenwater's handwritten notes were as follows:

> 01 [-] digital scales in kitchen
>
> 02 - razor blades
>
> 03 - sandwich bags
>
> 04 - suspected crack/cocaine
>
> 05 - 53 [U.S. dollars]
>
> 06 - video equipment living room
>
> 07 - baggies with corners cut up in trash
>
> 08 - cooking apparatus – kitchen
>
> 09 - digital scales – kitchen cabinet
>
> 10 - bag of money – safe in bedroom back left
>
> 11 - small bag of marijuana/in flashlight/kitchen area
>
> 12 - box of bullets back left bedroom
>
> 13 - piece of mail desk drawer
>
> 14 - small bag of weed [and] papers – desk drawer
>
> 15 - .38 cal[iber] pistol
>
> <u>Front right bedroom</u>
>
> Money
>
> .38 cal[iber pistol]

The list indicated that the first four items were removed from the "kitchen area." After Defendant was arrested and taken to the police

station, he was given an Inventory of Items Seized Pursuant to Search standardized form, with Det. Gillenwater's handwritten notes attached. Defendant never signed the form's acknowledgment of receipt.

Det. Gillenwater transported the items seized from Defendant's residence to the police station, where he placed them in evidence bags that he labeled and sealed. He secured the items in a storage locker until they could be picked up by a designated RPD property officer. Det. Gillenwater later prepared a more detailed Property Evidence Report for Defendant's case. The Property Evidence Report noted that a total of $1,163.00 in cash was seized from Defendant's residence, and indicated that only one .38-caliber handgun[2] was recovered during the 26 February 2013 search. All evidence seized from Defendant's residence, along with the formal Property Evidence Report, was turned over to RPD Detective Donovan Young on 14 March 2013.

Defendant was indicted on 18 March 2013 for possession with intent to sell or deliver marijuana, possession with intent to sell or deliver cocaine, maintaining a dwelling to use, keep, or sell a controlled substance, and possession of drug paraphernalia. Additionally, Defendant was indicted on 12 May 2014 for selling cocaine and delivering cocaine.

All charges against Defendant were joined for trial and tried on 3 August 2015. Defendant filed motions to suppress (1) all evidence seized from Defendant's residence during the 26 February 2013 search and (2) a custodial statement Defendant alleged he made before being read his *Miranda* rights. The trial court heard and denied both motions. A jury convicted Defendant on 6 August 2015 of possession of marijuana, possession with intent to sell and deliver cocaine, intentionally keeping and maintaining a dwelling house for keeping and/or selling a controlled substance, possession of drug paraphernalia, selling cocaine, and delivery of cocaine. Defendant received consecutive suspended sentences of 8 to 19 months' and 14 to 26 months' imprisonment and was placed on supervised probation for a period of 36 months. Defendant appeals.

II. Motion to Suppress

A. Standard of Review

Defendant first argues the trial court erred by denying his motion to suppress the evidence removed from his residence as a result of the

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2. Defendant emphasizes that Det. Gillenwater's handwritten inventory, prepared during the search, contained two separate references to a .38 caliber gun, whereas the later-prepared property evidence report showed only one gun was removed from Defendant's home.

26 February 2013 search. "This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the [trial court's] conclusions of law.' " *State v. Granger*, 235 N.C. App. 157, 161, 761 S.E.2d 923, 926 (2014) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)). "[W]e examine the evidence . . . in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

On appeal, "[t]he trial court's findings of fact regarding a motion to suppress are conclusive . . . if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). In the present case, because Defendant has failed to challenge any of the factual findings in the trial court's order denying his motion to suppress evidence, those findings are binding on this Court. *See State v. Elder*, 232 N.C. App. 80, 83, 753 S.E.2d 504, 507 (2014).

"Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648 (citation omitted). "Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *State v. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation and internal quotation marks omitted) (alteration in original). According to Defendant, the trial court erroneously denied his motion to suppress because the evidence was collected as a result of a statutory violation. "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (citation and quotation marks omitted). We review *de novo* the trial court's conclusion that "Defendant was properly noticed as to the . . . items seized at [his] residence."[3]

B. Analysis

Defendant contends the trial court erred in denying his motion to suppress evidence collected from his residence on the grounds that the inventory list prepared by Det. Gillenwater, as required by N.C. Gen.

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3. Defendant does not challenge the trial court's other conclusions of law, *i.e.*, that (1) the officers properly executed the 26 February 2013 search warrant at Defendant's home; (2) Defendant was properly noticed as to the search warrant under N.C. Gen. Stat. § 15A-252, and (3) none of Defendant's state or federal constitutional rights were violated by the seizure of his property.

Stat. § 15A-254, was unlawfully vague and inaccurate in describing the items seized. This argument is without merit.

Defendant maintains his motion to suppress the evidence should have been granted under N.C. Gen. Stat. § 15A-974, which requires suppression if, *inter alia*, the evidence "is obtained as a result of a substantial violation of the provisions of [Chapter 15A of our General Statutes]." N.C. Gen. Stat. § 15A-974(a)(2) (2015). In determining whether a particular violation is "substantial," a court

> must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful; [and]
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.

Id. However,

> [e]ven where a substantial violation has occurred, . . . evidence will only be suppressed where there is a causal connection between the violation and the evidence obtained. [I]f the challenged evidence would have been obtained regardless of the violation . . . , such evidence has not been obtained 'as a result of' such illegality and is not, therefore, to be suppressed by reason of G.S. 15A-974(2) [sic].

State v. Vick, 130 N.C. App. 207, 219, 502 S.E.2d 871, 878-79 (1998) (citation omitted) (alteration in original).

Defendant argues the evidence gathered from his residence was obtained in substantial violation of N.C.G.S. § 15A-254, which provides that "[u]pon seizing items pursuant to a search warrant, an officer must write and sign a receipt itemizing the items taken and containing the name of the court by which the warrant was issued." N.C. Gen. Stat. § 15A-254 (2015). If items "were" seized from a person, the receipt must be given to that person. *Id.* If items "are" taken from a place or vehicle, "the receipt must be given to the owner, or person in apparent control of the premises or vehicle if the person is present; or if he is not, the officer must leave the receipt in the premises or vehicle from which the items were taken." *Id.* Defendant asks us to consider the level of descriptiveness required of an itemized receipt under N.C.G.S. § 15A-254, a matter of first impression, and to hold that the inventory receipt at issue in this

case was "vague and inaccurate and fail[ed] to satisfy the requirements of North Carolina law[.]" However, because we conclude that evidence is not obtained "as a result of" a violation of N.C.G.S. § 15A-254, rendering N.C.G.S. § 974(a)(2) inapplicable, we need not determine whether Det. Gillenwater's receipt in fact violated N.C.G.S. § 15A-254.

The requirement that evidence be obtained "as a result of" a violation of Chapter 15A to warrant suppression under N.C.G.S. § 974(a)(2) means, at minimum, that the evidence was "obtained *as a consequence* of the officer's unlawful conduct . . . [and] would not have been obtained *but for* the unlawful conduct of the investigating officer." *See State v. Pearson*, 356 N.C. 22, 32, 566 S.E.2d 50, 56 (2002) (citation omitted) (emphases in original). Thus, to prevail in the present case, Defendant must show that the evidence seized during the 26 February 2013 search of his residence would not have been obtained *but for* the alleged violation of N.C.G.S. § 15A-254. *See id.* (noting that "[a] defendant bears the burden of presenting facts in support of his motion to suppress." (citation and internal quotation marks omitted)). Defendant has failed to make such a showing.

By definition, evidence must be obtained before an inventory of items seized may be prepared. The plain language of N.C.G.S. § 15A-254 recognizes as much, providing that "an officer must write and sign a receipt itemizing the *items taken*" only "*[u]pon seizing items* pursuant to a search warrant." *Cf.* N.C. Gen. Stat. § 15A-252 (2015) (providing officer must read warrant and furnish a copy of the warrant application and affidavit "*[b]efore undertaking any search or seizure*[.]" (emphasis added)). *See also Pearson*, 356 N.C. at 32, 566 S.E.2d at 56 (concluding N.C.G.S. § 15A-974(a)(2) did not require suppression of evidence where "the collection of the evidence obtained . . . was not causally related to the statutory violations . . . because [the statutes requiring return of inventory of evidence obtained from a person subject to nontestimonial identification procedures] focus on policies to be followed *after* samples are taken . . . [and] are not related to *obtaining* the samples." (emphases in original)). Additionally, N.C.G.S. § 15A-254 uses the past tense —"if items *were* taken"— in setting forth procedures that apply where property is seized from a person directly, as occurred in Defendant's case.

In *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978), a defendant argued that evidence seized during a search of his home should have been excluded based in part on law enforcement officers' failure to comply with N.C. Gen. Stat. § 15A-223(b), which provides that in the context of consent searches, "[u]pon completion of the search, the officer must make a list of the things seized, and must deliver a receipt

embodying the list to the person who consented to the search[.]" N.C. Gen. Stat. § 15A-223(b) (2015). Our Supreme Court rejected the defendant's contention, holding that N.C. Gen. Stat. § 974(a)(2) was inapplicable because

> [i]t [was] clear that the items seized and later offered into evidence were not "obtained as a result of" violations of Chapter 15A. No causal connection exist[ed] between the failure to follow the requirements of G.S. 15A-223(b) and the acquisition of the items seized from [the] defendant's residence and toolbox.

295 N.C. 309, 324, 245 S.E.2d 754, 764 (1978). We conclude that the same reasoning applies to alleged violations of N.C.G.S. § 15A-254.

This is consistent with prior decisions in which this Court has declined to suppress evidence based on actual or alleged violations of N.C.G.S. § 15A-254. In *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978), an officer executed a search warrant on the defendant's premises while the defendant was not at home. The officer seized marijuana found during the search and then left the premises without leaving either a copy of the warrant or a receipt of items taken as required by N.C.G.S. § 15A-252 and N.C.G.S. § 15A-254, respectively. This Court held the officer violated the explicit terms of both statutes,[4] but that N.C.G.S. § 15A-974(a)(2) was nevertheless inapplicable, because "[the] violations occurred only after the marijuana had been lawfully seized, [and thus] . . . the marijuana was not 'obtained as a result' of these violations[.]" 35 N.C. App. at 180, 241 S.E.2d at 127. We also observed that "[t]he primary interest protected by the prohibition against unreasonable searches and seizures is the individual's reasonable expectation of privacy." *Id.* at 181, 241 S.E.2d at 127. The officer's violation of N.C.G.S. § 15A-254, we concluded, "had no adverse impact whatever on that primary interest, [because it] occurred after the search was completed." *Id.*

In *State v. O'Kelly*, 98 N.C. App. 265, 390 S.E.2d 717 (1990), the defendant alleged N.C.G.S. § 15A-974(a)(2) mandated suppression of

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4. We note that *Fruitt* is factually distinguishable from Defendant's case. In *Fruitt*, the officer violated the express language in N.C.G.S. § 15A-254 requiring that a copy of the itemized receipt be left on the premises *if the owner or apparent owner is not present at the time of the search*. By contrast, in the present case, there was no explicit violation of N.C.G.S. § 15A-254. Defendant was present at the time of the search, and he was given a list of items seized after being taken into custody. Additionally, N.C.G.S. § 15A-254 does not, on its face, require any specific level of descriptiveness.

evidence collected from his residence and storage unit in part because he was not given inventories of the items taken, in violation of N.C.G.S. § 15A-254. We again rejected that argument, observing that the law enforcement officer "exercised due diligence in attempting to comply with the requirement that the defendant be supplied with the inventory of seized property," *id.*, 98 N.C. App. at 272, 390 S.E.2d at 721, and mailed a copy of the itemized receipt to the defendant within a week of the search and seizure. We affirmed the trial court's conclusion that because the officer "substantially complied with the provisions of Article 11 of North Carolina General Statute 15A . . . [there was no] ground or reason to exclude or suppress evidence seized [during] the incident search." *Id.*, 98 N.C. App. at 273, 390 S.E.2d at 721-22.

We disagree with Defendant's contention that "[a]llowing evidence to be admitted because it was not seized 'as a result' of [a violation of N.C. Gen. Stat. § 15A-254] would undercut the purpose of the statute" and authorize law enforcement officers to "ignore the [statute's] dictates[.]" Defendant is mistaken in his assertion that "[t]he clear purpose of [N.C.G.S. § 15A-254] is to . . . establish a process by which the owner of the property is notified [of the items seized]." N.C.G.S. § 15A-254 does not operate as a notice requirement in the discovery process. Instead, the statute prescribes procedures to be followed *after* property has been seized which promote accountability for items so obtained. Defendant himself appears to acknowledge the statute's *post hoc* operation, noting that "[another] purpose of N.C. Gen. Stat. § 15-254 is to create a record of the *items seized*[.]" (emphasis added) Defendant further observes that the statutory requirements "must be met . . . after a search is completed."

"In interpreting statutes, all statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *In re R.L.C.*, 179 N.C. App. 311, 317, 635 S.E.2d 1, 4 (2006) (citation and internal quotation marks omitted). Accordingly, in considering the purpose and effect of N.C.G.S. § 15A-254, we look to other provisions in Chapter 15A's Article 11, which governs search warrants. Article 11 defines a search warrant as "a court order and process directing a law-enforcement officer to search designated premises . . . for the purpose of [1] *seizing designated items* and [2] *accounting for any items so obtained* to the court which issued the warrant." N.C. Gen. Stat. § 15A-241 (2015) (emphases added). This is instructive in the present case. It demonstrates that Article 11 encompasses procedures to be followed both before and after evidence is obtained, and bolsters our conclusion that N.C.G.S. § 15A-254 concerns post-search accountability, not the collection of evidence.

The suppression of illegally obtained evidence is rooted in the "individual's right to be free from unreasonable searches and seizures . . . [and is] based on a defendant's reasonable expectation of freedom from government intrusion." *See State v. Joe*, 222 N.C. App. 206, 211-12, 730 S.E.2d 779, 783 (2012) (citation and internal quotation marks omitted). This interest is recognized throughout Article 11. *See*, *e.g.*, N.C. Gen. Stat. § 15A-242 (2015) (providing that search warrant must be supported by probable cause); N.C. Gen. Stat. § 15A-246 (2015) (requiring that search warrant "establish with reasonable certainty the premises, vehicles, or persons to be searched[.]"); N.C. Gen. Stat. § 15A-249 (2015) (requiring officer to give notice of identity and purpose before entering premises to be searched); N.C. Gen. Stat. § 15A-251 (2015) (permitting entry by force only if certain conditions are met); N.C. Gen. Stat. § 15A-252 (2015) (providing that executing officer must read warrant and give copy of warrant application and affidavit to person to be searched before undertaking any search or seizure). However, as we observed in *Fruitt*, not all Article 11 subsections implicate "the individual's reasonable expectation of privacy." *Fruitt*, 35 N.C. App. at 181, 241 S.E.2d at 127-28. It follows that not all Article 11 subsections afford a basis for suppression of evidence under N.C.G.S. §15A-974(a)(2), regardless of whether a violation of the subsection in fact occurs.

It seems clear that the itemized receipt requirement in N.C.G.S. § 15A-254 is not intended to protect an individual's reasonable expectation of privacy, since it applies only after search and seizure have occurred. We note that N.C.G.S. § 15A-254 does not specify an exact time at which or by which an itemized receipt must be given to the person searched. Where items are seized from a person, nothing in the statute requires that the person be given an itemized receipt, *e.g.*, before the officers leave the premises or before the person is taken into custody. It provides only that if (1) items are taken from a place or vehicle, *and* (2) the owner or apparent owner is not present, then an officer must leave the receipt on the premises or in the vehicle. Otherwise, the statute is silent about when exactly a person must be given a receipt of items seized. The statute also does not require affirmative acknowledgement of receipt from *the recipient* of the inventory list; it provides only that *the officer* must sign the receipt.[5] The receipt must contain "the name

5. As the State noted during the hearing on Defendant's motion to suppress, although the standardized Inventory of Items Seized Pursuant to Search form includes an acknowledgment of receipt signature block (which, in this case, Defendant did not sign), N.C.G.S. § 15A-254 itself does not require a signature from the recipient of the itemized inventory list.

of the court by which the warrant was issued." In keeping with N.C.G.S. § 15A-241, the inventory receipt requirement serves "the purpose of . . . accounting for any items . . . obtained to the court which issued the warrant."

To hold that evidence may be obtained "as a result of" a violation of N.C.G.S. § 15A-254 would disregard the distinctions throughout Article 11 between individual rights incident to search and seizure of property, and procedures to be followed after property is seized. Construing the statutes together, we conclude N.C.G.S. § 15A-254 applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained "as a result of" a violation of N.C.G.S. § 15A-254, N.C.G.S. § 15A-974(a)(2) is inapplicable to either alleged or actual N.C.G.S. § 15A-254 violations.

We do not hold that it is impossible for a law enforcement officer to violate N.C.G.S. § 15A-254. *See Fruitt*, *supra*, (finding law enforcement officer violated explicit language of the statute by failing to leave a receipt on the premises after conducting a search and seizing contraband in the absence of the property owner). We also do not speculate about what recourse may be available where a violation occurs. We hold only that any such violation is not a basis for the suppression of evidence under N.C.G.S. § 15A-974(a)(2), the only statute Defendant cites in support of this argument. Defendant's contention that the evidence in the present case was obtained "as a result of" a violation of N.C.G.S. § 15A-254 fails as a matter of law. This argument is overruled.

III. Admission of Evidence

A. Standard of Review

In the alternative, Defendant argues the trial court committed plain error by admitting "illegally obtained" evidence. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial . . . [which] had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted).

B. Analysis

Defendant contends it was plain error to admit the evidence seized from his residence because it was "illegally obtained" and, "[h]ad the trial court prevented the introduction of this evidence, [Defendant] would not have been convicted." In making this argument, Defendant essentially reasserts his argument that the evidence was unlawfully obtained because "[t]he [inventory] list created by [Det.

Gillenwater] fell substantially below the legal standard required by N.C. Gen. Stat. § 15A-254." As discussed above, Defendant has failed to demonstrate that any evidence was illegally obtained as a result of a violation of N.C.G.S. § 15A-254. Defendant does not advance any additional argument in support of his contention that the evidence was illegally obtained (and thus erroneously omitted).

Further, even assuming *arguendo* that the evidence taken from Defendant's residence was erroneously admitted, the error did not amount to plain error. Our Supreme Court has held that "[s]ubstantial evidence of a defendant's guilt is a factor to be considered in determining whether [an] error was a fundamental error rising to plain error." *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012); *see also State v. Black*, 328 N.C. 191, 199, 400 S.E.2d 398, 403 (1991) (defining "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). In the present case, the State presented substantial evidence of Defendant's guilt, largely in the form of mutually corroborative testimony from Honeycutt, Det. Gillenwater, and Lt. Freeman. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (noting that, in considering whether evidence is substantial, the evidence is viewed in the light most favorable to the State, and the credibility of its witnesses is a question for the jury). Defendant did not present any evidence at trial. Additionally, while defense counsel objected to the introduction into evidence of a number of individual items seized from Defendant's home, counsel did not object to the admission of a RPD property evidence report which listed all evidence seized from Defendant's residence, in greater and more precise detail than did the itemized inventory receipt prepared on the day of the search. Taken together, the State's evidence was "clearly sufficient to support a reasonable inference that [Defendant committed] the crime[s] charged." *State v. Smith*, 40 N.C. App. 72, 80, 252 S.E.2d 535, 540 (1979). We find nothing in the record suggesting a "miscarriage of justice" occurred in this case. *See State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted). Accordingly, we conclude Defendant received a trial free from error.

NO ERROR.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
HENRY DATWANE HUNT

No. COA 16-143

Filed 6 September 2016

1. Drugs—trafficking—failure to give requested jury instruction—lesser included charge—possession of controlled substance

The trial court did not err by failing to give a requested jury instruction on the lesser-included offense of possession of a controlled substance. Defendant's challenges to the State's expert testimony did not amount to a conflict in the evidence. The State's evidence was clear and positive as to every element of the trafficking charge.

2. Evidence—expert witness testimony—facts and data—principles and methods

The trial court did not err in a possession with intent to sell or deliver marijuana and trafficking by possession of 4 or more grams but less than 14 grams of opium case by admitting certain testimony from the State's expert witness. The agent's testimony was based upon sufficient facts and data, and showed that he applied the principles and methods reliably to the facts.

Appeal by defendant from judgments entered 30 July 2015 by Judge Todd Pomeroy in Henderson County Superior Court. Heard in the Court of Appeals 11 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

McCULLOUGH, Judge.

Henry Datwane Hunt ("defendant") appeals from judgments entered upon his convictions of possession with intent to sell or deliver marijuana and trafficking by possession of 4 or more grams but less than 14 grams of opium. Defendant argues that the trial court erred by failing to give a requested jury instruction on a lesser-included offense and in

admitting certain testimony from the State's expert witness. After careful review, we hold no error.

I. Background

On 14 July 2014, defendant was indicted for possession with intent to sell or deliver marijuana in violation of N.C. Gen. Stat. § 90-95(a)(2), possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a), and trafficking by possession of more than 4 but less than 14 grams of opium in violation of N.C. Gen. Stat. § 90-95(h)(4)(a). Defendant's case came on for trial at the 27 July 2015 criminal session of Henderson County Superior Court, the Honorable Todd Pomeroy presiding.

The State's evidence at trial tended to show the following: On 2 March 2013, officers from the Henderson County Sheriff's Department responded to a call about a suspicious vehicle located in the parking lot of Mountain Inn and Suites ("the hotel"). Detective Steve Pederson ("Detective Pederson") testified that based on information obtained from a telephone conversation with a clerk at the hotel, he decided to conduct a "knock-and-talk" investigation of hotel rooms 200 and 206. Upon entering the hotel, officers noticed a strong odor of raw marijuana in the lobby. Detective Pederson proceeded to the second floor of the hotel where Corporal Josh Harden ("Corporal Harden") and Deputy Scott Lindsay were already located.

Corporal Harden testified that he had seen defendant walking down the hallway of the second floor. Corporal Harden asked defendant what room he was staying in and defendant said room 206. Corporal Harden asked if "there was somewhere we could go to talk" when defendant opened the door to room 206 and invited the officers inside. Corporal Harden testified that the room smelled of marijuana. During the course of his subsequent conversation with Corporal Harden, defendant admitted to smoking "four blunts" and gave consent to search his room. Defendant stated that he had also rented room 200. Defendant then requested to use the restroom. Corporal Harden told defendant that he would be have to be searched first and defendant consented to a search of his person. After the search revealed a lump in defendant's right front pocket, defendant produced a clear plastic bag containing pills. Defendant stated that the pills were "Percs," what Corporal Harden understood to be "Percocet," and that he was holding them for a friend. Defendant consented to searches of both hotel rooms and the searches revealed marijuana, cash, and various drug paraphernalia.

The State tendered, without objection from defendant, Miguel Cruz-Quinones ("Agent Cruz-Quinones"), a special agent and forensic chemist with the North Carolina State Crime Laboratory, as an expert in forensic drug chemistry. Agent Cruz-Quinones testified that after visual inspection, he determined that the pills found in defendant's possession were pharmaceutically manufactured pills containing oxycodone. Agent Cruz-Quinones testified that the North Carolina State Crime Laboratory procedures are governed by a document called the "administrative procedure for sampling" ("APS"). Pursuant to the APS, Agent Cruz-Quinones elected to use a testing procedure called the "administrative sample selection" that is applied to pharmaceutically manufactured pills. This method of analysis involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database called "Micromedex[1]" to determine whether the pills are pharmaceutically prepared. After the chemist has determined that the units are similar, and not counterfeit, the administrative sample selection method requires the chemist to weigh the samples and "randomly select one and chemically analyze the one tablet" using gas chromatography and a mass spectrometer.

Here, Agent Miguel Cruz-Quinones testified that upon receiving the pills found to be in defendant's possession, he divided them into four separate categories based on the physical characteristics of the pills. He labeled these categories 1A, 1B, 1C, and 1D. Using administrative sample selection, Agent Miguel Cruz-Quinones tested one pill from groups 1A, 1B, and 1C. Each chemically analyzed pill tested positive for oxycodone, a Schedule II controlled substance. Agent Cruz-Quinones testified that the combined weight of the pills seized from defendant exceeded four grams: twenty-four pills in 1A weighed 2.97 grams; nine pills in 1B weighed 0.88 grams; and three pills in 1C weighed 0.30 grams. Agent Cruz-Quinones did not test 1D, which consisted of only 1 pill, because the statutory threshold for trafficking had already been met. Agent Cruz-Quinones' laboratory report provided that as to the non-tested tablets in each group, they "were visually examined, however no chemical analysis was performed. . . . The physical characteristics, including shape, color and manufacturer's markings of all units were visually examined and found to be consistent with a pharmaceutical preparation containing Oxycodone – Schedule II Opium Derivative. There were no visual indications of tampering." The results of this particular drug analysis

1. The transcript of Agent Cruz-Quinones' testimony reflects the spelling, "Micromatics." However, we believe the correct spelling to be "Micromedex" as noted in footnote 1 of *State v. Ward*, 364 N.C. 133, 136, 694 S.E.2d 738, 740 n.1 (2010).

were subjected to peer review by a senior level analyst at the North Carolina State Crime Laboratory.

On 24 July 2015, defendant filed a motion in limine and argued that the State's experts should be prohibited from "expressing any opinion as to the identity of any and all items submitted to the State Crime Lab which were not actually subjected to forensic chemical testing." Defendant contended that the State Crime Lab's protocols provided that in the use of administrative sample selection, "No inferences about unanalyzed materials are made."

The trial court denied defendant's motion, concluding that the "reasoning and methodology underlying [Agent Cruz-Quinones'] testimony regarding the weight, composition, and his use of Administrative Sampling Method" were scientifically valid, could be applied to the facts in issue, and complied with Rule 702 of the North Carolina Rules of Evidence.

On 30 July 2015, a jury found defendant guilty on all charges. Defendant was sentenced as a prior record level I to concurrent sentences of 70 to 93 months imprisonment for trafficking opium and 5 to 15 months for possession with intent to sell or deliver marijuana. Defendant appeals.

II. Discussion

Defendant presents two issues on appeal. He argues that (A) the jury should have received an instruction on the lesser-included offense of possession of a controlled substance and that (B) the trial court erred in admitting certain testimony of the State's expert witness. We address each argument in turn.

A. Lesser-Included Offense Jury Instruction

[1] Defendant contends that the trial court committed error by failing to instruct the jury on the lesser-included charge of possession of a controlled substance. This contention is without merit.

Defendant's 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). Even in the absence of a special request, judges are required to charge upon lesser-included offenses if the evidence supports such a charge. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a

rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "[W]hen the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980).

The crime of trafficking in opium, N.C. Gen. Stat. § 90-95(h)(4), contains two essential elements. Defendant must engage in the: "(1) knowing possession (either actual or constructive) of (2) a specified amount of [opium]." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). N.C. Gen. Stat. § 90-95 (h)(4) also applies to trafficking in pharmaceutical preparations containing opium derivatives. *State v. Ellison*, 366 N.C. 439, 444, 738 S.E.2d 161, 164 (2013). Simple possession of opium is a lesser-included offense of trafficking in opium. *See State v. McCracken*, 157 N.C. App. 524, 528, 579 S.E.2d 492, 495 (2003).

Specifically, defendant challenges Agent Cruz-Quinones' testimony that the tablets delivered to the State Crime Lab collectively contained over 4 grams of opium. The APS, which governs State Crime Lab protocol, notes in its definition of the administrative sample selection that "No inferences about unanalyzed material are made." At trial, Agent Cruz-Quinones testified that this language applies to non-pharmaceutical tablets and not to pharmaceutically prepared tablets. Defendant argues that Agent Cruz-Quinones' interpretation of the APS was incorrect and that because he only performed a chemical analysis of three pills, which weighed less than the statutory threshold for the trafficking charge, the jury should have received the instruction on the lesser-included offense of possession.

Defendant relies on *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970), for his arguments. In *Riera*, the defendant was convicted of violating a statute that made the possession of 100 or more "tablets, capsules or other dosage forms containing either barbiturate or stimulant drugs, or a combination of both" *prima facie* evidence that such possession was for the purpose of "sale, barter, exchange, dispensing, supplying, giving away, or furnishing." *Id.* at 365, 172 S.E.2d at 538. The North Carolina Supreme Court held that because there was ample evidence which would allow a jury to find that the defendant committed the lesser-included offense of the misdemeanor, possession of barbiturate drugs, the trial court erred by failing to submit to and instruct the jury on the lesser-included offense. *Id.* at 370, 172 S.E.2d at 541. However, the

circumstances found in *Riera* are distinguishable from the case before us. In *Riera*, there was conflicting evidence presented as to whether the defendant possessed the capsules for the purpose of sale, thereby providing conflicting evidence as to whether the defendant had violated the applicable statute. The defendant's evidence tended to demonstrate that he had found the capsules behind a building three to four weeks before the search of his home and that he had no intention to use or sell them, did not know what the capsules were, and had intended to throw them out. *Id.* at 364, 172 S.E.2d at 537. Also in *Riera*, the State's expert witness testified that out of 205 capsules that were found at the defendant's home, "he did not test all 205 capsules and that he did not know exactly how many he did test[,]" but that he "usually tested three or four and looked at the others to see if they all had the same physical appearance." *Id.* Here, Agent Cruz-Quinones thoroughly documented his analysis and followed protocol, grouping the pharmaceutically manufactured tablets seized from defendant into four categories based on the unique physical characteristics of the pills. He then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone. Agent Cruz-Quinones was able to testify extensively as to the exact procedures he performed instead of making a conjecture as to his analysis as the State's expert did in *Riera*.

The following cases are helpful in our analysis: In *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E.2d 664 (1982), the defendant was convicted of trafficking methaqualone. On appeal, the defendant argued that since only three tablets were chemically analyzed, the State had failed to prove that he possessed more than 5,000 methaqualone tablets. *Id.* at 303, 296 S.E.2d at 667. Our Court rejected the defendant's argument and held that "[w]hen a random sample from a quantity of tablets or capsules identical in appearance is analyzed and is found to contain contraband, the entire quantity may be introduced as the contraband." *Id.* Our Supreme Court held in *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), that, in trafficking cases "[a] chemical analysis of each individual tablet is not necessary" and that while "[a] chemical analysis is required in this context, [] its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Id.* at 148, 694 S.E.2d at 747.

Recently, in *State v. Lewis*, __ N.C. App.__, 779 S.E.2d 147 (2015), *disc. rev. denied*, __ N.C. __, 781 S.E.2d 480 (2016), the defendant was convicted of conspiracy to traffic 14 grams or more but less than 28 grams of opiates. *Id.* at __, 779 S.E.2d at 148. The police seized twenty pills from the defendant, weighing 17.63 grams total. The State's expert

chemically analyzed one pill and testified that it contained oxycodone with a net weight of 0.88 grams. *Id.* The remaining pills, with a net weight of 16.75 grams, were visually examined and found to have "the same similar size, shape and form as well as the same imprint on each of them." *Id.* On appeal, the defendant contended that the jury was entitled to instructions on all lesser-included offenses because the evidence did not clearly establish the amount of opium derivative present in the pills. *Id.* As in the present case, the defendant in *Lewis* "[did] not challenge the evidence supporting the fact that he was trafficking in opium derivative; rather, [he challenged] the sufficiency of the expert's analysis as to precisely how much opium derivative was present." *Id.* at __, 779 S.E.2d at 148-49. Our Court, citing to precedent established in *Wilhelm* and *Ward*, concluded that it was not necessary to test every tablet. Instead, it held that "upon establishing the chemical composition of a sufficient sample, and visually confirming that the remaining pills were similar, the State's analyst satisfied the evidentiary burden upon the State to determine the quantity of opium derivative in the pills." *Id.* at __, 779 S.E.2d at 149. Accordingly, our Court held that the trial court did not err by declining to instruct the jury on lesser-included offenses because the evidence was sufficient to support the charge of conspiracy to traffic 14 grams or more but less than 28 grams of opiates. *Id.*

Based on the reasoning stated in *Wilhelm*, *Ward*, and *Lewis*, it was not necessary for Agent Cruz-Quinones to chemically analyze each individual tablet. Here, Agent Cruz-Quinones visually inspected all the pills and after comparing them to an online database, determined that they were pharmaceutically manufactured pills containing oxycodone. He then divided the pills into four separate categories based on the physical characteristics of the pills, which included the shape, color, texture, and manufacturer's markings or imprints. Agent Cruz-Quinones then selected one pill from three of the categories and chemically analyzed the pill. Each pill tested positive for oxycodone. As to the remaining pills that were not chemically analyzed, Agent Cruz-Quinones reported that they were visually examined and found to be consistent with pharmaceutically prepared oxycodone. He testified that the combined weight of the pills seized from defendant exceeded four grams. Agent Cruz-Quinones' sample was "sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Lewis*, __ N.C. App. at __, 779 S.E.2d at 149. Because he confirmed that he visually analyzed the remaining pills and determined that they were similar to the chemically analyzed pills, Agent Cruz-Quinones satisfied the State's evidentiary burden of establishing the quantity of opium in the pills. *See State v. Dobbs*, 208 N.C. App. 272, 276, 702 S.E.2d 349,

352 (2010) ("a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone."). Accordingly, the State's evidence was clear and positive with respect to each element of trafficking in opium.

Defendant contends that the introduction of the APS into evidence and Agent Cruz-Quinones' deviation from the protocol distinguishes his case from *Lewis* and its antecedents. Our Court addressed a comparable issue in an unpublished opinion, *State v. Hudson*, 218 N.C. App. 457, 721 S.E.2d 763, 2012 N.C. App. LEXIS 153, 2012 WL 379936 (Feb. 2012) (unpub.). Although this case does not constitute controlling legal authority, we find its reasoning persuasive. In *Hudson*, the defendant argued that testimony from the State's fingerprint expert, Amanda Wiltzus, should have been excluded because she failed to adhere to the Analysis, Comparison, Evaluation, and Verification ("ACE-V") methodology, which she purported to apply in her analysis. *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *5. The defendant argued that the ACE-V protocol required independent verification for fingerprint analysis and that because verification in his case was performed by Wiltzus' supervisor, the supervisor could not have conducted an independent examination of Wiltzus' work. *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *5-6. This Court held that "[o]nce the trial court determines the expert meets the minimum qualifications to qualify as such, deviations from guidelines go to the weight of the expert's testimony, not admissibility." *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *9. In accordance with this reasoning, we also hold that any deviation that Agent Cruz-Quinones might have taken from the established methodology went to the weight of his testimony and not the admissibility of the testimony.

In addition, several circuit courts have held that, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), the introduction of laboratory protocols goes to the weight and not the admissibility of evidence. *See e.g. United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) (holding that flaws in an application of an otherwise reliable methodology go to weight and credibility, not admissibility); *United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994) ("The impact of imperfectly conducted laboratory procedures might therefore be approached more properly as an issue going not to the admissibility, but to the weight of the DNA profiling evidence."); *United States v. Bonds*, 12 F.3d 540, 563 (6th Cir. 1993) ("[C]riticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid

or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.").

Based on the foregoing, we hold that defendant's challenges to the State's expert testimony did not amount to a conflict in the evidence. The State's evidence was clear and positive as to every element of the trafficking charge and the trial court did not err in failing to instruct the jury on the lesser-included offense of possession of a controlled substance.

B. State Expert Testimony Under Rule 702(a)

[2] In the alternative, defendant argues that the trial court erred by admitting Agent Cruz-Quinones' testimony which required inferences that were expressly prohibited under the APS. As a result, defendant contends that Agent Cruz-Quinones' testimony contravened Rule 702(a) of the North Carolina Rules of Evidence, which governs the testimony of expert witnesses.

Our Supreme Court has recently confirmed that the General Assembly's amendment to Rule 702 adopted the federal standard for the admission of expert witness testimony articulated in *Daubert*. *State v. McGrady*, __ N.C. __, __, 787 S.E.2d 1, __, 2016 N.C. LEXIS 442 (June 2016). We review a trial court's ruling on admissibility of expert testimony pursuant to Rule 702(a) for an abuse of discretion. *Id.* at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *22.

Rule 702(a) of the North Carolina Rules of Evidence provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). "These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and

Kumho. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *McGrady*, __ N.C. at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *17 (internal citations and quotation marks omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.*

> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

Id. at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *18-19.

In the present case, Agent Cruz-Quinones testified that he analyzed the pills seized from defendant in accordance with procedures set forth in the APS which were employed by the State Crime Lab at the time he completed his testing and which he was required to follow in drug testing. Agent Cruz-Quinones visually inspected the shape, color, texture, and manufacturer's markings or imprints on all the pills and compared them to an online database to determine whether the pills were pharmaceutically manufactured. Once he made the determination that the pills were pharmaceutically prepared, Agent Cruz-Quinones was required to

use a testing procedure called the administrative sample selection, pursuant to the guidelines of the APS.

Agent Cruz-Quinones testified that he divided the pills into four separate categories and grouped the pills together based on similar physical characteristics. The groups were labeled 1A, 1B, 1C, and 1D. The administrative sample selection required Agent Cruz-Quinones to indiscriminately select one pill from each group and chemically analyze that one pill. When questioned what he did with each pill, Agent Cruz-Quinones testified:

> A. What I did with that pill was I took a small sample of it, a small piece of it and submitted to analysis using the gas chromatography and mass spectrometer. That piece was dissolved in a, I believe it was choleriform, yes, choleriform sol[v]ent in a sterile glass vial. After it was dissolved it was sealed with an aluminum cap and labeled with the item number, laboratory number, my initials and date. And it was analyzed in the gas chromatography and mass spectrometer.

The chemically analyzed pills tested positive for oxycodone. Agent Cruz-Quinones testified that the combined weight of all the pills exceeded four grams: twenty-four pills in 1A weighed 2.97 grams; nine pills in 1B weighed 0.88 grams; and three pills in 1C weighed 0.30 grams. 1D was not tested because the statutory threshold for trafficking had already been met. The pills that he did not chemically analyze were nevertheless inspected "using the physical characteristics . . . [such as] the color, the texture, the shape and the imprints[.]" These tablets were also examined for evidence of being counterfeit, compared to an online database of pharmaceutical preparations, and found to be consistent with a pharmaceutical preparation containing oxycodone.

Based on Agent Cruz-Quinones' detailed explanation of the procedure he employed to identify the pills seized from defendant, a procedure adopted by the State Crime Lab to analyze and identify pharmaceutically manufactured pills, we hold that his testimony was the "product of reliable principles and methods[,]" sufficient to satisfy the second prong of Rule 702(a).

However, the crux of defendant's argument is that Agent Cruz-Quinones should not have been permitted to testify regarding the pills that were not chemically analyzed and, therefore, Agent Cruz-Quinones' testimony was not "based upon sufficient facts or data" and Agent

Cruz-Quinones did not apply "the principles and methods reliably to the facts of the case[,]" failing to satisfy the first and third prongs of Rule 702(a). We disagree.

At trial, Agent Cruz-Quinones was cross-examined as follows:

> Q. The other pills you did a visual inspection of but no actual testing; correct?
>
> A. Correct. Visual inspection.
>
> Q. But you're sitting here today offering an opinion as to the whole amount; correct?
>
> A. Correct.
>
> Q. And that's in spite of your rules and regulations that say specifically under administrative sampling selection that no inferences about unanalyzed materials are made. You are saying that in spite of your rules; correct?
>
> A. That's incorrect. The administrative sample selection has two parts. One, that it is specific to pharmaceutically prepared tablets. And the other one that would apply to more commonly controlled substances that are not pharmaceutically prepared. That statement about not making inference about unanalyzed material refers to that second part, for more commonly controlled substances. It does not refer to pharmaceutically prepared tablets. Pharmaceutically prepared tablets are visually inspected. So they have been visually inspected. That constitutes a preliminary part of the analysis. So that statement about not making inferences about unanalyzed material only applies to other type[s] of controlled substances, more commonly controlled substances, not pharmaceutically prepared tablets.

Agent Cruz-Quinones testified that the pills that were not chemically analyzed were nevertheless carefully visually inspected and compared to an online pharmaceutical database. These pills had similar characteristics, including the shape, color, texture, and manufacturer's markings, as the other pills which were consistent with a pharmaceutical preparation containing oxycodone, a Schedule II opium derivative. Agent Cruz-Quinones also reported "[t]here were no visual indications of tampering."

As such, we hold that Agent Cruz-Quinones' testimony was based upon sufficient facts and data and that he applied the principles and methods reliably to the facts of the case, satisfying the first and third prong of the reliability analysis under Rule 702(a). Accordingly, the trial court did not abuse its discretion in admitting this testimony.

III. Conclusion

For the reasons discussed above, we hold that defendant received a fair trial, free from error.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TONY KING, DEFENDANT

No. COA15-765

Filed 6 September 2016

1. Evidence—vouching for credibility of witness—objection sustained—no prejudice

The trial court did not abuse its discretion by not declaring a mistrial ex mero motu in a prosecution for sexual offense and kidnapping where an officer testified that the prosecuting witness had been reliable with him. Even assuming that the officer vouched for the credibility of the prosecuting witness, an objection was sustained and the statement did not prejudice defendant such that a fair trial was impossible.

2. Kidnapping—second-degree—forced victim into car

The trial court did not err by denying a motion to dismiss a second-degree kidnapping charge where defendant told the victim not to walk away from him after he sexually assaulted her and forced the her to get into a car with him, although he ultimately drove her home.

Appeal by defendant from judgment entered on or about 14 January 2015 by Judge Yvonne Mims Evans in Superior Court, Cleveland County. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Donna D. Smith, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of second degree sexual offense and second degree kidnapping. For the following reasons, we conclude there was no error.

I. Background

The State's evidence tended to show that in August of 2005, Marie[1] contacted defendant to look at a rental property. Defendant arranged to meet Marie and drove her to the rental house. After they went inside for Marie to look at the house, defendant grabbed Marie by the throat and began kissing her neck and breasts. Defendant moved Marie from the hallway to a bedroom with his hands on her throat and threw her onto a bed. Defendant ripped off Marie's pants and placed his fingers inside her vagina. Defendant tried to get Marie to perform oral sex on him, but she refused. Marie tried to get away from defendant after they left the house, but she ended up riding with defendant to return home. After Marie got back home, she told her mother what had happened and Marie's mother called the police. While she was speaking with the police at her home, defendant called Marie asking, "Are you mad at me?" and saying, "[I]f you meet me somewhere . . . I will pay you to keep your mouth shut." After a trial by jury, defendant was convicted of second degree sexual offense and second degree kidnapping.[2] Defendant appeals.

II. Mistrial

[1] During defendant's trial Sergeant Carl Duncan stated, "She's been reliable to me[,]" in regards to his prior interactions with Marie. The defense objected to this statement, and the trial court sustained the objection. Defendant contends that "the trial court erred in failing to declare a mistrial *ex mero motu* after Officer Duncan improperly vouched for the credibility of the prosecuting witness." (Original in all caps.)

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1. A pseudonym will be used.

2. The trial court arrested judgment for a first degree kidnapping conviction.

> The decision to grant a mistrial is within the trial court's discretion. This is particularly true where, as here, defendant has not moved for a mistrial. A mistrial may be granted only when the case has been prejudiced at trial to such an extent that a fair and impartial verdict is impossible. A trial court's decision regarding a motion for mistrial will not be disturbed on appeal unless the trial court clearly has abused its discretion.

State v. Jaynes, 342 N.C. 249, 279, 464 S.E.2d 448, 467 (2005) (citations omitted).

Even assuming *arguendo* that Sergeant Duncan "vouched for the credibility of the prosecuting witness[,]" his statement, which was both objected to and sustained, did not prejudice defendant such "that a fair and impartial verdict is impossible." *Id.* ("In the present case, the trial court sustained each of defendant's three objections. As a result, no evidence prejudicial to defendant was introduced in response to the prosecutor's questions concerning defendant's alleged prior crimes or convictions. The trial court's actions were sufficient to remedy any possible harm resulting from the mere asking of the three questions by the prosecutor. The trial court did not err by failing to declare a mistrial. This assignment of error is overruled.") This argument is overruled.

III. Motion to Dismiss

[2] Defendant next argues that "the trial court erred in denying the motion to dismiss the kidnapping charge, when the evidence was insufficient to prove that any confinement or restraint was separate and apart from the force necessary to facilitate the sex offense." (Original in all caps.)

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

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

> The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony. This Court has previously held that the offense of kidnapping under N.C. Gen. Stat. § 14–39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will. . . .
>
> In situations involving both kidnapping and sexual offense, the restraint of the victim must be a complete act, independent of the sexual offense.
>
> > It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. [O]ur Supreme Court has held that G.S. 14–39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. We construe the word restrain, as used in G.S. 14–39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> The test of the independence of the act is whether there was substantial evidence that the defendant restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape, statutory sex offense, or crime against nature. Further, the test 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. Martin, 222 N.C. App. 213, 220-21, 729 S.E.2d 717, 723 (2012) (citations, quotation marks, ellipses, and brackets omitted). Furthermore, our Supreme Court has clarified that "[t]he key question is whether the victim is exposed to greater danger than that inherent in the [charged offense] itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (citation and quotation marks omitted).

Both defendant and the State cite numerous cases turning on small factual nuances to determine whether the restraint in each particular case was independent from or an inherent part of each crime at issue. Such small distinctions are not necessary in this particular case, since Marie testified that after defendant committed his sexual offenses against her she wanted to "take [off] running[,]" but defendant ordered her to " '[f]ix [herself] up' " and told her " 'this is going to be our secret.' " Marie walked out of the room "speed walking" and defendant told her, " 'You better slow down.' " Marie then decided she was "going to cooperate just so I can get back – just Lord get me back – get me back to my mama." Marie had no other way to get home, since she had ridden with defendant, and defendant had already told her not to try to walk away from him. Defendant and Marie then got into defendant's car. While defendant did ultimately drive Marie back to her home, defendant also forced Marie to get into a car with him immediately after he had sexually assaulted her. Forcing Marie to ride in his car is exactly "the kind of danger and abuse the kidnapping statute was designed to prevent" and "exposed [her] to greater danger" than that inherent in the sexual offenses, and thus the State did show sufficient evidence of the element of restraint for the charge of second degree kidnapping to proceed to the jury. *Id.*; *see also State v. Boyce*, 361 N.C. 670, 674-75, 651 S.E.2d 879, 882-83 (2007) ("The State's evidence in the present case sufficiently established that defendant prevented the victim's escape by pulling her back into her residence before the onset of the robbery with a dangerous weapon. This restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law. That the victim was removed just a short distance and only momentarily before the robbery is irrelevant, as this Court long ago dispelled the importance of distance and duration.") Therefore, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges ELMORE and DIETZ concur.

STATE v. WAGNER

[249 N.C. App. 445 (2016)]

STATE OF NORTH CAROLINA
v.
RICKEY HARDING WAGNER, JR.

No. COA15-1111

Filed 6 September 2016

1. Sexual Offenses—wife's opinion of guilt—unusual behavior of defendant

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by allowing defendant's wife to offer her opinion regarding defendant's guilt. She was merely responding to a question on direct examination as to whether she had ever observed any unusual behavior involving defendant and the victim.

2. Sexual Offenses—wife's testimony—phone call from jail

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by allowing defendant's wife to testify regarding a phone call with defendant after his arrest and while he was incarcerated. Her statement that he declined to discuss the allegations over the phone due to his concern that the call was being recorded could not be considered a violation of his privilege against self-incrimination.

3. Sexual Offenses—evidence of victim's virginity

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by admitting testimony regarding the victim's virginity at the time she was first sexually abused. Even assuming error, defendant failed to demonstrate a probable impact on the jury's verdict.

4. Sentencing—mitigating factors—not found by trial court

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not err by declining to find two mitigating factors—successful completion of a substance abuse program and positive employment history—during the sentencing phase of his trial.

Appeal by defendant from judgments entered 13 March 2015 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 25 April 2016.

Roy Cooper, *Attorney General*, *by Jennie Wilhelm Hauser*, *Special Deputy Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Rickey Harding Wagner, Jr. ("Defendant") appeals from the judgments entered upon his convictions for two counts of statutory rape, two counts of incest, three counts of sex offense with a child, and three counts of taking indecent liberties with a child. On appeal, Defendant contends that the trial court erred by (1) allowing his wife to offer her opinion regarding Defendant's guilt and to testify about a statement by Defendant that implicated his privilege against self-incrimination; (2) admitting testimony regarding the victim's virginity at the time she was first sexually abused; and (3) failing to find certain mitigating factors during the sentencing phase of Defendant's trial. After careful review, we conclude that Defendant received a fair trial free from plain error.

Factual Background

The State presented evidence at trial tending to establish the following facts: "Mary" is the daughter of Defendant and J.C.[1] Defendant did not live with Mary or J.C. but had regular visits with Mary on Thursdays and every other weekend.

In 2012, when Mary was 13 years old, Defendant began taking her on drives in his truck during their visits. Defendant would drive to various residences where he would sell drugs to individuals while Mary remained in the front passenger seat of his truck. During these drives, Defendant forced Mary to take methamphetamine, and he would then touch her breasts and buttocks.

On one occasion, Defendant drove Mary to a barn where he forced her to snort methamphetamine through a rolled-up dollar bill. He then put his hands inside Mary's pants, touching her vagina.

Later that year, Defendant drove Mary to a secluded field in a rural area where he again made her snort methamphetamine. He then proceeded to grope her breasts and buttocks and digitally penetrated her vagina. He proceeded to take off her clothes and engage in vaginal

1. Pseudonyms and initials are used throughout this opinion for the protection of the minor child and for ease of reading.

intercourse with her. Afterwards, he warned Mary not to tell anyone about the incident or else "there would be consequences."

That same year, around Thanksgiving, Defendant took Mary to his home where he lived with his wife, N.E., and their infant daughter. On the way there, Defendant made Mary ingest methamphetamine. When they arrived, N.E. was asleep. Mary took off her clothes and went to the bathroom. As Mary exited the bathroom, she encountered Defendant wearing only a shirt. He began groping her breasts and buttocks and penetrated her vagina with his fingers. He then forced her to perform oral sex on him. When Mary went back to her bedroom, Defendant followed her, physically forced her onto the floor, and proceeded to engage in vaginal intercourse with her.

On another occasion, Defendant once again drove Mary to a secluded rural area, forced her to take methamphetamine, and touched her breasts and buttocks while digitally penetrating her vagina. He then took off her clothes and engaged in vaginal and anal intercourse with her.

On 2 March 2014, after this latest incident of sexual abuse by Defendant, Mary told J.C. that Defendant had raped her and that she did not want to see him again. J.C. called the police and informed them of Mary's accusations against Defendant.

Detective Sarah Benfield ("Detective Benfield") with the Rowan County Sheriff's Office went to the home of Mary and J.C. and interviewed Mary. After hearing Mary's account of Defendant's actions, Detective Benfield subsequently obtained an arrest warrant and placed Defendant under arrest on 28 March 2014.

On 19 May 2014, Defendant was indicted on (1) two counts of statutory rape; (2) two counts of incest; (3) three counts of sex offense with a child; and (4) three counts of taking indecent liberties with a child. Beginning on 9 March 2015, a jury trial was held before the Honorable W. David Lee in Rowan County Superior Court. At trial, the State introduced the testimony of Mary, J.C., Detective Benfield, and N.E. Defendant testified on his own behalf.

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to consecutive sentences of 220-324 months imprisonment for his statutory rape and incest convictions (which were consolidated in file number 14 CRS 51824); 220-324 months imprisonment for his statutory rape and incest convictions (which were consolidated in file number 14 CRS 51828); 166-260 months imprisonment in

connection with his sex offense with a child conviction in file number 14 CRS 51826; 166-260 months imprisonment with regard to his sex offense with a child conviction in file number 14 CRS 51830; 166-260 months imprisonment in connection with his sex offense with a child conviction in file number 14 CRS 51833; and 12-24 months imprisonment for his taking indecent liberties with a child convictions in file numbers 14 CRS 51826, 51830, and 51833. Defendant was also ordered to register as a sex offender and enroll in satellite-based monitoring for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

Analysis

I. Opinion Testimony

[1] Defendant's first argument on appeal is that the trial court erred by allowing N.E. to offer opinion testimony as to whether Defendant was guilty of sexually abusing Mary. We disagree.

Defendant failed to object at trial to the testimony he now challenges on appeal. Therefore, our review is limited to plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> 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) (internal citations, quotation marks, and brackets omitted).

Defendant's argument on this issue is based on the following portions of N.E.'s testimony on direct examination:

> Q. Did you ever see anything abnormal take place between [Defendant] and [Mary] when she was at the home?

> A. Actually, yes. Now that I've had time to think about some things --
>
> Q. Okay.
>
> A. -- since he's been incarcerated. It's just little things that -- well, *red flags that I should have picked up on*, but I didn't think much of it at the time.
>
> Q. Okay. What were those little red flags that you didn't pick up on?
>
> A. I'd wake up at like maybe three or four or something like that to go get the baby a bottle, go use the restroom, and him and [Mary] would be wide awake. And it -- I would really be upset because I was thinking in my mind, "you know, why aren't y'all in the bed asleep? You could help me with the baby instead of staying up all night."
>
> On another occasion, which I found very odd, I had gotten up to go use the restroom because I was on a lot of antibiotics, so, you know, it affected my stomach. And it's like [Defendant] had come running out of [Mary's] bedroom, and [Mary] actually went into the bathroom.

(Emphasis added).

Defendant asserts that N.E.'s reference to "red flags that I should have picked up on" in connection with Defendant's behavior towards Mary constituted an improper opinion that Defendant was, in fact, guilty of the crimes with which he was charged. It is true that witnesses are not permitted to "offer their opinions of whether [a] defendant [is] guilty." *State v. Carrillo*, 164 N.C. App. 204, 210, 595 S.E.2d 219, 223 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 283, 610 S.E.2d 710 (2005). However, a contextual reading of this portion of her testimony shows that N.E. was not offering an opinion as to Defendant's guilt. Rather, she was merely responding to a question on direct examination as to whether she had ever observed any unusual behavior involving Defendant and Mary while Mary was visiting their home. In so doing, she testified solely as to her own observations of Defendant's behavior during Mary's overnight visits. Her use of the phrase "red flags" was a shorthand label for instances of unusual conduct she personally observed as opposed to a declaration of her opinion as to his guilt.

Therefore, we believe that the trial court's admission of this evidence clearly did not constitute plain error. Defendant's argument on this issue is overruled.

II. Privilege Against Self-Incrimination

[2] Defendant also contends that during her testimony N.E. improperly commented on Defendant's exercise of his constitutional right to remain silent following his arrest. Defendant did not object to this testimony at trial. Therefore, our review is limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Defendant's argument is specifically based on the following testimony from N.E. regarding a phone call between her and Defendant after his arrest and while he was incarcerated for the charges upon which he was ultimately convicted.

> Q. Okay. Do you still talk to the defendant now?
>
> A. No.
>
> Q. When is the last time that you spoke to him?
>
> A. I want to say it was the week before Halloween.
>
> Q. Did you ever talk to him about these specific allegations?
>
> A. I want to say that I did ask him what had happened, and *he said that he couldn't talk over the phone because it was being recorded.*

(Emphasis added).

This argument is lacking in merit. "[A] proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest." *State v. Boston*, 191 N.C. App. 637, 651, 663 S.E.2d 886, 896, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). However, this is not what happened here. The testimony at issue was from Defendant's wife rather than from a law enforcement officer and was given by her in the course of explaining whether she had ever discussed with Defendant Mary's allegations against him. Her statement that Defendant had declined to discuss those allegations over the phone due to his stated concern that the call was being recorded cannot properly be characterized as a violation of his privilege against self-incrimination.

III. Testimony as to Victim's Virginity

[3] Defendant next challenges the admission of testimony from J.C. and Detective Benfield stating that Mary was a virgin at the time

Defendant began sexually abusing her. J.C. testified as follows on direct examination:

> Q. Okay. Was there anything specific that happened on that Sunday that led [Mary] to -- to talk to you about what had taken place?
>
> A. No, nothing happened. She just kind of out of the blue said she just wanted to talk to me, and that's when she told me.
>
> Q. Okay. Did she go into any great detail about it? [O]r did she pretty much leave it as you've testified; that he raped her and had done things to her?
>
> A. Yes, she had told me -- she had told me what happened; *that she was still a virgin when it happened.*

(Emphasis added). Detective Benfield testified on direct examination as follows:

> Q. Okay. And what did [Mary] tell you about what occurred at that time?
>
> A. She said that her dad told her *that he was going to take her virginity*, and that he made her take her pants off and had sex with her in the backseat of the car.

(Emphasis added).

On appeal, Defendant argues that this evidence was inadmissible under Rule 412 of the North Carolina Rules of Evidence, which generally prohibits evidence of a rape or sex offense victim's sexual history. N.C.R. Evid. 412. Defendant asserts that "[t]he improper admission of testimony regarding [Mary's] virginity at the time of [Defendant's] alleged conduct could only serve to inflame the jury against [him], causing the jury to decide the case based on passion and prejudice, rather than on a rational weighing of the evidence in light of the State's burden of proof beyond a reasonable doubt." The State, conversely, contends that this testimony was properly admitted as corroborative evidence of Mary's account of Defendant's actions.

Defendant did not object to this testimony at trial. Therefore, our review is once again limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Even assuming — without deciding — that the testimony regarding Mary's virginity was improperly admitted, Defendant has failed to

demonstrate that this evidence had a probable impact on the jury's verdict. Because Mary was only 13 years old at the time the sexual conduct between her and Defendant began, a reasonable juror would have assumed that she was a virgin at the time even without testimony on that issue. We therefore hold that this testimony did not rise to the level of plain error.

IV. Mitigating Factors

[4] Defendant's final arguments on appeal concern the trial court's refusal to find two mitigating factors during the sentencing phase of his trial. Specifically, he contends that the trial court erred in failing to find as mitigating factors the fact that he (1) successfully completed a substance abuse program prior to trial; and (2) had a positive employment history. We disagree.

It is well settled that

> [t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C. Gen. Stat. § 15A-1340.16(a) (2015).

"The weighing of factors in aggravation and mitigation is within the sound discretion of the sentencing court, and will not be disturbed upon appeal absent a showing of an abuse of discretion." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399, *disc. review improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997). *See also State v. Butler*, 341 N.C. 686, 694, 462 S.E.2d 485, 489-90 (1995) ("The balance struck by a sentencing court in weighing the aggravating and mitigating factors is a matter left to the sound discretion of the sentencing court and will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason. The sentencing court need not justify the weight it attaches to any factor." (internal citation omitted)).

A. Completion of Substance Abuse Program

The completion of a drug treatment program after a defendant's arrest and prior to trial is one of the statutory mitigating factors set out in N.C. Gen. Stat. § 15A-1340.16.

> (e) Mitigating Factors. — The following are mitigating factors:
>
> . . . .
>
> (16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

N.C. Gen. Stat. § 15A-1340.16(e)(16).

During sentencing, Defendant presented his certificate of completion for a substance abuse program dated 7 January 2014. However, Defendant was not arrested for the offenses at issue in the present case until 28 March 2014. Therefore, his completion of the program occurred *prior to* — rather than *after* — his arrest and thus did not meet the statutory criteria set out in N.C. Gen. Stat. § 15A-1340.16(e)(16).

Defendant nevertheless contends that the trial court erred by failing to treat his completion of the substance abuse program as a non-statutory mitigating factor. Factors not expressly enumerated in N.C. Gen. Stat. § 15A-1340.16(e) may also be deemed by a trial court, in its discretion, as worthy of consideration as a mitigating factor. *See State v. Cameron*, 314 N.C. 516, 518-19, 335 S.E.2d 9, 10 (1985) ("Regarding non-statutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing . . . the trial judge may consider them, but such consideration is not required.").

The trial court is authorized to consider any such non-statutory mitigating factors under the "catch-all" provision of N.C. Gen. Stat. § 15A-1340.16(e), which provides for a trial court's consideration of "[a]ny other mitigating factor reasonably related to the purposes of sentences." N.C. Gen. Stat. § 15A-1340.16(e)(21). *See State v. Spears*, 314 N.C. 319, 322-23, 333 S.E.2d 242, 244 (1985) ("[A]lthough failure to find a *statutory* mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's consideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge. . . . Thus, [the trial court's] failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion.").

Here, the trial court carefully considered and weighed the applicable mitigating and aggravating factors, ultimately finding one mitigating

factor — that Defendant "has a support system in the community" — and finding no aggravating factors. As a result, the trial court sentenced Defendant within the mitigated range. Moreover, it is clear from the trial transcript that the trial court inquired about Defendant's completion of the substance abuse program as a potential non-statutory mitigating factor.

Defendant argues, in essence, that the timing of Defendant's substance abuse program in relation to his arrest should be deemed irrelevant and asserts that the trial court's refusal to find this as a mitigating factor entitles him to a new sentencing hearing. Defendant's argument, however, is inconsistent with the balance struck by the General Assembly in N.C. Gen. Stat. § 15A-1340.16(e)(16). By requiring trial courts to consider as a statutory mitigating factor a defendant's involvement in a drug treatment program only in cases where he entered the program following arrest and prior to trial, the legislature has implicitly directed that a defendant's completion of such a program prior to arrest is not *required* to be so considered.

Adoption of Defendant's argument would essentially require us to rewrite N.C. Gen. Stat. § 15A-1340.16(e)(16) to do away with the timing requirement imposed by the General Assembly in this statutory provision. This we cannot do. Our courts lack the authority to rewrite a statute, and instead, "[t]he duty of a court is to construe a statute as it is written." *In re Advance Am., Cash Advance Centers of N.C., Inc.*, 189 N.C. App. 115, 122, 657 S.E.2d 405, 410 (2008) (citation and quotation marks omitted). *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) ("Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." (citation and quotation marks omitted)). The trial court therefore did not abuse its discretion by declining to find as a mitigating factor Defendant's completion of a substance abuse program prior to his arrest.

B. Positive Employment History

Finally, Defendant contends that the trial court should have found as a statutory mitigating factor his positive employment history. N.C. Gen. Stat. § 15A-1340.16(e)(19) sets forth the following mitigating factor: "The defendant has a positive employment history or is gainfully employed." N.C. Gen. Stat. § 15A-1340.16(e)(19). Defendant asserts that he demonstrated at the sentencing phase through his own testimony and the testimony of his mother as well as by his introduction of a newspaper article into evidence that he had achieved success as a professional bull rider.

Initially, we note that at the sentencing hearing Defendant's trial counsel did not specifically request that Defendant's employment history be considered as a mitigating factor under N.C. Gen. Stat. § 15A-1340.16(e)(19). Instead, evidence of his bull riding career was introduced for the purpose of showing that he possessed a "support system in the community" — a separate statutory mitigating factor that is set out in N.C. Gen. Stat. § 15A-1340.16(e)(18). Defendant's counsel argued that the evidence of his prior employment history showed that he had been a more "normal" member of society prior to his drug use and that he could revert back to that status with the help of the family and community support system he now had in place.

We have emphasized that where "a defendant fails to request that a trial court find a factor in mitigation, the trial court has a duty to find the factor only when the evidence offered at the sentencing hearing supports the existence of a [statutory] mitigating factor . . . [and] defendant [proves] by a preponderance of the evidence that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law." *State v. Davis*, 206 N.C. App. 545, 549, 696 S.E.2d 917, 920 (2010) (internal citations and quotation marks omitted).

Taken together, Defendant's evidence merely showed that he had (1) participated in and won several bull riding competitions; (2) won several thousand dollars in prize money, as well as a saddle for his horse and a truck; and (3) competed in the 2007 national bull riding championship with a broken leg. Even assuming, without deciding, that a career in professional bull riding constitutes the type of positive employment history envisioned by N.C. Gen. Stat. § 15A-1340.16(e)(19), Defendant's evidence indicated that he retired from professional bull riding in 2007, and he did not present evidence that he was gainfully employed between 2007 and the date of his arrest in 2014. Indeed, to the contrary, the only evidence at trial of Defendant earning money during this time period concerned his sale of methamphetamine. Therefore, the trial court did not err in declining to find Defendant's employment history as a mitigating factor.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from plain error.

NO PLAIN ERROR.

Chief Judge McGEE and Judge STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JACKSON CAIN WHISENANT

No. COA16-82

Filed 6 September 2016

1. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—unopened knife—afraid for life

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge. The unopened knife was a dangerous weapon when defendant threatened to use it to cause great bodily harm or death. Viewed in the light most favorable to the State, the evidence tended to show the store loss prevention associate was afraid his life was endangered by defendant's actions and threats.

2. Constitutional Law—effective assistance of counsel—denial of motion to continue—denial of motion for appointment of substitute counsel

Defendant's appeal of the trial court's denial of his motion to continue and for appointment of substitute counsel was dismissed without prejudice.

Appeal by defendant from judgment entered 16 July 2015 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Law Office of Aaron Young PLLC, by Aaron Young, for defendant-appellant.

TYSON, Judge.

Jackson Cain Whisenant ("Defendant") appeals from judgments entered upon return of the jury's verdicts finding him guilty of robbery with a dangerous weapon, possession of methamphetamine, and simple assault. We find no error in part, and dismiss without prejudice in part.

I. Factual Background

At approximately 2:30 p.m. on 20 December 2014 in Waynesville, North Carolina, Kmart loss prevention associate William Pate observed a male, later identified as Defendant, scanning the jewelry section inside the store. Mr. Pate observed Defendant take two separate watches and place them inside his pants, and conceal two necklaces under his shirt. The items had a total retail value of $95.95.

Defendant walked away from the jewelry section and past the registers without paying for the merchandise. Mr. Pate followed Defendant outside and asked him to return to the foyer of the Kmart.

After Mr. Pate questioned Defendant about taking the jewelry, Defendant stated, "I don't have anything on me" and "F you. I don't have anything. I'm leaving." During this confrontation, Defendant repeatedly placed his hands into his pockets. Mr. Pate testified he saw a knife in Defendant's pocket. When Defendant's hand went to the knife in his pocket, Mr. Pate told Defendant to "get his hands off his knife."

Mr. Pate testified Defendant attempted to force his way out of the Kmart foyer and pulled the unopened knife out of his pocket. Immediately, Mr. Pate grabbed Defendant's hand and wrestled the closed knife away from him. Defendant repeatedly said, "I will kill you" to Mr. Pate.

Gregory Winsell, another Kmart security officer, approached to assist Mr. Pate. At this point, Mr. Pate pushed Defendant out of the foyer. Defendant walked into the parking lot and then returned and sprayed the men with pepper spray. The spray hit Mr. Winsell directly in the face.

Defendant fled across the parking lot to a Little Caesars pizza shop. James Messer, an employee of Little Caesars, had parked his truck beside the pizza shop. Mr. Messer saw Defendant bend down and toss something underneath his truck. The police found the items stolen from Kmart underneath the truck, as well as 2.58 grams of methamphetamine hidden between the windshield and hood. Defendant was arrested and later indicted for robbery with a dangerous weapon, possession with intent to manufacture, sell, or deliver methamphetamine, and three counts of simple assault.

Immediately prior to his trial on 13 July 2015, Defendant's attorney moved for a continuance due to his inability to prepare the case for trial. The trial court denied the motion and the case proceeded to trial. The jury found Defendant guilty on all counts. Defendant appeals from the judgment entered thereon.

II. Issues

Defendant argues the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge because (1) the weapon was unopened, and (2) the State failed to establish Mr. Pate's life was in danger or threatened.

Defendant also argues his appointed counsel was not adequately prepared and the trial court's denial of his motion to continue and for substitute counsel violated his Sixth Amendment right to counsel.

III. Robbery With a Dangerous Weapon

A. Standard of Review

[1] When ruling upon a defendant's motion to dismiss, the trial court determines whether substantial evidence exists of: (1) each essential element of the offense charged, and (2) whether defendant is the perpetrator of the crime. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "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).

Upon a motion to dismiss, the court must review the evidence in the light most favorable to the State to determine whether substantial evidence was present of each element of the offense. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). This Court reviews a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

B. Analysis

Defendant asserts the wielded knife must have been opened with an exposed blade to satisfy the dangerous weapon element of the crime of robbery with a dangerous weapon. We disagree.

A dangerous weapon is any article, instrument, or substance that is likely to produce either death or great bodily harm. *State v. Marshall*, 188 N.C. App. 744, 749, 656 S.E.2d 709, 713, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the *manner in which defendant used it or threatened to use it*, and in some cases the *victim's perception* of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (emphasis supplied). The conduct of Defendant and the victim's perception are factors as relevant as the actual weapon used in the altercation. *Id.*

This Court has repeatedly addressed what constitutes a dangerous weapon in North Carolina. *See State v. Blair*, 181 N.C. App. 236, 638 S.E.2d 914 (upholding robbery with a dangerous weapon conviction where victim did not see the defendant's knife when defendant took his wallet, but a police officer saw defendant verbally threaten victim while holding the wallet and knife), *disc. review denied*, 361 N.C. 570, 650 S.E.2d 815 (2007); *State v. Williams*, 335 N.C. 518, 438 S.E.2d 727 (1994) (holding a jury can infer danger or threat to life and find defendant guilty of robbery with a dangerous weapon where defendant had his hand in his pocket pointing toward victims, appearing to his victims to be a firearm during the robbery).

While an issue of first impression in this Court, courts in other jurisdictions have ruled closed knives used in the commission of a robbery satisfy the dangerous weapon element. The Georgia Court of Appeals held a gesture toward another individual with an unopened knife during the commission of a robbery is sufficient to satisfy the element of a dangerous weapon. *Alford v. State*, 204 Ga. App. 14, 15, 418 S.E.2d 397, 398 (1992). Similarly, the Texas Court of Appeals held an unopened knife could be "legally sufficient to support a conviction" for aggravated robbery based on evidence that, while in an attempt to commit theft, the defendant "placed [the victim] in fear of imminent serious bodily injury or death, and during the course of that attempt, exhibited an unopened knife that, in the manner of its use or intended use, was capable of causing serious bodily injury or death." *Blanson v. State*, 107 S.W.3d 103, 106 (Tex. App. 2003). Both cases rely on the manner and conduct in which the respective defendants displayed the knives. *Id.*, *Alford*, 204 Ga. App. at 15, 418 S.E.2d at 398.

Based on precedents from our Courts, as well as persuasive authority in other jurisdictions, we conclude Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled "I will kill you," attempted to push past Mr. Pate, removed the knife from his pocket and brandished it when Mr. Pate mentioned police involvement.

We hold the unopened knife was a dangerous weapon when Defendant threatened to use it to cause great bodily harm or death. Sufficient evidence shows Defendant not only possessed a knife while committing the theft, he also removed it from his pocket and wielded it with dire threats when Mr. Pate attempted to call the police.

Defendant also argues the State presented insufficient evidence tending to show Mr. Pate's life was "endangered or threatened" as required by N.C. Gen. Stat. § 14-87 (2015). The State must present "evidence that the defendant endangered or threatened the life of the victim by possession of [the] weapon, aside from the mere fact of the weapon's presence." *State v. Gibbons*, 303 N.C. 484, 490, 279 S.E.2d 574, 578 (1981).

While Mr. Pate was attempting to disarm him, Defendant threatened, "I will kill you. I will kill you." Mr. Pate testified he felt afraid "when the knife came out" of Defendant's pocket. The State's evidence clearly shows more than mere possession of a dangerous weapon. Reviewed in the light most favorable to the State, this evidence tends to show Mr. Pate was afraid his life was endangered by Defendant's actions and threats. *Id.* Defendant's argument is overruled.

IV. Motion to Continue and Motion for Substitute Counsel

A. Standard of Review

[2] A motion to continue generally rests solely within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 11, 240 S.E.2d 426, 432 (1978). However, "[d]ue process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime [for] which he stands charged." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970). When the motion to continue is based on a constitutional right, "the question presented is one of law and not of discretion and is reviewable." *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976).

B. Analysis

In arguing his motion to continue, Defendant's attorney, Mr. Patton, asserted lack of adequate time to prepare, due to Defendant's incarceration in Catawba County from April to early June, and counsel's own illnesses during April through June. Mr. Patton was appointed to represent Defendant on 22 December 2014. Mr. Patton indicated he and Defendant had no communication from 10 March 2015 to 13 July 2015, when the case was called for trial. Mr. Patton also stated he underwent rotator cuff surgery on 10 April 2015 and did not return to work until the week of 18 May 2015.

Mr. Patton also informed the trial court he had tried a large criminal case during the week of 8 June and re-entered the hospital on 14 June 2015. Mr. Patton indicated the "antibiotic treatment" he received in the hospital "had a very severe effect" on him and that he "had not had

many good days since then." He informed the trial court he was unable to return to work until 29 June 2015, approximately two weeks prior to trial.

On the morning of trial, Defendant informed counsel he had two witnesses "that could come to court for him." Defendant also informed counsel that morning that he had prior contact with the prosecuting witness.

Criminal defendants are constitutionally guaranteed "a fair trial and a competent attorney." *Engle v. Isaac*, 456 U.S. 107, 134, 71 L. Ed. 2d 783, 804 (1982). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993).

Defendant must meet a two prong test to establish counsel's assistance was so defective to require reversal of a conviction. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show the deficient performance prejudiced the defense." *Id.*

Under our analysis we presume, without deciding, Defendant may meet the first prong to show counsel's representation of Defendant was deficient due to counsel's illnesses, his failure to speak to Defendant between March 2015 and 13 July 2015, counsel's recent knowledge of the potential defense witnesses, and the alleged prior contact with the prosecution's witness.

Under *Strickland*, this Court must determine whether Defendant was prejudiced due to counsel's deficient performance. *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876. In order to establish prejudice "[t]he 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." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

"[W]hen [a] Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

The factual record before us is insufficient to allow us to determine whether Defendant was prejudiced. No testimony or other information

reveals what Defendant's proposed witnesses would have testified to, what relationship Defendant had with the prosecution's witness, or what specifically Mr. Patton was unable to master or present at trial due to his illnesses. We dismiss Defendant's appeal of the denial of a continuance without prejudice. Defendant may review procedures to develop a factual record surrounding the trial court's denial of his motion to continue and appointment of substitute counsel before the superior court.

V. Conclusion

We hold the trial court properly submitted the charge of robbery with a dangerous weapon to the jury and find no error. We dismiss Defendant's argument regarding the trial court's denial of his motion to continue and for appointment of substitute counsel without prejudice.

NO ERROR IN PART. DISMISSED WITHOUT PREJUDICE IN PART.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 SEPTEMBER 2016)

BREIGHNER v. BREIGHNER No. 16-146	Moore (13CVD613)	Dismissed
CLARK v. N.C. DEP'T OF PUB. SAFETY No. 15-624	Office of Admin. Hearings (14OSP5446)	Affirmed
CRAWFORD v. NAWRATH No. 15-955	Mecklenburg (14CVD12037)	Affirmed
ELDER v. WILLIAMS No. 16-121	Carteret (11CVD1543)	Dismissed
GREATAMERICA FIN. SERVS. CORP. v. LILLINGTON FAM. CHIROPRACTIC, PA No. 15-1314	Wake (15CVD1018)	Affirmed
HAIRE v. KRAMER No. 16-140	Iredell (12CVS1419)	Dismissed
IN RE B.N.H. No. 16-275	Wilkes (15JA118) (15JA119) (15JA121) (15JA122)	Reversed
IN RE E.A.L. No. 16-266	Caswell (10JT19-20)	Affirmed
IN RE E.R.S. No. 16-220	Guilford (13JT484) (13JT485)	Affirmed
IN RE I.T. No. 15-1342	Wake (13JT189)	Affirmed
IN RE Z.B. No. 16-128	Wake (14JA134)	Affirmed
LOCAL GOV'T FED. CREDIT UNION v. DISHER No. 15-1402	Pitt (14CVD2186)	Reversed and Remanded
NEWELL v. NEWELL No. 15-1016	Wake (12CVD4605)	Affirmed in part; vacated and remanded in part

SHOPE v. PENNINGTON No. 15-1249	Lee (09CVD933)	Affirmed
STATE v. BOWLES No. 15-1359	Iredell (13CRS55042)	Affirmed
STATE v. BRITT No. 16-99	Johnston (12CRS55220)	No Error
STATE v. BROWN No. 15-847	Buncombe (13CRS57281) (14CRS80662)	Reversed and Remanded
STATE v. BROYAL No. 16-21	Chatham (13CRS50376-78) (13CRS640)	No Error
STATE v. CERASI No. 16-45	Wake (11CRS228622)	Affirmed
STATE v. DIXON No. 15-350	Alamance (09CRS55361) (09CRS7503)	No Error
STATE v. FIELDS No. 15-1086	Alamance (09CRS55401) (09CRS55483) (09CRS7504)	No plain error.
STATE v. JOHNSON No. 15-732	Cumberland (13CRS51987)	No Error
STATE v. JONES No. 15-995	Wake (12CRS204285) (12CRS206010) (12CRS3090) (13CRS3100) (13CRS3101)	No prejudicial error.
STATE v. McCANN No. 16-152	Vance (14CRS52728)	NO ERROR AT TRIAL, RESTITUTION AMOUNT VACATED AND REMANDED.
STATE v. McLEAN No. 16-158	Cumberland (13CRS5373)	No prejudicial error
STATE v. MOLINA No. 15-1180	Johnston (14CRS55115) (14CRS594)	No Error

STATE v. ORE No. 16-100	Durham (09CRS42754)	Vacated
STATE v. ROBERSON No. 16-118	Rowan (15CRS869)	No Plain Error
STATE v. SCHIMMELPFENNING No. 15-1315	Forsyth (14CRS168) (15CRS478)	Vacated and Remanded
STATE v. VAZQUEZ No. 16-191	Pitt (13CRS56868) (13CRS56870)	No error in part. dismissed in part.
STATE v. WILCOX No. 16-91	New Hanover (08CRS51854)	Affirmed

THOMAS BENTLEY, EMPLOYEE, PLAINTIFF
v.
JONATHAN PINER CONSTRUCTION, ALLEGED EMPLOYER, AND STONEWOOD INSURANCE COMPANY, ALLEGED CARRIER, DEFENDANTS

No. COA16-62

Filed 20 September 2016

Workers' Compensation—opinion and award—deputy commissioner not present for hearing

The Industrial Commission erred by basing its opinion and award in plaintiff's workers' compensation claim on an opinion and award by a deputy commissioner who was not present at the hearing and did not hear evidence.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 9 October 2015. Heard in the Court of Appeals 8 August 2016.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, and Robert C. Dodge, P.A., by Robert C. Dodge, for Plaintiff-Appellant.

Dickie, McCamey & Chilcote, P.C., by Martin R. Jernigan and Michael W. Ballance, for Defendants-Appellees.

McGEE, Chief Judge.

Thomas Bentley ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") determining he was not an "employee" of Jonathan Piner Construction ("Piner Construction"), as that term is used in the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1 *et seq.* On appeal, Plaintiff contends, *inter alia*, that the Commission erred by basing its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence. We agree, vacate the Commission's opinion and award, and remand for a new hearing.

I. Background

Piner Construction, a residential and commercial contractor, hired Plaintiff to work as a framer at one of its construction sites. While working at the construction site on 3 March 2014, Plaintiff was injured when

a nail he was prying from a board broke loose and struck him in the right eye. Following the injury, Plaintiff filed a workers' compensation claim with the Commission on 25 March 2014. Piner Construction, along with its insurance carrier, Stonewood Insurance Company (collectively, "Defendants") denied the claim for compensation, contending the injury was non-compensable under the Workers' Compensation Act because Plaintiff was not an employee of Piner Construction on the date of the accident. The claim was assigned for a hearing before Deputy Commissioner Mary C. Vilas ("Deputy Vilas").

A hearing before Deputy Vilas occurred on 5 December 2014. Near the end of the hearing, Deputy Vilas suggested that the jurisdictional question of whether Plaintiff was an employee of Piner Construction be bifurcated from the merits of Plaintiff's claim, because she would no longer be at the Commission after 1 February 2015. Deputy Vilas noted that she had many cases to write, but she would "try" to decide the jurisdictional question in the present case before she left the Commission. An order bifurcating the jurisdictional and merits issues was filed 9 December 2014 by Deputy Vilas, and stated that bifurcation "was appropriate given the issues for hearing and that medical testimony by deposition is not scheduled until 26 January 2015 and [Deputy Vilas] will not be at the Commission after 1 February 2015." Deputy Vilas filed an order closing the record and declaring that the jurisdictional issue was "ready for a decision" on 12 January 2015.

An opinion and order was entered 16 February 2015 by Deputy Commissioner William H. Shipley ("Deputy Shipley"). Deputy Shipley concluded as a matter of law that the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained. Plaintiff appealed to the full Commission, which came to the same conclusion in an opinion and award entered 9 October 2015. Plaintiff appeals.

II. Analysis

Plaintiff argues the Commission erred in basing its decision on an opinion and award of a deputy commissioner who did not hear the evidence.[1] Whether N.C. Gen. Stat. § 97-84 permits one deputy commissioner to consider the evidence and another to render an opinion and

1. Plaintiff raises two other arguments in his brief regarding the merits of the Commission's decision. Because we agree that a plain reading of N.C. Gen. Stat. § 97-84 requires a single deputy commissioner to both hear the evidence and render an opinion and award, we do not reach the remaining issues presented for adjudication.

award is a question of statutory interpretation, which we review *de novo*. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[q]uestions of statutory interpretation are questions of law and are reviewed de novo" (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998))).

Statutory interpretation "properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)).

The statute at issue in this case, N.C.G.S. § 97-84, provides:

> The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The Commission shall decide the case and issue findings of fact based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by *a deputy*, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, *and said deputy* shall proceed to a *complete determination of the matters in dispute*, *file his written opinion within 180 days of the close of the hearing record* unless time is extended for good cause by the Commission, and *the deputy* shall cause to be issued an award pursuant to such determination.

N.C. Gen. Stat. § 97-84 (2015) (emphasis added). Considering the words in the statute as they appear, and giving those words their plain and

ordinary meaning, we find that if a dispute in the Industrial Commission is heard by a deputy, N.C.G.S. § 97-84 requires "said deputy" to both arrive at a "complete determination of the matters in dispute," and "file his [or her] written opinion[.]"[2] The statute refers to a deputy commissioner in the singular form throughout the statute, stating that "a deputy" may hear the dispute in the same manner as "a member" of the Commission, and that "said deputy" shall proceed to a complete determination of the case, file an opinion, and "the deputy" shall cause an award to be issued.

We believe the context in which "a deputy," "said deputy," and "the deputy" are used in N.C.G.S. § 97-84 evidences the General Assembly's intent that a single deputy handle a case from its outset to its completion. We recognize that, under the Workers' Compensation Act, we are to read the singular to include the plural unless the context requires otherwise. *See* N.C. Gen. Stat. § 97-2(17) (2015) (providing that "the singular includes the plural" unless "the context otherwise requires"). However, reading the singular to include the plural in this instance – reading "a deputy" as "deputies," "said deputy" as "said deputies," and "the deputy" as "the deputies" – would permit a panel of deputies to hear the dispute and, taken to its logical conclusion, would also permit one deputy to issue preliminary orders, another deputy to hear the testimony, another to close the record, and yet another to render a decision. In the latter circumstance, no one deputy would have come to a "complete determination of the matters in dispute," rendering that portion of the statute superfluous. *See Estate of Jacobs v. State*, ___ N.C. App. ___, ___, 775 S.E.2d 873, 877, *disc. review denied*, ___ N.C. ___, 778 S.E.2d 93 (2015) (declining to adopt an interpretation that would have rendered portions of a statute "superfluous or nonsensical").

We believe the context in which "a deputy," "said deputy," and "the deputy" are used requires that the entire process be handled by a single deputy commissioner, and that a contrary interpretation would contravene the manifest intent of the General Assembly. N.C.G.S. § 97-2(17); *see also* N.C. Gen. Stat. § 12-3(1) (2015) (providing that in the interpretation of statutes, "[e]very word importing the singular number only shall extend and be applied to several persons or things," unless

2. This question is one of first impression. In *Crawford v. Board of Education*, 3 N.C. App. 343, 164 S.E.2d 748 (1968), the defendant argued the Commission erred in allowing a hearing officer to preside at the hearing in which the majority of the evidence was presented, when another hearing officer presided over the first day of the hearing and ultimately issued the opinion and award. 3 N.C. App at 347-48, 164 S.E.2d at 751. However, this Court found the defendant's argument on the issue to be waived, and did not reach the merits. *Id.*

"such construction would be inconsistent with the manifest intent of the General Assembly.").

In so finding, we rely only on the plain language of the statute, and reject Plaintiff's argument that *State v. Bartlett*, 368 N.C. 309, 776 S.E.2d 672 (2015) controls this case. In *Bartlett*, our Supreme Court interpreted a provision of the North Carolina Criminal Procedure Act, N.C. Gen. Stat. § 15A-977, as requiring a trial judge who presides at a suppression hearing to also issue the findings of fact. 368 N.C. at 313, 776 S.E.2d at 647. This is so, the Court reasoned, because "[t]he trial judge who presides at a suppression hearing 'sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth.' " *Id.* (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971)). Plaintiff reasons that, because a deputy commissioner hearing evidence in the Industrial Commission functions like a trial judge at a suppression hearing, *Bartlett*'s holding should be read to mandate that a single deputy commissioner both hear the evidence and render a decision.

Clear precedent from our Supreme Court allows us to reject this reasoning. As Defendants point out, in *Adams v. AVX Corp*, 349 N.C. 676, 509 S.E.2d 411 (1998), our Supreme Court stated that under the Workers' Compensation Act, "the Commission is the fact finding body" and is the "sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* at 680, 509 S.E.2d at 413 (citation omitted). Defendants correctly note that under *Adams*, the full Commission reviewing the opinion and award of the hearing officer may either conduct a new hearing or proceed on the cold record, and unlike N.C.G.S. § 15A-977, which entrusts the trial court to be the fact finder, N.C. Gen. Stat. § 97-85 "places the ultimate fact-finding function with the Commission – not the hearing officer." *Id.* at 681, 509 S.E.2d at 413.

We are cognizant of *Adams* and its instruction that the full Commission is the sole judge of the credibility of witnesses. *Id.* Defendants argue that, because the Commission may proceed on a cold record in reviewing the hearing officer's decision, whether the deputy commissioner issuing the original opinion and order heard live testimony or proceeded on a cold record is of no moment. However, we cannot ignore the plain language of a statute. Our decision does not question the Commission's ability to review the hearing officer's decision on a cold record – under our precedents it unquestionably can. In the present case, we simply examine whether the plain language of N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and order in a case over which he or

she did not personally preside. As noted, we find said language to unambiguously dictate that when "a deputy" commissioner presides over a dispute, "*said deputy* shall proceed to a *complete determination of the matters in dispute*, file his written opinion within 180 days of the close of the hearing record," and "cause to be issued an award pursuant to such determination." N.C.G.S. § 97-84 (emphasis added).

In the present case, Deputy Vilas presided over the hearing, issued a preliminary order bifurcating the jurisdictional and merits issues, and closed the record on the issue of the employment relationship, while Deputy Shipley issued the opinion and order finding that the Commission had no jurisdiction because Plaintiff was not an employee of Piner Construction. Neither Deputy Vilas nor Deputy Shipley "proceed[ed] to a complete determination of the matters in dispute," "file[d] [a] written opinion," *and* "cause[d] to be issued an award pursuant to such determination." N.C.G.S. § 97-84. We therefore conclude that the proceedings before Deputy Vilas resulting in an opinion and order by Deputy Shipley violated N.C.G.S. § 97-84.

III. Conclusion

For the reasons stated, the Commission's opinion and award is vacated, and this case is remanded for a new hearing.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

GILBERT BREEDLOVE AND THOMAS HOLLAND, PLAINTIFFS
v.
MARION R. WARREN, IN HIS OFFICIAL CAPACITY AS INTERIM DIRECTOR OF THE N.C. ADMINISTRATIVE OFFICE OF THE COURTS, AND THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, DEFENDANTS

No. COA15-1381

Filed 20 September 2016

1. Courts—Administrative Office of Courts—no power over magistrates—standing

The trial court did not err by granting defendants' motion to dismiss based on lack of standing. Defendant Administrative Office of the Courts (AOC) does not have power to nominate, appoint, remove, or otherwise control magistrates, nor does AOC have the power to institute criminal prosecutions against magistrates for failure to perform their duties.

2. Appeal and Error—motion to dismiss—failure to state a claim—argument not addressed

Although plaintiffs contended the trial court erred by granting defendants' motion to dismiss based on failure to state a claim, this argument was not addressed because the Court of Appeals already held that the trial court did not err in dismissing plaintiffs' complaint for lack of standing.

Appeal by plaintiffs from order entered 19 September 2015 by Judge George B. Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 May 2016.

Center for Law and Freedom, by Elliot Engstrom, and Ellis Boyle Law, PLLC, by W. Ellis Boyle, for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for defendant-appellees.

CALABRIA, Judge.

Gilbert Breedlove ("Breedlove") and Thomas Holland ("Holland") (collectively, "plaintiffs") brought this action against the North Carolina Administrative Office of the Courts ("AOC") and its Interim Director, Marion R. Warren ("Warren") (collectively, "defendants"). Plaintiffs appeal the trial court's grant of defendants' motion to dismiss. We affirm.

I. Factual and Procedural Background

Plaintiffs served as magistrates, Breedlove from Swain County and Holland from Graham County. Both identify as devout Christians.

In the autumn of 2014, the Supreme Court of the United States, and the Court of Appeals for the Fourth Circuit, established that states within the Fourth Circuit, including North Carolina, cannot decline to marry a same-sex couple, nor can they decline to recognize an otherwise lawful marriage of a same-sex couple from a different state. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S.Ct. 308, 190 L. Ed. 2d 140 (2014). This holding was subsequently and explicitly affirmed under North Carolina law. *See Gen. Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014) (holding that "any . . . source of state law that operates to deny same-sex couples the right to marry in the State of North Carolina . . . [is,] in accordance with *Bostic*, *supra*, unconstitutional").

On 13 October 2014, the Director of AOC, at the time John Smith ("Smith"), issued a guidance memorandum (the "Interim Guidance Memo") to various North Carolina judicial employees, including, *inter alia*, plaintiffs. This document stated that the AOC had "received a sufficient number of requests for guidance given the recent federal ruling on same-sex marriages to justify this interim memorandum of guidance to magistrates." This document stated that magistrates should immediately begin conducting marriage ceremonies for same-sex couples, and that such marriages "should not be delayed or postponed while awaiting further clarification of other questions or issues." The document further advised recipients that a more detailed memorandum was forthcoming.

On 14 October 2014, AOC issued a second memorandum (the "Same-Sex Marriages Memo") to various North Carolina judicial employees, including, *inter alia*, plaintiffs. In this document, AOC presented various questions, and answers thereto, on the issue of magistrates performing same-sex marriages. In response to the question as to whether a magistrate who performs other marriages may refuse to marry a same-sex couple for whom a marriage license had been issued, the document stated that a magistrate's refusal to lawfully marry a same-sex couple would "[violate] the equal protection clause of the U.S. Constitution" and further "would constitute a violation of the oath and a failure to perform a duty of the office." In response to the question as to the consequences of refusal of a magistrate to marry a same-sex couple, the document stated that "refusal is grounds for suspension or removal from office,

as well as potential criminal charges[,]" and that North Carolina law "makes clear that this criminal provision remains enforceable in addition to the procedures for suspension and removal under G.S. 7A-173." In response to the question of whether a magistrate's reason for refusal made a difference to the outcome, the document stated that it did not.

On 5 November 2014, AOC composed a letter to Senator Phil Berger ("Berger"), President *Pro Tempore* of the North Carolina Senate. Berger had requested that AOC revise the Same-Sex Marriages Memo, and suggested that the document violated the religious workplace protections of federal Title VII. In its letter in response to Berger, AOC stated that "our magistrates are affirmatively bound by [federal] rulings in exercising their official powers," and that the document was issued to judicial employees in order to ensure that they are "aware of the potential consequences for failure to comply with the injunction and follow the law."

Plaintiffs sought accommodations so that they would not be forced to violate their religious beliefs by performing same-sex marriages. Plaintiffs' requests for accommodation were denied, and plaintiffs ultimately resigned.

On 6 April 2015, plaintiffs brought the underlying action against AOC and Smith. Plaintiffs' complaint alleged violations of plaintiffs' rights under the North Carolina Constitution, and sought a declaratory judgment that AOC's policy of forcing plaintiffs to perform same-sex marriages was unconstitutional, and a preliminary and permanent injunction against being forced to perform same-sex marriages. Plaintiffs also sought to be reappointed as magistrates, and to receive back pay and benefits for the time spent resigned from their posts.

On 11 May 2015, Smith and AOC filed a motion to dismiss plaintiffs' complaint, pursuant to, *inter alia*, Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Specifically, the motion alleged that plaintiffs "have failed to allege an actual case or controversy, in that neither the AOC Director nor AOC has any authority over magistrates, and Plaintiffs, therefore, lack standing;" and that plaintiffs failed to state a claim upon which relief can be granted, in that the memoranda at issue "did not constitute a mandate to magistrates" and "[did] not violate either plaintiff's rights[,]" and that Smith was "entitled to qualified immunity."

Between the filing of this motion and the filing of the trial court's order, Smith stepped down from his role, and Warren was appointed Interim Director of AOC. Warren replaced Smith, in his official capacity, as a defendant in this case.

On 19 September 2015, the trial court entered an order on defendants' motion to dismiss. In its order, the trial court found and held that it "lacks subject matter jurisdiction in that there is no actual case or controversy, because the defendants have no power to nominate, appoint, remove, or otherwise control magistrates, nor do the defendants have the power to institute criminal prosecutions against magistrates for failure to perform their duties." The trial court granted defendants' motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

Plaintiffs appeal.

II. Motion to Dismiss for Lack of Standing

[1] In their first argument, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss for lack of standing. We disagree.

A. Standard of Review

"In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

B. Analysis

"As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted). In order for a plaintiff to demonstrate standing, he must show three things:

> (1) injury in fact-an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007) (citations and quotations omitted).

Plaintiffs contend that they had standing to bring their claims against defendants because (1) defendants were in a position of practical and actual authority over plaintiffs, (2) defendants exerted authority over North Carolina magistrates, including plaintiffs, and (3) plaintiffs resigned from their positions as magistrates due to defendants' exertions

of authority. For the purpose of defendants' motion to dismiss, these allegations are taken as true.

The North Carolina Constitution provides for the appointment of magistrates as follows:

> For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court.

N.C. Const., art. IV, § 10. This provision is further codified in the North Carolina General Statutes. *See* N.C. Gen. Stat. § 7A-171 (2015).

The General Statutes also provide procedures for the removal of magistrates:

> A magistrate may be suspended from performing the duties of his office by the chief district judge of the district court district in which his county is located, or removed from office by the senior regular resident superior court judge of, or any regular superior court judge holding court in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.

N.C. Gen. Stat. § 7A-173(a) (2015).

Lastly, the General Statutes provide for the administrative and supervisory authority over magistrates:

> The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:
>
> . . .
>
> (4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a

> particular county shall be available for the performance of their duties to another district court judge or the clerk of the superior court, or the judge may appoint a chief magistrate to fulfill some or all of the duties under subdivision (12) of this section, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate.

N.C. Gen. Stat. § 7A-146(4) (2015).

These statutes, taken together, make it explicit that the appointment of magistrates is within the authority of the Senior Resident Superior Court Judge; that the suspension of magistrates is within the authority of the Chief District Court Judge; that the removal of magistrates is within the authority the Senior Resident Superior Court Judge, or any superior court judge holding court in the relevant county; and that administrative and supervisory authority over magistrates is vested in the Chief District Court Judge, pursuant to the general supervision of the Chief Justice of the Supreme Court. Nowhere in any of these statutes is AOC listed as a party with any authority to appoint, sanction, suspend, remove, or generally supervise magistrates.

Plaintiffs contend that defendants nonetheless possess this authority, due to various statutory provisions that grant AOC various ministerial powers with respect to judicial employees and officials, including magistrates. However, plaintiffs' complaint was not premised upon defendants setting their salary, or evaluating their work experience; it was premised upon the concern that their adherence to their religious beliefs would result in their removal as magistrates. Although AOC is entrusted with statutory authority to establish and evaluate judicial compliance with regulations, rules, and procedures,[1] the statutes cited above clearly show that AOC lacked the power, its memoranda notwithstanding, to sanction, suspend, or remove plaintiffs. As such, we hold that defendants lacked any authority to sanction, suspend, or remove plaintiffs.

Because defendants lacked the actual authority to sanction, suspend, or remove plaintiffs, the allegations in plaintiffs' complaint, when viewed as true and considered in the light most favorable to plaintiffs, fail to demonstrate an injury that defendants were capable of inflicting

1. *See, e.g.*, N.C. Gen. Stat. §§ 7A-171.1, 7A-171.2, 7A-174, 7A-177, 7A-343.

upon plaintiffs, and by extension fails to show that such an injury could be redressed. If defendants could not remove plaintiffs, then defendants could not have harmed plaintiffs by such a removal, and therefore plaintiffs lacked standing to bring an action for this purported harm. We therefore hold that the trial court did not err in granting defendants' motion to dismiss for lack of standing.

This argument is without merit.

III. Motion to Dismiss for Failure to State a Claim

[2] In their second argument, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss for failure to state a claim. Because we have already held that the trial court did not err in dismissing plaintiffs' complaint for lack of standing, we need not address this issue.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

EVERETT E. HENKEL, JR., PLAINTIFF
v.
TRIANGLE HOMES, INC., DEFENDANT

No. COA15-1123

Filed 20 September 2016

Deeds—foreclosure sale—pre-existing federal tax lien

The trial court did not err in a quiet title action by granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment and judgment as a matter of law. A deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a pre-existing federal tax lien on the property.

Appeal by Defendant from final order and judgment entered 25 May 2016 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 31 March 2016.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Anthony S. di Santi, for Plaintiff-Appellee.

Asheville Law Group, by Michael G. Wimer and Jake A. Snider, for Defendant-Appellant.

INMAN, Judge.

A deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a pre-existing federal tax lien on the property.

Triangle Homes, Inc. ("Defendant") appeals from the trial court's 29 May 2015 judgment in favor of Everett Henkel ("Plaintiff") in a quiet title action. Defendant contends that (1) the trial court erred because North Carolina is a "pure race" jurisdiction and Defendant recorded its deed prior to Plaintiff recording his deed; (2) the local tax lien was superior to the federal tax lien and therefore extinguished the federal tax lien upon foreclosure; and (3) the federal tax lien was discharged when the Internal Revenue Service issued its Deed of Real Estate to Plaintiff.

After careful review, we affirm the trial court's order.

I. Factual and Procedural History

On 31 January 2007 Zodie and Sage Johnson conveyed to Garry and Amanda Lynch ("the Lynches") a warranty deed for Lot 87 of Mushroom Park Subdivision ("the Parcel") in Avery County, North Carolina. The Lynches recorded the deed with the Avery County Register of Deeds Office on 2 February 2008. Following the conveyance, a series of federal and municipal property tax liens were levied against the Parcel. The first of these was a federal tax lien for the amount of $888,765.42 issued on 7 December 2011 and recorded by the United States with the Avery County Register of Deeds Office on 29 December 2011. The second was a federal tax lien for the amount of $877,490.42 issued on 27 August 2012 and recorded by the United States with the Avery County Register of Deeds Office on 4 September 2012. The third lien was for a tax liability to the Village of Sugar Mountain ("the Village"), an incorporated municipality.

On 12 February 2013, the Village filed a complaint in Avery County District Court alleging the Lynches had failed to pay local property taxes for the Parcel in the amount of $2,575.16. On 23 September 2013 the district court entered a Default Judgment against the Lynches and issued a notice of foreclosure sale scheduled for 13 November 2013. Although federal statute 26 U.S.C. § 7425(a) required notice to be given to the United States, at no point before or during the district court action or the foreclosure sale following that action was the United States joined as a party or provided notice.

The Village's judicial tax foreclosure sale took place on 13 November 2013 at 10:00 a.m. No one attended the sale except for a representative of the Village, which was the highest bidder with a purchase price of $6,673.73.

The following day, 14 November 2013, the federal tax lien foreclosure sale was held and the Parcel was sold to Plaintiff for a total purchase price of $172,000 with a deposit of $20,000 paid at the foreclosure sale. It was made known to the attendants at the second foreclosure sale that there had been a prior foreclosure sale the day before on a municipal tax lien. After several conversations, a representative for the Village, the highest bidder at the municipal tax foreclosure sale, agreed to assign any interest it had in the Parcel to the highest bidder at the federal tax foreclosure sale. Plaintiff received a "Receipt for Deposit" and "Notice to Purchaser or Purchaser's Assignee" for this sale on 14 November 2013.

On this same day, approximately four hours after the federal tax lien foreclosure sale, and with proper notice of the federal tax lien foreclosure sale and the events occurring therein, Defendant filed an upset bid on the Village's judicial foreclosure sale in the amount of $7,423.73. Following the filing of this upset bid, an attorney for the Village warned Defendant's principal about the federal tax lien and foreclosure sale, explained that the deed Defendant was purchasing was a quitclaim deed with no warranties so that Defendant was unlikely to be able to obtain a clean title, and offered to refund Defendant's deposit. Defendant's principal acknowledged his understanding and proceeded to affirm his upset bid.[1]

On or before 14 December 2013, Plaintiff tendered the remaining balance for the purchase price to the Internal Revenue Service. On 16 December 2013, Plaintiff received a Form 2435 Certificate of Sale of Seized Property.

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1. After obtaining the quitclaim deed for $7,423.73 in November 2013, Defendant's principal, on behalf of Defendant, entered into a contract to sell the Parcel to third parties for $144,000.00 and promised to convey fee simple marketable title, free of all liens. Defendant's principal did not disclose to the third parties the federal tax lien or the fact that Plaintiff had purchased the Parcel in the federal tax foreclosure sale. After the North Carolina Real Estate Commission accused Defendant's principal, James McClure, of improper, fraudulent and/or dishonest dealing in violation of N.C. Gen. Stat. § 93A-6(a)(10) as the result of his conduct with regard to the Parcel, Mr. McClure voluntarily surrendered his North Carolina real estate broker's license.

On 3 January 2014, Defendant filed a Motion Confirming Foreclosure Sale with the Avery County District Court, seeking to confirm its upset bid. The district court entered a Final Report and Accounting of Foreclosure Sale for the Village's judicial foreclosure, awarding the Parcel to Defendant for the amount of $7,423.73 on 21 January 2014. On or about this date, Defendant paid the final purchase price and an attorney for the Village drafted and executed a Commissioner's Deed, which Defendant recorded on 7 April 2014.

On 20 May 2014, following a statutory 180-day waiting period in which no one redeemed the property following the federal tax foreclosure sale, Plaintiff mailed the Certificate of Sale of Seized Property to the Internal Revenue Service. On 28 May 2014, Plaintiff received a Deed of Real Estate from the Internal Revenue Service. Plaintiff recorded the deed on 6 June 2014 with the Avery County Register of Deeds Office.

Plaintiff filed a complaint against Defendant on 15 October 2014 in Avery County Superior Court seeking quiet title in the Parcel. Following Defendant's Answer, both parties filed Motions for Summary Judgment. The cross-motions were heard on 11 May 2015. On 25 May 2015, the trial court entered summary judgment in favor of Plaintiff, declaring Plaintiff "the owner in fee simple" of the Parcel and awarding Plaintiff his costs incurred in the action.

Defendant timely filed a Notice of Appeal.

II. Analysis

A. Standard of Review

"An award of summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law.' " *Austin Maintenance & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). On appeal, the standard of review from summary judgment "is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Id.* at 408, 742 S.E.2d at 541 (internal citations omitted). A trial court's decision granting summary judgment is reviewed *de novo*. *Id.* (citing *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986)).

B. North Carolina as a "pure race" jurisdiction

Defendant first contends that its deed should prevail because it was the first to record a deed with the Avery County Register of Deeds Office. We disagree.

Defendant's argument relies on N.C. Gen. Stat. § 47-18(a), North Carolina's recordation statute, which provides:

> No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies . . . .

N.C. Gen. Stat. § 47-18(a) (2015). This statute makes North Carolina a "pure race" jurisdiction, "in which the first to record an interest in land holds an interest superior to all other purchases for value, regardless of actual or constructive notice as to other, unrecorded conveyances." *Rowe v. Walker* 114 N.C. App. 36, 39, 441 S.E.2d 156, 158 (1994). N.C. Gen. Stat. § 47-18(a) applies "[w]here a grantor conveys the same property to two different purchasers," and results in "the first purchaser to record his deed win[ning] the 'race to the Register of Deeds' Office' and thereby defeat[ing] the other's claim to the property, even if he has actual notice of the conveyance to the other purchaser." *Id.* (internal citations omitted). This statute, however, is inapplicable to the case at hand.

At the time of the Village's judicial foreclosure sale, there were three prior recorded tax liens on the Parcel: the Village's municipal tax lien and the two federal tax liens. Generally, in North Carolina, municipal tax liens are superior to federal tax liens. Title 26 of the United States Code Section 6323(b)(6) governs the validity of federal tax liens and provides as follows:

> (b) Protection for certain interests even though notice filed.--Even though notice of a lien imposed by section 6321 has been filed, *such lien shall not be valid*--
>
> [. . .]
>
> (6) Real property tax and special assessment liens.--With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interest in such property which are prior in time, and such lien secures payment of--

> (A) a tax of general application levied by any taxing authority based upon the value of such property;

26 U.S.C. § 6323(b)(6) (2012). North Carolina law grants priority to the local tax liens described in Section 6323(b)(6) over federal tax liens:

> (a) On Real Property.–The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:
>
> (1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

N.C. Gen. Stat. § 105-356(a)(1) (2015). Therefore, a federal tax lien is junior to any local tax lien.

Generally, foreclosure of a senior lien extinguishes all junior liens. *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) ("Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument.") (citing *St. Louis Union Trust Co. v. Foster*, 211 N.C. 331, 190 S.E. 522 (1937)). To ensure a valid foreclosure sale, a senior lien holder must follow certain procedures. N.C. Gen. Stat. § 1-339.1 *et seq.* governs the procedures for judicial foreclosure sales, however, where property is subject to a federal tax lien, federal law imposes additional procedures.

The general rule making federal tax liens inferior to local tax liens applies only when the United States is provided prior notice of a foreclosure sale arising from a local tax liability. 26 U.S.C. § 7425(a) (2012) provides that a senior lien holder foreclosing on property subject to a federal tax lien must provide the United States with notice prior to the foreclosure sale. If the United States has not been provided notice of a judicial foreclosure proceeding, any federal tax lien on the foreclosed property remains undisturbed. 26 U.S.C. § 7425(a) provides in pertinent part:

> (a) Judicial proceedings.--If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of Title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title--
>
> (1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced . . . .

When federal and state law conflict, *i.e.*, "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[,]" federal law preempts state law. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44-45, 681 S.E.2d 465, 476 (2009). Therefore, a foreclosure proceeding and sale will not disturb or extinguish a previously recorded federal tax lien unless the United States is properly notified and made a party to the proceeding. *See, e.g.*, *Myers v. U.S.*, 647 F.2d 591, 596-97 (5th Cir. 1981) ("Although under state law the inferior mortgages and liens were discharged by the foreclosure sale, . . . if the proper type of notice required by federal statute is not afforded where so required, the federal tax lien then remains unaffected by the foreclosure process and will follow the property into the hands of the subsequent purchaser . . . .").

It is undisputed that the federal tax liens against the Parcel were properly issued and recorded in the Avery County Register of Deeds Office on 29 December 2011 and 4 September 2012. Approximately one year later, and before the federal liens were discharged, the Village filed a complaint in Avery County District Court and was granted a Default Judgment for a tax deficiency on the Parcel. The undisputed facts further establish that the United States was not made a party to the judicial foreclosure proceedings that followed the Default Judgment. Therefore, the federal tax liens survived the judicial foreclosure sale and Defendant took the Parcel subject to these liens.

The United States and the Internal Revenue Service have a right to levy and sell any real property in an effort to collect on unpaid taxes. 26 U.S.C. § 6330 *et seq.* (2012) "The term 'levy' as used in this title includes the power of distraint and seizure by any means." 26 U.S.C. § 6331(b). Following a sale pursuant to Section 6335, "[t]he owners . . . *or any person having any interest therein*, . . . shall be permitted to redeem the property sold, or any particular tract of such property, at

any time within 180 days after the sale thereof." 26 U.S.C. § 6337(b)(1) (emphasis added).

Defendant's purchase of the Parcel as the upset bidder from the 13 November 2013 foreclosure sale discharged the local tax lien and Defendant was conveyed a quitclaim deed by the Village. "A quitclaim deed conveys only the interest of the grantor, whatever it is, no more and no less." *Heath v. Turner*, 309 N.C. 483, 491, 308 S.E.2d 244, 248 (1983) (citing *Hayes v. Ricard*, 245 N.C. 687, 691, 97 S.E.2d 105, 108 (1952)).

Because the Village's foreclosure action and judicial foreclosure sale violated federal law by failing to provide notice to, and joining as a party, the United States, and occurred prior to the federal tax lien foreclosure sale, Defendant's quitclaim deed was conveyed subject to the federal tax lien. Defendant's deed granted it the right to redeem the Parcel from the federal tax foreclosure sale pursuant to 26 U.S.C. § 6337, quoted *supra*. However, Defendant failed to redeem within the 180 days prescribed by law, and therefore, forfeited any rights it had to the Parcel.

Because Defendant's claim to the Parcel based upon the quitclaim deed was subordinate to Plaintiff's claim based upon the superior federal tax lien, North Carolina's recordation statute, N.C. Gen. Stat. § 47-18(a), does not apply. Winning the race to the courthouse does not upset the rules of lien priority established by state and federal law, including federal preemption when those laws conflict.

Defendant was put on notice of the federal tax lien foreclosure sale following the judicial foreclosure sale and had the opportunity to exercise its right to redeem the Parcel. However, Defendant did not exercise this right within the redemption period and consequently severed its claim to the Parcel. Defendant's argument that the discharge of the federal lien as to Plaintiff, as a result of the federal tax foreclosure sale, also extinguished the lien as to Defendant is without merit.

III. Conclusion

For the reasons stated above we affirm the trial court's order granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment and Judgment as a Matter of Law.

AFFIRMED.

Judges DIETZ and TYSON concur.

SONYA PAIT HEUSTESS, ADMINISTRATRIX OF THE ESTATE OF RONNIE WAYNE HEUSTESS, PLAINTIFF

v.

BLADENBORO EMERGENCY SERVICES, INCORPORATED, D/B/A BLADENBORO RESCUE; LYNDA A. SANDERS, INDIVIDUALLY; DAVID D. HOWELL, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED, AND INDIVIDUALLY; JEFFERY BRISSON, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED AND INDIVIDUALLY; AND HOLLIS FREEMAN, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED AND INDIVIDUALLY, DEFENDANTS

No. COA16-106

Filed 20 September 2016

1. Appeal and Error—interlocutory orders and appeals—motion for change of venue—substantial right

Although an appeal from the denial of a motion to change venue is from an interlocutory order, it affects a substantial right and is immediately appealable.

2. Venue—motion to change—part of cause of action in county

The trial court did not err by denying defendants' motion to change venue. Although plaintiff alleged other negligent acts and omissions that occurred in Bladen County, venue was proper in Robeson County since part of the cause of action arose there.

Appeal by defendants from Order entered 29 June 2015 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 10 August 2016.

MUSSELWHITE, MUSSELWHITE, BRANCH & GRANTHAM, by J. William Owen and W. Edward Musselwhite, Jr., for plaintiff.

CRANFILL SUMNER & HARTZOG LLP, by Jaye E. Bingham-Hinch, Colleen N. Shea, and Elizabeth C. King, for defendants.

ELMORE, Judge.

Defendants[1] appeal from the trial court's order denying their motion to change venue. After careful consideration, we affirm.

1. Defendant Lynda A. Sanders did not file a notice of appeal.

I. Background

This appeal arises out of an action filed in Robeson County by Sonya Heustess (plaintiff), administratrix of the estate of Ronnie Wayne Heustess (the decedent), against Bladen County; Bladen County Emergency Services (EMS), a department of Bladen County; Bladenboro Emergency Services, Inc. d/b/a Bladenboro Rescue (Bladenboro EMS); Lynda A. Sanders in her official capacity as a paramedic with Bladen County EMS and individually; David D. Howell in his official capacity as an emergency medical technician (EMT) with Bladenboro EMS and individually; Jeffery Brisson in his official capacity as an EMT with Bladenboro EMS and individually; and Hollis Freeman in his official capacity as an EMT with Bladenboro EMS and individually. Plaintiff later voluntarily dismissed without prejudice all claims against Bladen County, Bladen County EMS, and Sanders in her official capacity.

In plaintiff's complaint, she alleged that in February 2013, her husband, the decedent, began to experience abdominal pain and shortness of breath, and soon thereafter collapsed in their home. Plaintiff summoned the help of their daughter's boyfriend, an off-duty paramedic, who was sleeping in their daughter's house next door. Plaintiff also called the Bladen County 911 operator. Bladen County EMS and Bladenboro EMS were dispatched to the home in Bladen County and stayed on the scene for approximately twenty-six minutes before departing for Southeastern Regional Medical Center in Robeson County. A hospital physician informed plaintiff's family that he believed the decedent had a heart attack, but he was unable to treat the decedent due to "bleeding of the brain caused by the lack of oxygen to the brain." Plaintiff alleged that Sanders, Howell, Brisson, and Freeman, as agents of their respective employers, failed to do the following: comply with the applicable protocols set forth by the North Carolina Office of EMS and Bladen County EMS; ensure that the decedent was properly intubated and that such intubation was properly monitored; make sure that the "king airway" was properly inserted and monitored while en route to the hospital; and take all necessary action to make sure the decedent received adequate oxygen.

Bladenboro EMS, Sanders, Howell, Brisson, and Freeman filed a motion to dismiss or, alternatively, to change venue to Bladen County pursuant to N.C. Gen. Stat. § 1-83(1), claiming that venue was not proper in Robeson County. After a hearing, the Robeson County Superior Court denied the motion and concluded that venue was proper in Robeson County, as alleged in plaintiff's complaint, pursuant to N.C. Gen. Stat.

§ 1-77. Bladenboro EMS, Howell, Brisson, and Freeman (collectively defendants) appeal.

II. Analysis

Defendants argue that the trial court erred in denying their motion to change venue because Robeson County is not the proper venue for this action. Defendants contend that venue is governed by N.C. Gen. Stat. § 1-82 whereas plaintiff alleges that N.C. Gen. Stat. § 1-77 controls.

[1] At the outset, we acknowledge that an order denying a motion to change venue is interlocutory, and interlocutory orders are generally not immediately appealable. *See Hawley v. Hobgood*, 174 N.C. App. 606, 607–08, 622 S.E.2d 117, 118 (2005) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)) ("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."). Our courts have established, however, that "[m]otions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable." *Id.* at 608, 622 S.E.2d at 119 (citations omitted).

[2] Defendants filed a motion for change of venue under N.C. Gen. Stat. § 1-83 (2015), which states,

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one. . . .

"Despite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). "A determination of venue under

N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*." *Id.* (citations omitted).

Under N.C. Gen. Stat. § 1-77 (2015),

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

However, "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2015).

Here, the trial court concluded as a matter of law that N.C. Gen. Stat. § 1-77(2) applies, in that there was "an agency relationship between Bladen County and Bladenboro [EMS] for purposes of venue under N.C. Gen. Stat. § 1-77(2)." Additionally, it concluded that plaintiff's allegations were sufficient to establish that part of plaintiff's cause of action arose in Robeson County.

Our Supreme Court has stated that "[a]ny consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a 'public officer or person especially appointed to execute his duties'? (2) In what county did the cause of action in suit arise?" *Coats v. Sampson Cty. Mem. Hosp., Inc.*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965) (holding that the defendant-hospital was an agency of Sampson County and venue was proper in Sampson County under N.C. Gen. Stat. § 1-77); *see also Wells v. Cumberland Cty. Hosp. Sys., Inc.*, 150 N.C. App. 584, 587, 564 S.E.2d 74, 76 (2002).

Defendants argue that N.C. Gen. Stat. § 1-77 does not apply because plaintiff dismissed the three "County defendants" and failed to allege or present any evidence that the remaining defendants were public officers within the meaning of section 1-77. Defendants rely on our holding in *Fraley v. Griffin*, 217 N.C. App. 624, 629, 720 S.E.2d 694, 697 (2011), to support their argument. In that case, this Court held that the defendant, an EMT, was not entitled to public official immunity and could be held

personally liable for any harm caused by his negligence as an EMT. *Id.* For the following reasons, *Fraley* is not controlling here.

In *Hyde v. Anderson*, 158 N.C. App. 307, 309–10, 580 S.E.2d 424, 425 (2003), this Court observed that the test for whether a party can be considered a public officer for purposes of venue does not take into account the test for finding immunity. In *Hyde*, the plaintiff argued that "the correct test for determining if section 1-77(2) applies should be whether a municipality is engaged in a proprietary function or a governmental function." *Id.* We stated, "Although we acknowledge this is the proper test for determining whether a governmental actor is entitled to sovereign immunity, . . . we discern no basis for applying it to determinations of venue in suits against a municipality." *Id.* at 310, 580 S.E.2d at 425.

Here, plaintiff claims that there was an agency relationship between Bladen County, a government entity, and Bladenboro EMS, a nonprofit corporation, and that Bladenboro EMS was serving the "essential government and public function" of providing emergency medical care to Bladen County citizens.

"In determining whether a corporate entity should be treated as an agency of local government, 'we . . . must look at the nature of the relationship between the [corporation] and the county[.]' " *Odom v. Clark*, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008) (quoting *Publishing Co. v. Hosp. Sys., Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981)). Under N.C. Gen. Stat. § 143-507 (2015), the General Assembly established a "Statewide Emergency Medical Services System" in the Department of Health and Human Services as follows:

> Emergency Medical Services as referred to in this Article include all services rendered by emergency medical services personnel as defined in G.S. 131E-155(7) in responding to improve the health and wellness of the community and to address the individual's need for immediate emergency medical care in order to prevent loss of life or further aggravation of physiological or psychological illness or injury.

N.C. Gen. Stat. § 131E-155(7) (2015) states that "[e]mergency medical services personnel" include an EMT, which is defined in N.C. Gen. Stat. § 131E-155(10) (2015) as "an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician by the Department." *See also* N.C. Gen. Stat. § 131E-158 (2015)

("Credentialed personnel required."); N.C. Gen. Stat. § 131E-159 (2015) ("Credentialing Requirements.").

Moreover, "[e]ach county shall ensure that emergency medical services are provided to its citizens[,]" N.C. Gen. Stat. § 143-517 (2015), and "a county may operate or contract for ambulance services in all or a portion of the county." N.C. Gen. Stat. § 153A-250(b) (2015). The "Regulation of Emergency Medical Services" is provided for in Chapter 131E, Article 7 of our General Statutes. N.C. Gen. Stat. § 131E-156(a) (2015) provides,

> No person, firm, corporation, or association, either as owner, agent, provider, or otherwise, shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to be engaged in the business or service of transporting patients upon the streets or highways, waterways or airways in North Carolina unless a valid permit from the Department has been issued for each ambulance[2] used in the business or service.

Similarly, "No firm, corporation, or association shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to provide emergency medical services or transport patients upon the streets or highways, waterways, or airways in North Carolina unless a valid EMS Provider License has been issued by the Department." N.C. Gen. Stat. § 131E-155.1(a) (2015).

Consistent with the statutes cited above, here, Bladenboro EMS and Bladen County entered into a contract signed by the Chairman of the Board of Directors of Bladenboro EMS and the Chairman of the Board of Commissioners of Bladen County. Pursuant to that contract, both parties agreed that Bladenboro EMS would "furnish and provide continuing EMS services to all individuals lying within the boundaries of the Bladenboro EMS [ ] response area by dispatching upon call of any individual within the response area, with adequate equipment and personnel." While defendants claim that Bladenboro EMS was in complete "control of its vehicles, programs, volunteers, assistants and employees[,]" Bladenboro EMS was subject to the regulations provided in the statutes discussed above. Furthermore, in order to satisfy its own statutory duty to "ensure that emergency medical services are provided to its citizens[,]" N.C. Gen. Stat. § 143-517, Bladen County entered into a contract with Bladenboro EMS. Based on the nature of the relationship between Bladenboro EMS

2. The definition of "ambulance" in N.C. Gen. Stat. § 131E-155(1a) (2015) includes any privately or publicly owned vehicle.

and Bladen County, we conclude that Bladenboro EMS is an agency of Bladen County for purposes of venue here.

Additionally, although defendants argue that the alleged omissions giving rise to the cause of action occurred only in Bladen County, plaintiff alleged in her complaint that defendants failed to properly monitor the decedent and make sure that he had adequate oxygen while defendants transported him from plaintiff's home in Bladen County to the hospital in Robeson County. Plaintiff alleged that upon arriving at the hospital, a physician removed the king airway device and re-intubated the decedent. Plaintiff further alleged that the decedent died as a result of his brain being deprived of oxygen.

Even though plaintiff alleged other negligent acts and omissions that she claimed occurred in Bladen County, because part of the cause of action arose in Robeson County, venue is proper in Robeson County under N.C. Gen. Stat. § 1-77(2). *See Coats*, 264 N.C. at 334, 141 S.E.2d at 492 (" 'A broad, general rule applied or stated in many cases is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " (quoting Annot., Venue of actions or proceedings against public officers, 48 A.L.R. 2d 423, 432)); *see also Frink v. Batten*, 184 N.C. App. 725, 726, 730, 646 S.E.2d 809, 810, 812 (2007) (noting that section 1-77, which states that venue exists " 'where the cause, or some part thereof, arose,' acknowledges that those acts and omissions may arise in multiple counties" and "one of the sets of defendants will be required to litigate the case outside their home county").

Defendants also claim that the trial court erred in failing to rely on the affidavit of David D. Howell, dated 21 May 2015, and in making findings of fact and conclusions of law that were in conflict with his sworn testimony. "[T]he trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits such as those filed by the defendants without regard to whether they have been controverted by evidence introduced by the opposing party." *Godley Const. Co. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979) (citations omitted). The trial court was not required to rely on, or find facts and enter conclusions of law in accordance with, Howell's affidavit.

III. Conclusion

The trial court did not err in denying defendants' motion to change venue.

AFFIRMED.

Judges DAVIS and DIETZ concur.

STATE v. ELDRIDGE

[249 N.C. App. 493 (2016)]

STATE OF NORTH CAROLINA
v.
ANTWON LEERANDALL ELDRIDGE

No. COA16-173

Filed 20 September 2016

Search and Seizure—vehicle stop—reasonable suspicion—officer's mistake of law

The trial court erred in a trafficking in cocaine by transportation and trafficking in cocaine by possession case by denying defendant's motion to suppress evidence discovered during the stop of his vehicle. The requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that, like defendant's vehicle, are registered in another state. The officer's mistake of law was not objectively reasonable.

Appeal by defendant from judgment entered 3 August 2015 by Judge Edwin G. Wilson, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 24 August 2016.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

Kimberly P. Hoppin for defendant-appellant.

DAVIS, Judge.

Antwon Leerandall Eldridge ("Defendant") appeals from his convictions for trafficking in cocaine by transportation and trafficking in cocaine by possession. On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence discovered during the stop of his vehicle because the stop was based on an officer's mistake of law that was not objectively reasonable. After careful review, we reverse the trial court's order denying Defendant's motion to suppress.

Factual Background

On 12 June 2014, Deputy Aaron Billings of the Watauga County Sheriff's Office was traveling northbound on U.S. Highway 421 while talking on the phone to his supervisor, Lieutenant Brandon Greer. As he was driving, Deputy Billings noticed a white Ford Crown Victoria

driving without an exterior mirror on the driver's side of the vehicle. The vehicle was registered in Tennessee.

Deputy Billings was aware that North Carolina law generally requires vehicles to be equipped with exterior mirrors on the driver's side. He asked Lieutenant Greer to confirm that the applicable statute did, in fact, require the presence of an exterior mirror on the driver's side of a vehicle, and Lieutenant Greer responded that Deputy Billings was correct. Neither Deputy Billings nor Lieutenant Greer was aware that this statutory requirement — which is codified in N.C. Gen. Stat. § 20-126(b) — does not apply to vehicles registered out of state. Deputy Billings proceeded to perform a traffic stop on the Crown Victoria in a nearby parking lot.

Deputy Billings approached the vehicle and found Defendant in the driver's seat. Defendant consented to a search of the car, and officers later found 73 grams of crack cocaine and 12 grams of marijuana inside the vehicle. Defendant was arrested and subsequently admitted his awareness of the presence of the drugs in the vehicle.

On 2 February 2015, Defendant was indicted for trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession with intent to manufacture, sell, or deliver cocaine. Defendant filed a motion to suppress evidence obtained during the 12 June 2014 traffic stop, and a hearing was held on 4 June 2015 in Watauga County Superior Court before the Honorable Eric Morgan.

At the hearing, Deputy Billings testified that at the time of the stop he genuinely believed that the statutory provision requiring exterior mirrors applied to Defendant's vehicle. However, he conceded that he had since learned that the statute was not actually applicable because the Crown Victoria was not registered in North Carolina. Lieutenant Greer similarly testified that he had been unaware on the date at issue that the statutory requirement applied only to vehicles registered in North Carolina.

On 5 June 2015, the trial court entered an order denying Defendant's motion to suppress, which contained the following findings of fact:

> 1. Deputy Aaron Billings is a seven and a half year veteran of the Watauga County Sheriff's Department.
>
> 2. Deputy Billings was in uniform and on patrol at 10:42 PM on June 12, 2014.

3. Deputy Billings encountered the Defendant's vehicle on U.S. Highway 421 in Watauga County. U.S. Highway 421 is a public roadway.

4. Prior to stopping the Defendant, Deputy Billings noticed there was no exterior mirror on the driver's side of the vehicle. Upon closer examination, Deputy Billings noticed there was also no exterior mirror on the passenger side of the vehicle.

5. The Defendant's vehicle was registered in the State of Tennessee.

6. Deputy Billings had a reasonable and good faith belief that the condition of the Defendant's vehicle violated N.C.G.S. § 20-126(b).

7. Other subsections of N.C.G.S. § 20-126, which regulates mirrors on vehicles, do not require a vehicle to be registered in North Carolina to apply. For example, N.C.G.S. § 20-126(a) requires rearview mirrors in vehicles, but does not include a requirement that the vehicle be registered in North Carolina. In addition, N.C.G.S. § 20-126(c) requires rearview mirrors on motorcycles, but does not include a requirement that the vehicle be registered in North Carolina.

8. Lieutenant Brandon Greer also testified. Lieutenant Greer has twelve years of law enforcement experience and was Deputy Billings[']s supervisor on June 12, 2014.

9. Lieutenant Greer testified that Deputy Billings contacted Lieutenant Greer prior to conducting the traffic stop of the Defendant.

10. Lieutenant Greer informed Deputy Billings that he believed the absence of exterior mirrors on the Defendant's vehicle violated N.C.G.S. § 20-126(b).

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

1. Deputy Billings stopped the Defendant based on an objectively reasonable mistake of law that N.C.G.S. § 20-126(b) applied to the Defendant's vehicle even though it was registered in Tennessee and not North Carolina.

> This was a reasonable and good faith, but mistaken understanding of the scope of the legal prohibition of N.C.G.S. § 20-126(b).
>
> 2. The purpose of N.C.G.S. § 20-126(b) is to ensure the safety of motor vehicles and their drivers on North Carolina roads. This purpose would not lead an officer to believe that N.C.G.S. § 20-126(b) applies only to vehicles registered in North Carolina.
>
> 3. Deputy Billings's traffic stop of the Defendant for violating N.C.G.S. § 20-126(b) was a reasonable mistake of law within the meaning of Heien v. North Carolina, 135 S. Ct. 530 (2014), and Deputy Billings had a reasonable suspicion that justified the traffic stop of the Defendant.

On 3 August 2015, Defendant entered an *Alford* plea to trafficking in cocaine by transportation and trafficking in cocaine by possession but preserved his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 35 to 51 months imprisonment. Defendant gave oral notice of appeal in open court.[1]

Analysis

Defendant's sole argument on appeal is that the trial court erred in concluding that Deputy Billings's decision to stop Defendant's vehicle was based on a reasonable mistake of law and therefore constituted sufficient grounds for the traffic stop. The State concedes error on this point, and we agree that the stop was unlawful.

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). "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." *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 340 (2015) (citation and quotation marks omitted).

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1. Defendant has filed a petition for *certiorari* asking this Court to consider his appeal despite any "technical defect" in his notice of appeal. However, because it appears from the record that Defendant's notice of appeal was properly given, we deny the petition for *certiorari* as moot.

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L.Ed.2d 570, 576 (2000). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (citation and quotation marks omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008). Investigatory traffic stops "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Our Supreme Court has held that "[a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory traffic stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (citation and quotation marks omitted).

Under North Carolina law,

> (b) It shall be unlawful for any person to operate upon the highways of this State any vehicle manufactured, assembled or first sold on or after January 1, 1966 *and registered in this State* unless such vehicle is equipped with at least one outside mirror mounted on the driver's side of the vehicle. Mirrors herein required shall be of a type approved by the Commissioner.

N.C. Gen. Stat. § 20-126(b) (2015) (emphasis added).

The key question in this appeal is whether Deputy Billings's genuine — but mistaken — belief that N.C. Gen. Stat. § 20-126(b) applied to Defendant's vehicle provided reasonable suspicion for the traffic stop. Our resolution of this issue is controlled by the United States Supreme Court's decision in *Heien v. North Carolina*, __ U.S. __, 135 S. Ct. 530, 190 L.Ed.2d 475 (2014). In *Heien*, a law enforcement officer stopped a vehicle because its left brake light was not working. The defendant, who was both a passenger in the vehicle and its owner, consented to a search of the vehicle. During the search, the officer found a sandwich bag containing cocaine in a duffel bag located inside the car, and the defendant was arrested. After being charged with attempted trafficking in cocaine, the defendant moved to suppress the evidence, contending that the traffic stop violated the Fourth Amendment. The defendant's motion was denied. *Id.* at __, 135 S. Ct. at 534-35, 190 L.Ed.2d. at 480-81.

On appeal, this Court held that the denial of the motion to suppress had been improper, ruling that the statute at issue merely required vehicles to have at least one working brake light, which the defendant's vehicle clearly did. *Id.* at __, 135 S. Ct. at 535, 190 L.Ed.2d. at 481. Our Supreme Court reversed, concluding that even though having one faulty brake light was not a violation of the statute, the officer "could have reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order[.]" *Id.* at __, 135 S. Ct. at 535, 190 L.Ed.2d. at 481.

The United States Supreme Court upheld the validity of the traffic stop, holding that an officer's "mistake of law can . . . give rise to the reasonable suspicion necessary to uphold [a] seizure under the Fourth Amendment." *Id.* at __, 135 S. Ct. at 534, 190 L.Ed.2d at 480. In so holding, the Supreme Court distinguished between reasonable and unreasonable mistakes of law, explaining that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486.

In analyzing the applicable North Carolina statute regulating brake lights, the Court had "little difficulty concluding that the officer's error of law was reasonable." *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486. The Court focused on the lack of clarity in the statutory text and noted the absence of prior caselaw from North Carolina courts interpreting this statutory provision. *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 487. In its opinion, the Court stated the following regarding the ambiguity of the statute:

> Although the North Carolina statute at issue refers to "a stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N.C. Gen. Stat. Ann. § 20-129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," § 20-129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Id. at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486-87.

The present appeal provides this Court with its first opportunity to apply *Heien*. We are guided in this endeavor by decisions from a number of courts in other jurisdictions that have interpreted *Heien* in analogous contexts. These cases establish that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous. *See, e.g.*, *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute."); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) ("If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes." (citation omitted)); *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1057 (E.D. Wis. 2015) ("There also appears, in this Court's view, to be a condition precedent to even asserting that a mistake of law is reasonable. That is, as stated by Justice Kagan in her concurrence, that the statute be genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work." (citation and quotation marks omitted)).

Moreover, some courts applying *Heien* have further required that there be an absence of settled caselaw interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable. *See, e.g.*, *United States v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015) (where statute required use of turn signal in advance of making a turn and prior caselaw interpreting the statute distinguished between turns and lane changes, officer's stop of defendant's vehicle for failing to signal before changing lanes — as opposed to turning — was not objectively reasonable mistake of law under *Heien*); *United States v. Sanders*, 95 F. Supp. 3d 1274, 1284-86 (D. Nev. 2015) (although statute proscribing obstruction of rear view mirror was ambiguous, prior caselaw had interpreted virtually identical statute such that officer's stop of defendant's vehicle for obstructing rear view mirror was therefore not objectively reasonable mistake of law); *People v. Gaytan*, 32 N.E.3d 641, 650-53 (Ill. 2015) (where statute prohibiting certain materials from being attached to license plate was ambiguous and "no prior appellate case had addressed the scope of [the statute] with respect to trailer hitches[,]" officer's mistake of law was objectively reasonable).

Unlike the statutory language at issue in *Heien*, the text of N.C. Gen. Stat. § 20-126(b) is clear and unambiguous. The phrase "registered in this State" as used in this statutory provision is susceptible to only one

meaning — that is, the vehicle must be registered in North Carolina in order for the requirements of N.C. Gen. Stat. § 20-126(b) to apply. Thus, a reasonable officer reading this statute would understand the requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that — like Defendant's vehicle — are registered in another state.

Because we conclude that Deputy Billings's mistake of law was not objectively reasonable under the standard set out in *Heien*, no reasonable suspicion existed to support the stop of Defendant's vehicle. Therefore, the trial court erred in denying Defendant's motion to suppress. *See State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014) (reversing trial court's order denying motion to suppress and remanding for order vacating defendant's guilty plea).

Conclusion

For the reasons stated above, the trial court erred in denying Defendant's motion to suppress. Accordingly, we reverse the trial court's 5 June 2015 order and remand for entry of an order vacating Defendant's guilty plea.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
HEATH TAYLOR GERARD, DEFENDANT

No. COA15-1014

Filed 20 September 2016

Pornography—child pornography—search warrant

Where defendant was convicted of six counts of third-degree sexual exploitation of a minor, the trial court did not err by denying his motion to suppress. The warrant application and affidavit provided sufficient information for the magistrate to make an independent and neutral determination.

Appeal by defendant from judgments entered 7 May 2013 and order entered 20 May 2013 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Derrick C. Mertz, for the State.

Tim Fulton Walker & Owen, PLLC, by Melissa Owen, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying his motion to suppress and judgments convicting him of six counts of third degree sexual exploitation of a minor. The trial court erred in basing its determination upon the good faith exception under North Carolina General Statute § 15A-974 but reached the correct result by denying the motion to suppress, since the search warrant application and affidavit provided sufficient information for the magistrate to make an independent and neutral determination that probable cause existed for the issuance of the warrant which led to the search of defendant's computer and discovery of child pornography. Therefore, we affirm.

I. Background

The background of this case was summarized by this Court in *State v. Gerard*, 233 N.C. App. 599, 758 S.E.2d 903 (2014) (unpublished) ("*Gerard I*"). In summary, defendant

> was indicted on 7 June 2010 for six counts of third-degree sexual exploitation of a minor. Detective C.E. Perez ("Detective Perez"), of the Charlotte–Mecklenburg Police Department, obtained a search warrant on 14 April 2010 to conduct a search of Defendant's residence. Defendant filed a motion on 3 April 2013 to suppress evidence seized during the 14 April 2010 search of his residence.

Id. Thereafter, the trial court considered defendant's motion to suppress, and "[i]n an order entered on 20 May 2013, the trial court . . . concluded that the good faith exception applied and denied Defendant's motion to suppress. Defendant entered a plea of guilty pursuant to *Alford* decision to six counts of third-degree sexual exploitation of a minor. Defendant appeals." *Id.* (quotation marks omitted).

This Court dismissed defendant's appeal because defendant had "failed to give notice of his intention to appeal[.]" *Id.* Thereafter, defendant filed a petition for writ of certiorari which this Court "allowed for the purpose of reviewing the judgments entered 7 May 2013 and the amended order entered 20 May 2013 by Judge Yvonne Mims Evans. Such

review shall be limited to issues related to the denial of defendant's motion to suppress."

II. Motion to Suppress

Defendant first contends that "the trial court erred in denying Mr. Gerard's motion to suppress on the ground that probable cause existed to issue a search warrant." (Original in all caps.) Relying primarily on North Carolina General Statutes §§ 15A-244 and 245, defendant argues that the information in the affidavit supporting the search warrant application did not include sufficiently detailed facts and circumstances to support a determination that probable cause existed for issuance of the warrant.

> 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. The general rule is that the trial court should make findings of fact to show the bases of its ruling. 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. Conclusions of law are reviewed *de novo*.

State v. McCrary, 237 N.C. App. 48, 51–52, 764 S.E.2d 477, 479–80 (2014) (citations, quotation marks, ellipses, and brackets omitted), *aff'd in part and remanded*, ___ N.C. ___, 780 S.E.2d 554 (2015).

Defendant does not challenge the trial court's findings of fact. The State has not presented any proposed issue challenging any of the trial court's findings of fact as an alternative basis under North Carolina Rule of Appellate Procedure 10(c) to affirm the ruling, although the State does note

> that the trial court's finding of fact [27] regarding the sufficiency of the information set forth in the warrant . . . is more termed a conclusion of law, and appears to conflict with its actual finding of fact regarding a reasonable reading as a whole of the facts set forth in the affidavit.

(Quotation marks and footnote omitted)).

The trial court's first 17 findings of fact set forth in detail Detective Perez's extensive training and experience as a police officer and certified computer forensics examiner; a description of the Operation Peer Precision internet operation to identify child pornography; how SHA1

values are used to identify child pornography files on the internet; how Detective Perez identified the particular IP address as sharing known child pornography files; his download and review of some of the images and comparisons of SHA1 values to confirm that the files were child pornography; his identification of the address to which the IP address was registered; and his preparation of the search warrant application. Many of the details in findings of fact 1-17 were based upon Detective Perez's testimony.

The remaining findings of fact essentially explain where Detective Perez's affidavit was lacking as compared to his testimony:

> 18. The search warrant application and affidavit of probable cause presented to the magistrate on April 14, 2010, had significantly less detailed information than the foregoing 17 Findings of Fact. The application did name the officer applying for the warrant and the items to be seized. It described the premises to be searched and gave an address for the premises. The application suggests that the search will produce evidence of the crime of third-degree sexual exploitation of a minor as defined in N.C.G.S. 14-190.17A. The basic requirements for applying for the warrant are met.
>
> 19. The probable-cause affidavit did not describe Detective Perez's training and experience as a certified computer forensics examiner or even his basic training as a police officer.
>
> 20. The affidavit never defines "known child pornography" or use[s] the statutory language set forth in N.C.G.S. 14-190.17A.
>
> 21. The affidavit does not indicate that Detective Perez used Peer Spectre and GnuWatch to identify the seventeen files as child pornography. The affidavit never says that Perez actually opened any of the seventeen files and looked at the images or data. Nor does it describe any of the data or images in the seventeen files.
>
> 22. The affidavit does not name the seventeen files or their SHA 1 values. It does not say the detective actually compared the SHA 1 values of the IP address to known child pornography and that they were an exact match. The affidavit also fails to explain why SHA value comparison is reliable in cyber investigations.

23. The affidavit does not contain any facts to explain the source of Detective Perez's knowledge relating to the SHA values of previously identified child pornography.

24. However, upon reviewing the affidavit as a whole, a reasonable conclusion can be drawn that the way in which Detective Perez knew that the files contained known child pornography was by an SHA value comparison of the SHA values of "previously identified child pornography" and the SHA values of the 17 files on Defendant's computer that were alleged child pornography.

25. The affidavit goes on to explain that based upon the Detective's training and experience, he knows that those who have Internet access often possess computers and other devices capable of storing electronic media.

26. There is no evidence on the face of the application for the search warrant that the magistrate sought additional information from Detective Perez or that he provided any information other than what appears on the face of the document.

Because neither party has challenged any of these findings of fact, even if we tend to disagree with the trial court's description of portions of the affidavit, we must accept the findings of fact as true. *See Alexvale Furniture v. Alexander & Alexander*, 93 N.C. App. 478, 481, 385 S.E.2d 796, 798 (1989) ("It is also the law that a trial court's unchallenged findings of fact are binding upon appeal[.]") In summary, in its previous findings of fact the trial court had determined that, although the trial court found that although there was probable cause for issuance of the search warrant, the facts necessary to establish probable cause were not present in the affidavit, but rather were based upon the more detailed testimony of Detective Perez at the hearing. Ultimately in its last "finding of fact," number 27, which is actually a conclusion of law, the trial court concluded:

27. The Court finds that there was insufficient information in the warrant application and the Detective's affidavit from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant. However, the Detective acted in good faith when he and other officers executed the warrant.

Because the last "finding of fact" is actually a conclusion of law, we will review it accordingly. *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels findings of fact and conclusions of law employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that finding *de novo*." (citation and quotation marks omitted)).

We must therefore consider de novo whether the trial court properly concluded, based upon its findings of fact, that the search warrant application and affidavit did not present sufficient information "from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant." *See McCrary*, 237 N.C. App. at 51–52, 764 S.E.2d at 479. Our Supreme Court has described how we should review issues of this type, noting that the trial court's legal conclusions are "fully reviewable on appeal[:]"

> In so doing, we note that the parties do not challenge the superior court's findings of fact. Therefore, the scope of our inquiry is limited to the superior court's conclusions of law, which are fully reviewable on appeal.
>
> As this Court acknowledged in *State v. Beam*, when addressing whether a search warrant is supported by probable cause, a reviewing court must consider the totality of the circumstances. In applying the totality of the circumstances test, this Court has stated that an affidavit is sufficient if it establishes reasonable cause to believe that the proposed search probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. Thus, under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.
>
> In adhering to this standard of review, we are cognizant that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review. We are also mindful that:

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.
>
> Most importantly, we note that a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant. To that end, it is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.

State v. Sinapi, 359 N.C. 394, 397–99, 610 S.E.2d 362, 365 (2005) (citations, quotation marks, ellipses, and brackets omitted).

Defendant insists that Detective Perez's affidavit did not contain sufficient information for a magistrate to determine there was probable cause, and the trial court agreed, as it concluded that "there was insufficient information in the warrant application and the Detective's affidavit from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant." The State argues that "the warrant application was sufficient for both probable cause, and thus – under the proper standard of deference – to support the magistrate's issuance of the warrant under the statute."

The trial court was correct that Detective Perez's testimony was more detailed than his affidavit, and the additional information makes the existence of probable cause entirely clear, but the fact that Detective Perez gave such detailed testimony about his law enforcement experience and the forensic computer investigations of transmissions of child pornography over the internet does not make his affidavit insufficient. The trial court sets the bar a bit too high by requiring such extensive and detailed information in a search warrant affidavit. *Id.* at 398, 610 S.E.2d at 365 ("[A]n affidavit is sufficient if it establishes reasonable cause to believe that the proposed search probably will reveal the presence upon

the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty."). Our Supreme Court has noted that affidavits must be interpreted in a "commonsense" manner and not in a "hypertechnical" manner. *Id.* The trial court's "hypertechnical," *id.*, interpretation is revealed in findings 21 through 23:

> 21. The affidavit does not indicate that Detective Perez used Peer Spectre and GnuWatch to identify the seventeen files as child pornography. The affidavit never says that Perez actually opened any of the seventeen files and looked at the images or data. Nor does it describe any of the data or images in the seventeen files.
>
> 22. The affidavit does not name the seventeen files or their SHA 1 values. It does not say the detective actually compared the SHA 1 values of the IP address to known child pornography and that they were an exact match. The affidavit also fails to explain why SHA value comparison is reliable in cyber investigations.
>
> 23. The affidavit does not contain any facts to explain the source of Detective Perez's knowledge relating to the SHA values of previously identified child pornography.

Yet in some findings which the trial court relied upon in finding good faith, the trial court recognized the common-sense interpretation of the affidavit:

> 24. However, upon reviewing the affidavit as a whole, a reasonable conclusion can be drawn that the way in which Detective Perez knew that the files contained known child pornography was by an SHA value comparison of the SHA values of "previously identified child pornography" and the SHA values of the 17 files on Defendant's computer that were alleged child pornography.
>
> 25. The affidavit goes on to explain that based upon the Detective's training and experience, he knows that those who have Internet access often possess computers and other devices capable of storing electronic media.

Since the SHA1 values are defined and described in detail in the affidavit itself, it is obvious from the affidavit how Detective Perez identified the images as child pornography, even without the more detailed technical information provided by his testimony. The magistrate was "entitled to draw reasonable inferences from the material supplied to him by" Detective Perez, and considering the affidavit in light of "factual and practical considerations of everyday life on which reasonable and prudent persons" act, *id.* at 399, 610 S.E.2d at 365, the magistrate could have "reasonable cause to believe that the proposed search probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 398, 610 S.E.2d at 365.

The trial court also concluded that "the warrant affidavit was 'purely conclusory' in stating that probable cause existed." In support of this conclusion, defendant relies primarily upon *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972), a case also relied upon by the trial court as noted in the order. *Campbell* does not deal with internet pornography but rather with drugs. *See id.* In *Campbell*, the Supreme Court quoted another case in stating, "Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based[.]" *Id.* at 130-31, 191 S.E.2d 756 (citation and quotation marks omitted). In *Campbell*, the affidavit upon which the search warrant was based stated that defendant and two others have "on [their] premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs[.]" *Id.* at 130, 191 S.E.2d 756. The affidavit identified the people who lived in the house and stated that "[t]hey all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers." *Id.*

The Supreme Court noted that

> Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed

> on the described premises—does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.

Id. at 131, 191 S.E.2d at 756.

The affidavit here is much more detailed than the one in *Campbell*, and it does describe the "underlying circumstances upon which [Detective Perez's] belief is based[.]" *Id.* at 130-31, 191 S.E.2d at 756. Defendant essentially argues that the affidavit must go into even more extensive technical detail than it did regarding the law enforcement methods and software used to identity and track transmissions of child pornography over the internet. And in his motion to suppress, defendant contended that

> for a judicial official to make an independent determination about whether the images are likely child pornography, the judicial official probably must either view the images or receive a detailed description of the images that allows the judicial official to reach an independent conclusion about the content of the images. A statement from the applicant that the images "are child pornography" is most likely insufficient, as it does not provide factual information that the judicial official can use to determine probable cause. . . .
>
> 28. Based on the description as set out in the warrant application, it would be impossible for a reasonable law enforcement officer to determine that any of the files viewed by Det. Perez on December 3, 2009 were actually child pornography. Det. Perez did not include images, videos, or any other files that could have been viewed by the magistrate in order to make a determination of probable cause.

Essentially, defendant argues that identifying the alleged pornographic images as known child pornography based upon the computer information is not enough -- the pictures themselves should be provided with the affidavit. The trial court's finding suggest as much, since the trial court found as one of the affidavit's deficiencies that it "never says that Perez actually opened any of the seventeen files and looked at the

images or data. Nor does it describe any of the data or images in the seventeen files."

They say that a picture is worth a thousand words, and it is true that attaching copies of the allegedly pornographic images to the affidavit might make the existence of probable cause immediately obvious. But this affidavit described the alleged child pornography using methods developed by law enforcement agencies to track known images transmitted over the internet, *without* further harm to the children victimized by the creators and consumers of the pornography by republishing the images.[1] Pictures which fall within the legal definition of child pornography can be difficult to describe, as Justice Stewart of the United States Supreme Court explained,

> I imply no criticism of the Court, which in those cases was faced with *the task of trying to define what may be indefinable*. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it* . . . .

Jacobellis v. Ohio, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 803-04 (1964) (Stewart, J., concurring) (emphasis added) (footnotes omitted). Just like Justice Stewart, *see id.*, Detective Perez knew it when he saw it as well, according to his testimony, but his affidavit also described the use of SHA1 values to identify the images very specifically as confirmed child pornography. Detective Perez's affidavit did not rely solely upon his own perception of the images as child pornography but upon SHA1 values of known child pornography images.

The affidavit included detailed definitions of several technical terms as used in the affidavit, including "internet," "IP Address," "online," "peer-2-peer networks," "SHA1," and "Gnutella." Detective Perez averred that the Charlotte Mecklenburg Police Department Cyber Crime Unit

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1. We also note that even if a photograph were attached or described in graphic detail, the magistrate would have no way to determine whether the person depicted is a real person or a computer-generated image or the person's age. The photographs identified by SHA1, "a mathematical algorithm fingerprint of a computer file[,]" as described in the affidavit, have been "previously identified [as] child pornography[.]"

had conducted an internet operation "and identified a computer at IP address 174.96.87.196 as actively participating in the receipt and/or distribution of known child pornography." "'Known' child pornography is an image that has been presented to the National Center for Missing and Exploited Children and the person in the image has actually been identified and determined to be a child." Detective Perez was able to identify the images as "known child pornography" by the SHA1 values of the images. The affidavit defined SHA1 as an algorithm

> developed by the National Institute of Standards and Technology (NIST), along with the National Security Agency (NSA), for use with the Digital Signature Standard (DSS) as specified within the Secure Hash Standard (SHS). The United States of America has adopted the SHA-1 hash algorithm described herein as a Federal Information Processing Standard. Basically the SHA1 is an algorithm for computing a condensed representation of a message or data file like a fingerprint.

As Detective Perez averred, the IP address "was utilizing a peer to peer file sharing program identified as 'Limewire' to access and share the files, and that at least 17 files out of the 100 files that were being shared from the computer located at IP address 174.96.87.196 were previously identified as known child pornography." The affidavit noted that "Detective Perez was able to establish a direct connection to the" specific IP address, which was later identified by Time Warner Cable as assigned to John Doe at 123 Main Street in Charlotte.[2] Using the SHA1 information to identify the known images of child pornography eliminated the need to attach copies of the images to the affidavit or to present them to the magistrate. Including copies of the images themselves would further perpetuate the very harm the statutes regarding child pornography were intended to prevent.

Although it appears North Carolina's appellate courts have not addressed how detailed the information regarding child pornography in a search warrant affidavit should be, we find the analysis of similar cases by several federal courts instructive. The Court of Appeals for the Fourth Circuit addressed a similar case in *United States v. Wellman*, 663 F.3d 224 (4th Cir. 2011), where the defendant argued that

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2. We have used a pseudonym for the name of the owner of the house in which defendant resided and a false address to protect the identity and safety of the homeowner and other residents of the home.

> the search warrant authorizing the search of his home was defective, because the warrant application failed to include either an exemplar or a description of an image alleged to be child pornography. He contends that in the absence of such information, the application merely contained the officers' conclusions that the material sought constituted child pornography. According to *Wellman*, this defect in the warrant application precluded the reviewing judge from making an independent probable cause determination.

Id. at 227-28. Although the *Wellman* court ultimately based its determination upon the good faith exception, the court discussed and rejected this contention that the images must be included with the affidavit:

> We decline to impose a requirement that a search warrant application involving child pornography must include an image of the alleged pornography. While the inclusion of such material certainly would aid in the probable cause determination, we do not impose a fixed requirement or a bright-line rule, because law enforcement officers legitimately may choose to include a variety of information when submitting a search warrant application. Instead, when considering the merits of a judicial officer's probable cause determination, we will review a search warrant application in its entirety to determine whether the application provided sufficient information to support the issuance of the warrant.

Id. at 228-29 (citation omitted). In fact, the United States Supreme Court long ago rejected the argument that the "magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure." *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 n.5 , 89 L. Ed. 2d 871, 879 n.5 (1986).

Other courts have also addressed the use of SHA1 values in search warrants to identify child pornography which is being transmitted over the internet. Traditional physical searches of papers are entirely different from the digital methods used to identify information transmitted over the internet, not just in investigations of pornography but in many types of investigations:

> Hashing is a powerful and pervasive technique used in nearly every examination of seized digital media. The concept behind hashing is quite elegant: take a large

> amount of data, such as a file or all the bits on a hard drive, and use a complex mathematical algorithm to generate a relatively compact numerical identifier (the hash value) unique to that data. Examiners use hash values throughout the forensics process, from acquiring the data, through analysis, and even into legal proceedings. Hash algorithms are used to confirm that when a copy of data is made, the original is unaltered and the copy is identical, bit-for-bit. That is, hashing is employed to confirm that data analysis does not alter the evidence itself. Examiners also use hash values to weed out files that are of no interest in the investigation, such as operating system files, and to identify files of particular interest.
>
> It is clear that hashing has become an important fixture in forensic examinations.

Richard P. Salgado, Fourth Amendment Search and the Power of the Hash, 119 Harvard Law Review Forum 38, 38 (2006).[3]

Overall, courts and judges – who are usually not conversant with the details of digital technology – seem to struggle a bit with reconciling prior cases which addressed searches of paper-and-ink documents or tangible objects such as drugs and weapons with the most recent methods of digital transmission of documents and the highly specialized methods which law enforcement uses to conduct investigations of this sort, but this type of internet investigation has been addressed in some cases:

> Here, the magistrate found that the application and affidavit: (1) described a method of communication known as peer-to-peer (P2P) computer file sharing using the worldwide Internet; (2) described how individuals wishing to share child pornography use the P2P method to share and trade digital files containing images of child pornography; (3) described Agent Morral's experience and training in computer usage and investigation of child pornography cases; (4) incorporated details of an investigation by Agent Cecchini who accessed a P2P file designated LimeWire and conducted a search looking for users accessing known child pornography sites;

3. As of 23 August 2016, available at http://federalevidence.com/pdf/2013/02Feb/EE-4thAmSearch-Power%20of%20Hash.pdf.

> (5) stated that an IP address traced to Stults was identified as accessing child pornography sites; and (6) recounted that shared files from Stults's computer were downloaded and reviewed and were identified as containing numerous images of child pornography.

U.S. v. Stults, 575 F.3d 834, 843–44 (8th Cir. 2009) (citation and quotation marks); *see*, *e.g.*, *U.S. v. Pavulak*, 700 F.3d 651, 660-65 (3rd Cir. 2012) (determining the affidavit was insufficient to establish probable cause, but good faith applied); *U.S. v. Miknevich*, 638 F.3d 178, 183 (3rd Cir. 2011) ("Thus, our review of the affidavit leaves a clear impression: the state magistrate was presented with an affidavit that provided no factual details regarding the substance of the images in question. Although either the actual production of the images, or a sufficiently detailed description of them, satisfies the Fourth Amendment's probable cause requirement, an insufficiently detailed or conclusory description cannot. We believe, however, that even given the infirmities we highlighted, the affidavit still contained information sufficient to permit a finding of probable cause by the magistrate." (citation omitted)). For example, in *U.S. v. Henderson*, a similar investigation and affidavit led to the seizure of child pornography on the defendant's computer, and he raised the same arguments in challenging the basis for issuance of the search warrant as defendant here. *See* 595 F.3d 1198, 1200 (10th Cir. 2010). The 10th Circuit Court of Appeals noted that the affidavit described Special Agent Robert Leazenby's

> professional background; describes the general protocol investigating officers use to identify distributors of child pornography, including how officers usually determine that a computer at a given IP address has transferred a video with a particular SHA value; and states that Leazenby "learned" that a computer with the relevant IP address had shared videos with child-pornography-related SHA values. His affidavit, however, does not identify: (1) who informed Leazenby that a computer with the relevant IP address had transferred child pornography; or (2) the method used in this case to establish that a computer at the specified IP address transferred videos with child-pornography-associated SHA values.

Id. at 1199-1200 (footnote omitted). In *Henderson*, the Court ultimately based its ruling upon the good faith exception, since "[t]he government wisely conceded at oral argument that Leazenby's affidavit is insufficient to establish probable cause. Notably, the affidavit fails to identify how Leazenby's source determined that a computer with the relevant IP

address—rather than some other computer—shared videos with child-pornography-related SHA values." *Id.* at 1201-02.

But here, the affidavit does identify how Detective Perez determined that the "computer with the relevant IP address[,]" *id.*, shared the child pornography: "Detective Perez was able to establish a direct connection to the computer located at IP address 174.96.87.196. During this connection Detective Perez determined that the computer at IP address 174.96.87.196 was utilizing a peer to peer file sharing program identified as 'Limewire' to access and share the files[.]" The affidavit also stated how Detective Perez had obtained information that "a computer with the relevant IP address had transferred child pornography[,]" *id.*, by describing his use of Operation Peer Precision and the Gnutella network. Here, the search warrant application and affidavit included sufficient information to permit the magistrate to make a neutral and independent determination of probable cause for the issuance of a warrant; we determine that the trial court erred in concluding otherwise.

The trial court also concluded that "[t]he 'good faith' exception applies in this case and therefore the evidence will not be suppressed." Defendant argues that the trial court erred in finding the good faith exception applicable, but we need not address this argument since we have determined that the trial court erred in its conclusion that the affidavit was not sufficient to support a determination of probable cause. While the trial court's reliance on good faith was misplaced, it ultimately came to the correct determination in denying defendant's motion to suppress, and therefore, we affirm the order. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). This argument is overruled.

III. Conclusion

Because we have determined probable cause was established in the search warrant application and affidavit, we need not address defendant's argument regarding good faith. Although the trial court erred in relying upon good faith as the basis for denial of defendant's motion to suppress, since the affidavit was sufficient to support the magistrate's determination of probable cause for issuance of the search warrant, we affirm.

AFFIRMED.

Judges ELMORE and DIETZ concur.

STATE v. LINDSEY

[249 N.C. App. 516 (2016)]

STATE OF NORTH CAROLINA
v.
ERIC LAMAR LINDSEY

No. COA15-1188

Filed 20 September 2016

1. Motor Vehicles—DWI—probable cause—other cases

The trial court did not err in a DWI prosecution by denying defendant's motion to suppress and dismiss where the evidence and the findings supported the conclusion that the officer had probable cause to arrest defendant for DWI. Simply because the facts in this case did not rise to the level of the facts in the cases distinguished by defendant did not mean that the trial court's findings were insufficient to support a probable cause determination.

2. Motor Vehicles—DWI—sufficiency of evidence

The trial judge did not err by denying defendant's motions to dismiss a DWI charge for insufficient evidence. There may have been more evidence of impairment in the cases cited by defendant, but this case must be judged on its facts, which provide more evidence of impairment that the case cited by defendant in comparison.

3. Trials—last jury argument—video played during cross-examination—substantive evidence

The trial court did not err in a DWI prosecution by determining that defendant had put on evidence and denying defendant the final argument to the jury where defendant did not call any witnesses or put on evidence after the conclusion of the State's case, but cross-examined the State's only witness (the officer who stopped defendant) and played a video of the entire stop recorded by the officer's in-car camera. The video went beyond the testimony of the officer and was not merely illustrative. Moreover, it allowed the jury to form its own opinion of defendant's impairment.

Appeal by defendant from judgments entered 14 April 2015 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 29 March 2016.

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

Sharon L. Smith for defendant.

McCULLOUGH, Judge.

Eric Lamar Lindsey ("defendant") appeals from judgments entered upon his convictions for habitual driving while impaired and driving while license revoked for impaired driving. For the following reasons, we find no error.

I. Background

On 27 May 2014, a Union County Grand Jury indicted defendant on charges of DWI, habitual DWI, and DWLR. The underlying DWI was later dismissed as the State chose to proceed on the more serious habitual DWI charge.

Prior to the case coming on for trial, defendant filed a motion to suppress evidence and dismiss with a supporting affidavit on 20 January 2015. Defendant's motion came on for hearing in Union County Superior Court before the Honorable W. David Lee on 21 January 2015. Although defendant's motion sought to suppress evidence of the stop, his statements, and his arrest, defendant indicated at the hearing that he was only focusing on the probable cause to arrest. On 26 January 2015, the trial court filed an order denying defendant's motion to suppress.

Defendant's case was then called for jury trial on 13 April 2015 in Union County Superior Court before the Honorable Martin McGee. The State's only witness was Officer Timothy Sykes, who pulled defendant over and arrested defendant in the early morning hours of 21 February 2014. Officer Sykes' testimony tended to show that at approximately 2:47 in the morning on 21 February 2014, he pulled behind defendant at a stoplight. Officer Sykes then ran the tag on defendant's vehicle and determined it was expired. Officer Sykes initiated a traffic stop at that time. Defendant made two turns and parked in a handicap spot in a McDonald's parking lot. Officer Sykes did not notice any driving mistakes. Once Officer Sykes approached the vehicle, defendant informed the officer that his license was suspended for DWI and provided the officer with an identification card. Officer Sykes noticed a medium odor of alcohol coming from defendant's breath and that defendant's eyes were red and glassy. Officer Sykes then returned to his patrol car, ran defendant's information, and confirmed that defendant's license was suspended for DWI. Once backup arrived, Officer Sykes returned to defendant's vehicle and asked defendant to exit the vehicle in order to perform field sobriety tests. Defendant complied and exited his vehicle without any problem. Officer Sykes first performed a horizontal gaze nystagmus test and noted 5 out of 6 indicators of impairment. Officer

Sykes then made multiple attempts to conduct a portable breath test but defendant did not provide an adequate breath sample to register on the device. Upon further questioning, defendant informed Officer Sykes that he had consumed three beers at approximately 6:00 the evening before. Based on his observations of defendant, Officer Sykes formed the opinion that defendant had consumed a sufficient quantity of alcohol so as to appreciably impair both his mental and physical faculties and placed defendant under arrest. Defendant later refused a breath test at the police station. Officer Sykes further testified that he was with defendant for approximately two hours and his opinion that defendant was appreciably impaired did not change.

During the State's evidence, and out of the presence of the jury, defendant stipulated to prior DWI convictions, at least in part to keep evidence of the prior convictions from being mentioned in front of the jury. Defendant also stipulated that his license was revoked for a DWI and pled guilty to DWLR as part of a plea arrangement. The trial judge accepted the plea, leaving only the habitual DWI charge for the jury. Upon further discussions, it was agreed that the case would proceed as a normal DWI case, since defendant had already stipulated to prior DWI convictions supporting the habitual portion of the habitual DWI charge.

At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss. The trial judge denied those motions.

On 14 April 2015, the jury returned a verdict finding defendant guilty of DWI. Upon the guilty verdict, the trial judge entered judgment sentencing defendant to a term of 25 to 39 months for habitual DWI. The trial judge also entered judgment imposing a consecutive two day sentence for DWLR for impaired driving. Defendant gave notice of appeal orally in court.

II. Discussion

Defendant now raises the following three issues on appeal: whether the trial court (1) erred in denying his motion to suppress; (2) erred in denying his motions to dismiss; and (3) erred in denying him the final argument to the jury.

1. Motion to Suppress

[1] Defendant first argues the trial court erred in denying his motion to suppress and dismiss because the totality of the circumstances in this case were insufficient to constitute probable cause to arrest him for DWI.

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).

Our Courts have long recognized that

> [a]n arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

State v. Streeter, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (quoting *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)); *see also State v. Eubanks*, 283 N.C. 556, 559-60, 196 S.E.2d 706, 708 (1973). This Court has further explained that:

> "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (citation omitted). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).

State v. Teate, 180 N.C. App. 601, 606-607, 638 S.E.2d 29, 33 (2006).

The trial court's order in this case contained the following findings of fact:

> 1. On February 21, 2014, at approximately 2:53 a.m. Patrol Officer Timothy Sykes ("Officer Sykes") . . .

observed another vehicle as it proceeded ahead of him on the highway. Officer Sykes ran the tag on the vehicle and determined that the tag had expired.

2. Officer Sykes then activated his blue lights and followed the defendant, who properly signaled both right and left turns before entering a McDonald's parking lot where he parked well within the lines of a space marked for handicapped. Officer Sykes approached the vehicle and observed the defendant to be the driver and sole occupant of the Ford Taurus vehicle he was operating. Upon Officer Sykes's request the defendant produced only an identification card, admitting to the officer that his license was suspended. Officer Sykes smelled a moderate odor of alcohol coming from the defendant. He also observed the defendant's eyes to be red and glassy.

3. Officer Sykes, trained in the administration of the horizontal gaze nystagmus ("HGN"), administered the HGN test to the defendant, telling the defendant not to move his head and to follow the officer's finger with his eyes only. Of the six clues, or indicators of impairment about which Officer Sykes was trained and knowledgeable, he observed five such indications of impairment upon administering the test to the defendant.

4. Officer Sykes then directed the defendant to blow into a properly tested, calibrated and approved alco-sensor device. The defendant failed on at least three successive occasions to provide a sufficient sample of breath to enable a reading on the alco-sensor. Officer Sykes treated these failures as a refusal to submit to the alco-sensor.

5. The defendant admitted to Officer Sykes that he had consumed three Milwaukee Lite beers, but informed the officer that he had last consumed around 6:00 p.m. that afternoon, approximately 9 hours before the stop.

6. Following these events, Officer Sykes arrested the defendant for driving while impaired.

Based on these findings, the trial court concluded as follows:

2. Under the totality of the circumstances, and after carefully examining the attenuating facts and circumstances, including the officer's observations prior to arrest, the officer's administration of the HGN test, the defendant's responses to the officer's investigatory questions, and the refusal of the defendant to submit to the alco-sensor, the Court concludes that the facts and circumstances justified the officer's determination that reasonable grounds existed for believing that the defendant had committed an implied-consent offense.

3. Under the totality of the circumstances Officer Sykes possessed sufficient reliable and lawfully-obtained information at the time of the defendant's arrest to constitute a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the defendant was guilty of driving while impaired. The arrest and seizure of the defendant, as well as the evidence gathered by Officer Sykes was justified under the law.

4. The stop of the defendant's vehicle was based upon a reasonable articulable suspicion . . . and the subsequent arrest of the defendant did not violate the defendant's rights under the Fourth Amendment of the United States Constitution, Article I, Section 20 of the North Carolina Constitution, or the provisions of Chapter 15A of the North Carolina General Statutes.

Although defendant seems to take issue with the trial court's failure to issue findings of fact regarding police lights flashing during the HGN test, or the effect the flashing police lights may have had on the HGN test, defendant does not challenge any particular finding of fact issued by the trial court. Instead, defendant challenges the trial court's determination that its findings of fact support the conclusion that there was probable cause to arrest defendant for DWI. In doing so, defendant emphasizes that the trial judge thought this was "a really close case." Defendant then distinguishes the present case from cases in which this Court has upheld trial courts' probable cause determinations by identifying circumstances in those cases that were not present in this case; namely, that defendant was not driving poorly, did not commit a traffic violation, was not involved in an accident, did not have slurred speech, had no problem exiting the vehicle, was steady on his

feet, was cooperative and able to follow directions, and there was not an open container of alcohol visible in the vehicle. *See Teate*, 180 N.C. App. at 604-606, 638 S.E.2d at 32-33 (probable cause to arrest for DWI where the defendant failed to stop at a license checkpoint, there was an odor of alcohol on the defendant, the defendant admitted she had been drinking, the defendant's eyes were "glassy" and she had slurred speech, the defendant had difficulty performing counting tests, and breath samples tested with an alco-sensor instrument indicated intoxication); *Richardson v. Hiatt*, 95 N.C. App. 196, 200, 381 S.E.2d 866, 868 (1989) (probable cause to arrest for impaired driving where there was a strong odor of alcohol on the defendant, the defendant had been involved in a one-vehicle accident in excellent driving conditions in the middle of the afternoon, and the defendant claimed to have fallen asleep); *State v. Simmons*, 205 N.C. App. 509, 525-26, 698 S.E.2d 95, 106-107 (2010) (the defendant was driving poorly, there was a strong odor of alcohol coming from the defendant's breath, the defendant admitted he had consumed a couple of beers, there were beer bottles in the passenger area of the vehicle, one of which was half full, the defendant's eyes were red and glassy, the defendant's speech was slightly slurred, and alco-sensor tests of the defendant's breath were positive for alcohol; but probable cause to arrest was upheld solely based on the defendant's possession of an open container of alcohol in the vehicle). Thus, defendant contends the evidence of impairment in the present case does not rise to the level of the evidence in other cases. Defendant analogizes the facts in the present case to the facts in *State v. Sewell*, __ N.C. App. __, 768 S.E.2d 650 (*available* at 2015 WL 67193), *disc. rev. denied*, 368 N.C. 239, 768 S.E.2d 851 (2015), in which this Court affirmed the trial court's determination that there was not probable cause to arrest the defendant for DWI. Defendant contends that there was more evidence of impairment in *Sewell* then in the present case and, yet, there still was not probable cause to arrest for DWI in *Sewell*.

We are not persuaded by defendant's arguments. Simply because the facts in this case do not rise to the level of the facts in the cases distinguished by defendant does not mean the trial court's findings in this case are insufficient to support a probable cause determination. "Whether probable cause exists to justify an arrest depends on the 'totality of the circumstances' present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). The evidence in this case supports the following findings by the trial court: the officer smelled a moderate odor of alcohol coming from defendant and observed defendant's eyes to be red and glassy; the officer observed five of six indicators of impairment upon administering

an HGN test to defendant; and defendant admitted to the officer that he had consumed three beers hours before the stop. Without even considering defendant's multiple failed attempts to provide an adequate breath sample on an alco-sensor device, we hold the trial court's findings support its conclusion that there was probable cause to arrest defendant for DWI.

Additionally, we note that *Sewell* is not controlling in the present case. First and foremost, *Sewell* is an unpublished opinion and does not constitute controlling legal authority. *See* N.C. R. App. P. 30(e)(3) (2016). Second, although some facts are similar, there are key distinctions between the facts in *Sewell* and the present case. In *Sewell*, the defendant was stopped at a checkpoint and a trooper detected a strong odor of alcohol "emanating from [the] defendant's vehicle, not from the defendant, who was accompanied by a passenger." 2015 WL 67193 at *3. The trooper also observed that the defendant had red and glassy eyes, the defendant exhibited six of six indicators on the HGN test, and the defendant tested positive for the presence of alcohol on two alco-sensor breath tests. The trial court, however, determined the facts and circumstances known to the trooper were insufficient to establish probable cause to believe the defendant had committed the offense of DWI where the trooper "did not testify that [the] defendant herself was the source of the odor of alcohol[]" and the defendant did not have slurred speech, retrieved her license and registration without difficulty or delay, was steady on her feet, was cooperative, and exhibited no signs of intoxication on the "[o]ne-[l]eg [s]tand" and "[w]alk and [t]urn" tests. *Id.* This court affirmed the grant of the defendant's motion to suppress. *Id.* Contrary to the facts in *Sewell*, the evidence in this case was that defendant was the sole occupant of the vehicle and the officer smelled a medium odor of alcohol coming from defendant's breath. We find this factual discrepancy to be significant.

It is the trial judge's role to weigh the credibility of the witnesses and the evidence. Here, the evidence supports the trial court's findings, which in turn support the conclusion that the officer had probable cause to arrest defendant for DWI.

2. Motion to Dismiss

[2] Defendant also argues the trial judge erred in denying his motions to dismiss the DWI charge for insufficiency of the evidence.

"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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotation marks omitted).

Relevant to this case, the offense of impaired driving is defined as follows: "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2015). Thus, "[t]he essential elements of DWI: are (1) [d]efendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). The only element at issue in this case is the third element, the impairment of defendant.

This Court has explained that "[b]efore [a] defendant can be convicted under N.C. Gen. Stat. § 20-138.1(a)(1), the State must prove

beyond a reasonable doubt that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired. This means a finding that defendant's impairment could be recognized and estimated." *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997) (internal citation omitted). In *Phillips*, this Court held that there was sufficient evidence the defendant was appreciably impaired to satisfy the elements of N.C. Gen. Stat. § 20-138.1(a)(1) when reviewing the record in the light most favorable to the State where there was evidence of erratic driving, a pronounced odor of alcohol on the defendant, and the defendant admitted to drinking significantly earlier in the evening. *Id.* at 393, 489 S.E.2d at 892.

Similar to his argument concerning the denial of his motion to suppress, defendant contends the evidence of intoxication in this case is distinguishable from evidence in prior cases in which our courts determined there was sufficient evidence of impairment to survive motions to dismiss. *See id.*; *State v. Norton*, 213 N.C. App. 75, 79-80, 712 S.E.2d 387, 390-91 (2011) (sufficient evidence of impairment where there were witnesses to erratic driving, the defendant exhibited superhuman strength when officers attempted to apprehend him, a witness smelled alcohol on the defendant, and blood tests established the defendant's alcohol and cocaine use); *State v. Scott*, 356 N.C. 591, 597-98, 573 S.E.2d 866, 869-70 (2002) (sufficient evidence of impairment where there was a strong odor of alcohol in the defendant's vehicle, the officer observed an open container of beer in the passenger area of the vehicle, the defendant's coat was wet from what appeared to be beer, and the defendant's speech was slurred). Defendant emphasizes that in those cases, "the defendant was involved in an accident, there was evidence of faulty driving or erratic behavior, alcohol was found in the car, and/or there was substantial evidence that the defendant was over the legal limit for alcohol[,]" facts which are not present in this case. Defendant instead compares his case to *State v. Hough*, 229 N.C. 532, 50 S.E.2d 496 (1948), in which the Court held there was insufficient evidence of impairment to raise more than a suspicion or conjecture of impairment where the only evidence was from two officers who arrived at the scene of an accident approximately 25 minutes after the accident, one of whom testified that he opined the defendant driver was intoxicated based on the fact that he smelled something on the defendant's breath, and the other who testified he was of the opinion the defendant was intoxicated or under the influence of something. *Id.* at 533-34, 50 S.E.2d at 496-97. But in *Hough*, both officers testified that they were unsure whether the defendant's condition that night was the result of impairment or the accident. *Id.* at 533, 50 S.E.2d at 497. The Court reasoned that "[i]f the witnesses who observed the

defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of the injuries he had just sustained, we do not see how the jury could do so." *Id.*

As in the first issue on appeal, we agree that there may have been more evidence of impairment in the cases cited by defendant. Yet, we must judge the facts of the present case, which provide more evidence of impairment than in *Hough*.

Here the evidence was that defendant pulled into a handicap spot, Officer Sykes noticed a moderate odor of alcohol coming from defendant's breath, defendant had red and glassy eyes, defendant admitted to consuming alcohol hours before, Officer Sykes noted five out of six indicators of impairment on the HGN test, and Officer Sykes believed that defendant was impaired. Viewing these facts in the light most favorable to the State, and despite other evidence tending to show defendant was driving properly and was steady on his feet, we hold the evidence in this case was sufficient to survive defendant's motions to dismiss.

3. Final Argument to the Jury

[3] In defendant's final argument on appeal, defendant contends the trial court erred in denying him the final closing argument to the jury.

Pertinent to this issue, Rule 10 of the North Carolina General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10 (2016).

In this case, defendant did not call any witnesses or put on any evidence after the State concluded its presentation of the case. Yet, defendant did cross-examine the State's only witness and sought to play a video of the entire stop recorded by the officer's in-car camera during cross-examination. Defendant argued the video was illustrative. The State argued playing the video constituted introducing evidence. After argument on the issue, the trial court noted that it was a "difficult call" and indicated to the parties that it would make its final determination of whether the video constituted new evidence after the video had been played. The parties agreed, with the defense further indicating that "[they] intend to play [the video] one way or the other and understand the potential consequences." The video was marked as "Defendant's Exhibit 1" and played for the jury, with defendant stopping the video at times to ask questions of the State's witness. Upon the conclusion of the

defense's cross-examination and the close of the State's evidence, the trial court heard further arguments by the parties on whether the video constituted new evidence. The trial court again noted it was a "tough call," but ultimately determined that playing the video to the jury constituted putting on evidence, resulting in defendant's loss of the final argument to the jury.

The question we must address is whether admitting the entire video of the stop during cross-examination constituted introducing evidence. In *State v. Hennis*, 184 N.C. App. 536, 646 S.E.2d 398, *disc. rev. denied*, 361 N.C. 699, 653 S.E.2d 148 (2007), this Court summarized the applicable law as follows:

> In *State v. Shuler*, 135 N.C. App. 449, 520 S.E.2d 585 (1999), this Court determined that evidence is "introduced," within the meaning of Rule 10, when the cross-examiner either formally offers the material into evidence, or when the cross-examiner presents new matter to the jury that is not relevant to the case. *Id.* at 453, 520 S.E.2d at 588; *see also State v. Wells*, 171 N.C. App. 136, 138, 613 S.E.2d 705, 706 (2005) (quoting *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588). However, "[n]ew matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10." *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588. Most recently, in *State v. Bell*, 179 N.C. App. 430, 633 S.E.2d 712 (2006), this Court stated that evidence is introduced during cross-examination when: "(1) it is 'offered' into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue in the case." *Id.* at 431, 633 S.E.2d at 713 (citing *Shuler*, 135 N.C. App. at 452-53, 520 S.E.2d at 588).

Id. at 537-38, 646 S.E.2d at 399. In *Hennis*, this Court addressed "whether, under the first test in *Bell*, the defendant 'offered' [a] diagram and incident report into evidence during his cross-examination." *Id.* at 538, 646 S.E.2d at 399. This Court further explained that "[i]n *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), this Court set forth the following test to determine whether evidence is 'offered' within the meaning of Rule 10: 'whether a party has offered [an object] as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.' " *Hennis*, 184 N.C. App at 538, 646 S.E.2d at 399 (quoting *Hall*, 57 N.C. App. at 564, 291 S.E.2d at 814). Applying the above law, this Court granted the *Hennis*

defendant a new trial, holding the defendant did not offer evidence under either test articulated in *Bell*. *Id.* at 539, 646 S.E.2d at 400. This Court reasoned that the exhibits in *Hennis* related directly to the State's witness' testimony on direct examination and did not constitute substantive evidence – the diagram was used to merely illustrate the State's witness' prior testimony and the incident report was not published to the jury as substantive evidence, nor given to the jury to examine. *Id.*

In the present case, defendant now analogizes the facts of his case to *Hennis* and asserts "[t]he videotape was used by the defendant to illustrate Officer Sykes' account of these events. It was not admitted as substantive evidence and it was directly relevant to Officer Sykes' testimony[.]" We are not convinced.

Although Officer Sykes had provided testimony describing the stop that was shown in the video, we agree with the trial court that the video evidence in this case goes beyond the testimony of the officer, and is different in nature from evidence presented in other cases that was determined not to be substantive. Here, the playing of the video of the stop allowed the jury to hear exculpatory statements by defendant to police beyond those testified to by the officer and introduced evidence of flashing police lights, that was not otherwise in the evidence, to attack the reliability of the HGN test. This evidence was not merely illustrative. Moreover, the video allowed the jury to make its own determinations concerning defendant's impairment apart from the testimony of the officer and, therefore, amounted to substantive evidence. Consequently, we hold the trial court did not err in determining defendant put on evidence and in denying defendant the final argument to the jury.

III. Conclusion

For the reasons discussed above, we find the trial court did not err in denying defendant's motions to suppress or dismiss, or in denying defendant the final closing argument to the jury.

NO ERROR.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
CLAIRY KANYINDA MBAYA

No. COA16-364

Filed 20 September 2016

1. Evidence—rape victim—past sexual activity—irrelevant

The trial court correctly excluded as irrelevant under the Rape Shield Statute evidence of a teen-aged rape victim's past sexual activity where her past activity and parental punishments were not tied in any substantive manner to this incident or to a motive for her to fabricate these allegations. Moreover, even if relevant, this evidence would have been more prejudicial than probative.

2. Constitutional Law—right to present complete defense—Rape Shield Statute

The trial court did not violate defendant's constitutional right to present a complete defense in a prosecution for rape and other offenses by preventing defendant from cross-examining witnesses about irrelevant information. The information excluded was irrelevant under the Rape Shield Statute.

Appeal by defendant from judgment entered 20 August 2015 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Clairy Kanyinda Mbaya ("Defendant") appeals from judgment entered after a jury convicted him of statutory rape, statutory sex offense, and taking indecent liberties with a child. We find no error.

I. Factual Background

In February 2014, A.B. was living with her mother, her two younger siblings, and Defendant. Defendant was A.B.'s mother's boyfriend and

had been living in the apartment since 2013. A.B. was fifteen years old at the time the incidents occurred.

On the afternoon of 21 February 2014, A.B. returned home after school, ate, and went to sleep in her room. No one else was home because A.B.'s mother was pregnant and having contractions. Defendant, who was the newly arriving baby's father, drove A.B.'s mother to the hospital around 3 p.m. that afternoon. Defendant drove the work vehicle assigned to him by his employer, a chauffeured vehicle transportation company.

A.B.'s mother had arranged for A.B.'s two younger siblings to stay with other relatives, and for A.B. to stay with A.B.'s father while she was in the hospital. A.B.'s father planned to pick A.B. up after he left work that day.

A.B. testified at trial she woke up at approximately 8:10 p.m. and heard her bedroom door open and close. A few minutes later, she heard her door open again and saw a man walk into the room. A.B. testified the man was dressed in black, wore a mask that covered facial features, except his eyes, his nose, and dreadlocks, and that he carried a gun. A.B. did not recognize the man at first.

A.B. testified that the man said he would not hurt her, but told her to remove her clothes. He performed oral sex on her and told her to do the same to him. When A.B. refused, he had her rub his penis with her hands. Then, he pushed her on the bed, kissed the side of her face and neck, and raped her. Next, Defendant told her to get on "all fours" and raped her again. At that point, the man turned on the light and A.B. recognized him as Defendant. She recognized his eyes, nose, and dreadlocks and that he spoke with the same African accent as Defendant.

As these incidents occurred, A.B. cried and asked Defendant to stop and leave. Defendant did not stop until A.B.'s father knocked on the door to pick her up around 9:20 p.m. A.B. yelled for her father to hold on. Defendant made A.B. get onto her knees and told her that he was going to ejaculate on her face. Instead, he ejaculated on her chest. A.B. wiped herself off with a pair of sweatpants, dressed, and walked to the front door. Defendant followed her to the door and told her not to say anything or he would kill her.

A.B. left the apartment and walked over to her father, who was standing by his vehicle. A.B.'s father noticed that A.B. was upset and asked her what was wrong. A.B. replied she had just broken up with her boyfriend, because she was scared that Defendant would kill her or her father. A.B.'s father did not believe her and pressed the matter further. A.B. told her father she had just been raped.

A.B.'s father immediately returned to the apartment, but no one was there. They traveled to a nearby relative's house and called the police. An ambulance took A.B. to the hospital where she was examined, gave statements to officers and a nurse describing what happened, and evidence was collected with a rape kit.

Defendant was at the hospital when the baby was born, which was at approximately 12:00 a.m. on 22 February 2014. Shortly thereafter, Defendant was first questioned by detectives concerning his whereabouts at the time of the offenses. Defendant stated he stayed with A.B.'s mother at the hospital for several hours and left around 7:30 p.m. to pick up a friend at a hotel and go to Wal-Mart to buy paint. Detectives did not question Defendant further at the hospital, but arranged for him to come to the Law Enforcement Center the next day on Saturday, 22 February 2014.

On Saturday, Defendant dropped off his work vehicle at his employer's office. Although scheduled to work on Sunday, Defendant did not arrive for his shift. Defendant also failed to show up for his appointment at the Law Enforcement Center on Saturday. He was contacted by a detective and agreed to come in later that day but failed to appear. A detective called Defendant again, but he did not answer his cell phone or respond to the messages left by the detective.

While Defendant was missing, detectives learned that Defendant's employer had a Global Positioning System ("GPS") device installed on his work vehicle that tracked the location of the vehicle. The GPS records indicated the vehicle was not driven to a hotel or to a Wal-Mart after Defendant left the hospital on Friday 21 February 2014 and during the time the offenses occurred.

Rather, GPS records kept by Defendant's employer show the vehicle was driven away from the hospital around 7:30 p.m., arrived at Pitts Drive at 7:47 p.m., left Pitts Drive at 9:27 p.m., and returned to the hospital at 9:37 p.m. Pitts Drive is near A.B.'s mother's apartment and is the same street where the vehicle was located before Defendant drove A.B.'s to the hospital earlier that day. Arrest warrants were issued on 24 February 2014. Defendant was arrested on 5 March 2014. Prior to being arrested, Defendant cut off his dreadlocks.

Detectives interviewed Defendant on 28 May 2014 and the interview was recorded and transcribed. Defendant told detectives, again, after he left the hospital, he picked up his friend from a hotel and went to Wal-Mart. He then dropped off his friend at the hotel on Sugar Creek Road and returned to the hospital. Defendant said he did not go anywhere

else, he had driven his work vehicle, and that no one else drove it that day.

At this point in the questioning, detectives informed Defendant that the GPS tracking records for his work vehicle conflicted with his account of his whereabouts that night. Defendant admitted he returned to the apartment to get food, shoes, and to check the places he was supposed to paint. Although A.B.'s mother had given Defendant her key to the apartment, Defendant said he had knocked on the apartment door before entering and nobody answered. Once inside, he stated that he knocked on the inside doors that were not open and nobody was there. Later on in the interview, he admitted that when he opened A.B.'s bedroom door and looked in, he saw her asleep inside. He said he closed the door and never went back.

Forensic experts at the Charlotte-Mecklenburg Police Department's crime laboratory examined swabs and smears collected from A.B. at the hospital and a buccal swab taken from Defendant after his arrest. Sperm fractions were produced from the swabs and specimens taken from A.B.'s vagina, anus, external genitalia, and chest. Tests on the swabs from A.B.'s anus, external genitalia, and chest showed the presence of DNA matching Defendant's DNA profile. DNA found on the swab taken from A.B.'s neck also matched Defendant's DNA profile.

A. Pre-Trial Hearing

On 17 August 2015, at the beginning of the trial, the State filed a motion to enforce Rule 412, the Rape Shield Statute, to prevent Defendant from presenting any irrelevant evidence of A.B.'s other sexual activity. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2015). The State sought an order for Defendant and his counsel to "refrain from eliciting, proffering, or attempting to elicit or proffer any testimony or evidence regarding the sexual behavior of the minor child, from her or any other witness that testifies." The trial court cleared the courtroom to hear each party's arguments on the State's motion and the evidence Defendant intended to introduce regarding A.B's sexual history in response to the motion.

Defendant's counsel stated Defendant would present alibi evidence, and wanted to show A.B. was sexually active as evidence of the guilt of another perpetrator. He planned to elicit this testimony from A.B., her mother, and her father. The prosecutor informed the court that information obtained in discovery indicated A.B. was a sexually active teenager, and that she had last engaged in sex in December, a couple of months prior to the rape and sexual offenses on 21 February 2014.

Defendant's counsel argued in reply that for the court to allow the State's Rule 412 motion to exclude evidence would be unconstitutional and deny him the opportunity to present a complete defense. He asserted Defendant would be prevented from "presenting the evidence that others could have committed this crime." Counsel conceded the evidence only showed A.B. last had sexual intercourse in December prior to the February incidents, but asserted "a jury might infer that that was not an honest statement." Defendant's counsel noted "[A.B.'s] credibility is a key factor" in this case as she was "the only person who was at home at the time and has made the allegation of the conduct."

Notwithstanding Defendant's argument, the only evidence Defendant sought to introduce at that time was that A.B. had previously been sexually active. He did not offer any proposed evidence linking the sexual conduct to another possible perpetrator, or any other issue in the case, as is shown in the following exchange with the trial judge:

> THE COURT: I'm not sure, other than the fact that she was purportedly sexually active, what you're seeking to introduce.
>
> MR. LOVEN: Nothing your honor.
>
> THE COURT: Just that she was sexually active?
>
> MR. LOVEN: Yes, Your Honor.

The trial court granted the State's Rule 412 motion and excluded the evidence. The trial court also found, "aside from the Rule 412 analysis, . . . additionally the dangers of prejudice arising from testimony regarding a teenager being sexually active far outweigh any probative value." *See* N.C. Gen. Stat. § 8C-1, Rule 403.

B. *Voir Dire* of Complainant

Following A.B.'s testimony, Defendant obtained information in a *voir dire* hearing indicating that A.B. had been sexually active prior to the date of the alleged rape and sex offenses, but she had not engaged in sexual intercourse since December and the sexual activity in December was consensual. Although her parents were not aware of the sexual activity in December, they were aware that she had been sexually active in the past.

When questioned about her parents' reaction to learning she was sexually active, A.B. stated she had been punished, but not seriously. Rather, "it was more of something that [she] just had to think about and

realize the choices that [she] made rather than [her] parents actually punishing [her]." A.B. testified she was not concerned about consequences she would receive for such conduct or for telling her parents about future sexual conduct.

At the conclusion of the cross-examination, Defendant moved that evidence of A.B.'s past sexual activity and parental punishment be allowed for the purpose of showing she possessed a motive to fabricate the charges against Defendant. The State argued such evidence was irrelevant under Rule 412 and was not admissible for a proper reason.

In addition, the State argued evidence tending to show a teenager had engaged in sexual activity, and her parents were unhappy with her, does not show she would fabricate allegations of rape and sexual assaults. After considering the testimony, the trial court stated, "[m]y ruling with regard to the motion will remain that the defense is prohibited, pursuant to 412, from questioning the victim concerning prior sexual activity."

C. *Voir Dire* of Complainant's Parents

Following the testimony of A.B.'s father, Defendant questioned him about A.B.'s sexual activity in a *voir dire* hearing. A.B.'s father testified that he was aware that she had been sexually active and had a boyfriend. A.B.'s father discussed the risks of sexual activity with A.B., but he did not recall imposing any particular punishment. He stated he probably told her he "would deny her some privileges if she kept doing it."

A.B.'s mother testified during *voir dire* cross-examination that she first learned A.B. was sexually active several years before the alleged rape occurred. Like A.B.'s father, A.B.'s mother testified she had talked about the implications of having sexual intercourse and had previously punished A.B. by taking away her cell phone. A.B.'s mother believed A.B. was still sexually active, but was not surprised because, as she testified, "I was young once before, and I know." A.B.'s mother also noted A.B. was not permitted to have her boyfriend at the house when an adult was not present.

Following each testimony, Defendant's counsel requested the testimony be presented to the jury to show that A.B. had motive and opportunity to lie about the rape and sexual offenses. Both times, the trial court indicated its previous Rule 412 ruling would not change and denied Defendant's request to admit the evidence.

The jury convicted Defendant of statutory rape, statutory sex offense, and taking indecent liberties with a child. The jury also found

Defendant had taken advantage of a position of trust and confidence at the time of the crime as an aggravating factor.

Defendant was sentenced to a minimum of 300 months and a maximum of 420 months for the statutory rape conviction. The indecent liberties and statutory sex offense convictions were consolidated and Defendant was sentenced to a consecutive term of imprisonment for a minimum of 300 months and a maximum of 420 months. Defendant was also ordered to register as a sex offender for life and enroll in lifetime satellite based monitoring upon release. Defendant appeals.

II. Issues

Defendant argues the trial court erred by ruling North Carolina Rule of Evidence 412 barred him from presenting evidence during cross-examination of A.B.'s past sexual activity, which resulted in punishment by her parents. Defendant argues: (1) the evidence was relevant to show A.B. had a motive to fabricate a claim of being raped, and (2) the exclusion of the evidence violated his constitutional right to present a complete defense.

III. Standard of Review

The Rape Shield Statute is "a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. The exceptions . . . merely define those times when the prior sexual behavior of the complainant is relevant to issues raised in a rape trial." *State v. Khouri*, 214 N.C. App. 389, 405-06, 716 S.E.2d 1, 12 (2011) (quoting *State v. Baron*, 58 N.C. App. 150, 153, 292 S.E.2d 741, 743 (1982) (internal quotation marks and citations omitted)), *disc. review denied*, 365 N.C. 546, 742 S.E.2d 176 (2012); *see* N.C. Gen. Stat. § 8C-1, Rule 412.

"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) (citations omitted).

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

> on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Khouri, 214 N.C. App. at 406, 716 S.E.2d at 12-13 (citation omitted).

This Court also held that "the same deferential standard of review should apply to the trial court's determination of admissibility under Rule 412." *Id.*

We review *de novo* a defendant's arguments that his constitutional rights were violated. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

IV. Analysis

A. Rape Shield Statute

[1] Defendant argues that the trial court erred in excluding A.B.'s past sexual activity. We disagree.

The Rape Shield Statute states that evidence regarding the sexual activity of the complainant, other than the sexual act at issue, "is irrelevant to any issue in the prosecution," unless it falls within one of four categories. N.C. Gen. Stat. § 8C-1, Rule 412(a) and (b). Prior to asking questions concerning a complainant's other sexual activity, the proponent must first make an offer of proof to allow the trial court to determine the admissibility of the evidence. N.C. Gen. Stat. § 8C-1, Rule 412. This proffer must occur at a transcribed *in camera* hearing before any mention of the complainant's other sexual activity is to be made in the presence of a jury. *Id.*

The purpose of the statute is "to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has *little relevance to the case and has a low probative value.*" *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982) (emphasis supplied).

Our Supreme Court noted the Rape Shield Statute: "define[s] those times when [other] sexual behavior of the complainant is relevant to issues raised in a rape trial and *[is] not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.*" *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis supplied). As such, the four exceptions in the Rape Shield Statute are not

"the sole gauge for determining whether evidence is admissible in rape cases." *Younger*, 306 N.C. at 698, 295 S.E.2d at 456.

This Court recently held "there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." *State v. Martin*, __ N.C. App. __, __, 774 S.E.2d 330, 336-37 (citing *State v. Edmonds*, 212 N.C. App. 575, 580, 713 S.E.2d 111, 116 (2011) (noting "[t]he lack of a specific basis under [the Rape Shield Statute] for admission of evidence does not end our analysis")), *disc. review denied*, __ N.C. __, 775 S.E.2d 844 (2015); *see e.g.*, *State v. Rorie*, __ N.C. App. __, __, 776 S.E.2d 338, 344 (2015) ("[E]vidence that [the victim] was discovered watching a pornographic video, without anything more, is not evidence of sexual activity barred by the Rape Shield Statute."), *disc. review denied*, __ N.C. __, 784 S.E.2d 482 (2016).

In *Martin*, the defendant, a high school substitute teacher, was accused of sexually assaulting a female student. *Id.* at __, 744 S.E.2d at 331. The female student testified the defendant walked into the boy's locker room, saw she was standing and talking with two football players, told the boys to leave, and then demanded that she perform oral sex on him. *Id.* at __, 774 S.E.2d at 331-32.

At trial, the defendant sought to introduce testimony from himself and two other witnesses to show the female student was *in flagrante delicto* performing oral sex upon the football players when the defendant entered the locker room. *Id.* at __, 774 S.E.2d at 332. The defendant argued evidence was necessary to show the student had a reason to fabricate her accusations against the defendant, and to cover up her true actions. *Id.*

This Court concluded if the State's evidence is "based largely on the credibility of the prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant" and "motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault." *Id.* at __, 744 S.E.2d at 336. Rather, in that case:

> [T]he trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [complainant's] motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under

> Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). *See State v. Edmonds*, 212 N.C. App. at 578, 713 S.E.2d at 115 (quoting N.C. Gen. Stat. § 8C–1, Rule 403 (2009)).

Id.

Soon after our decision in *Martin*, this Court considered a similar case that it deemed to be "indistinguishable from *Martin* in any meaningful way." *State v. Goins*, __ N.C. App. __, __, 781 S.E.2d 45, 61 (2015). The Court held statements by complainant made to police that he was addicted to pornography, had an extramarital affair, and could not control his behavior because of what the defendant had done to him were relevant to show that complainant had a motive to fabricate allegations against the defendant. *Id.*

Like *Martin*, the charges in *Goins* were based largely upon the credibility of the complainant's testimony and the defendant sought to introduce evidence tending to show the complainant's motive to falsely accuse. *Id.* Also important to the Court was that the defendant "did not seek to cross-examine a prosecuting witness about his or her general sexual history. Instead, [d]efendant had identified specific pieces of evidence that could show [the complainant] had a reason to fabricate his allegations against [d]efendant." *Id.* (citations omitted). Upon review, this Court held that it was improper for the trial court to exclude the testimony under Rule 412 and Rule 401. *Id.* Defendant relies on this Court's decisions in *Martin* and *Goins* to support his argument.

The facts of this case are readily distinguishable from those cases. Defendant does not contend A.B.'s past sexual activity was admissible under one of the four categories in N.C. Gen. Stat. § 8C-1, Rule 412(b). Rather, he asserts A.B.'s past sexual activity and parental punishment for such activity is relevant to show that she had a motive to fabricate the accusations against Defendant.

Unlike *Martin*, Defendant proposed evidence about occurrences which were not close in time and proximity to the alleged crime. *See Martin*, __ N.C. App. at ___, 774 S.E.2d at 331-32; *see Edmonds*, 212 N.C. App. at 581-82, 713 S.E.2d 111, 117 (holding the trial court did not err by refusing to admit "some distant sexual encounter which has no relevance to this case other than showing that the witness [was] sexually active" (quoting *Younger*, 305 N.C. at 696, 295 S.E.2d at 456)). The sexual activity the defendant in *Martin* wished to present occurred on the same day and time as the sexual activity at issue in that case. Here, the evidence showed A.B. had not engaged in sexual activity for

several months prior to the actions at issue. A.B.'s parents also knew she had been sexually active for several years prior to the incidents. No evidence ties A.B.'s past sexual activity or parental punishment to the incident that occurred on 21 February 2014.

The court's analysis in both *Martin* and *Goins* indicated the State's case relied largely upon the testimony of the prosecuting witness, and both defendants had sought admission of evidence tending to show the witness had motive to falsely accuse. In both cases, this Court ruled this evidence could be relevant. *Id.* at ___, 774 S.E.2d at 336, *Goins*, __ N.C. App. at __, 781 S.E.2d at 61. Specifically in *Martin*, the Court noted that "[t]here were no other eyewitnesses or any physical evidence proving the crime had occurred." *Martin*, __ N.C. App. at __, 774 S.E.2d at 336.

A.B.'s allegations and testimony is supported by other compelling physical evidence submitted by the State. First, the evidence showed recovered samples collected from A.B.'s anus, chest, external genitalia, and neck in the rape kit contained material matching Defendant's DNA profile. Second, Defendant's employer's GPS records of the times and locations of the vehicle driven by Defendant, together with his denials and many false statements, showed that he drove and parked the vehicle near the apartment during the times the rape and sexual offenses occurred after he left the hospital. The vehicle remained at the apartment during the time the rape and sexual offenses occurred and left near the time A.B's father picked her up from the scene immediately following the attack. Third, Defendant gave conflicting accounts until confronted with GPS evidence from the vehicle he drove, failed to keep his appointment at the Law Enforcement Center the day after the incident and never returned detectives' calls, disappeared after he was first questioned by police, and altered his appearance by cutting off his dreadlocks before he was located and arrested.

Testimony presented during the *in camera* hearing supports the trial court's determination to block the victim's prior sexual activity as the type of irrelevant evidence the Rape Shield Statute was enacted to exclude. *See* N.C. Gen. Stat. § 8C-1, Rule 412. A.B.'s testimony indicated her parents were aware of her prior sexual activity and she was not concerned about being punished for engaging in sexual conduct. When asked whether she was seriously punished, she said: "No . . . it was more of something that I just had to think about and realize the choices that I made rather than my parents actually punishing me." Nothing in her parents' testimony indicated a reason to doubt A.B.'s statement to that point. At most, her parents indicated that as consequences, they had taken away some of her privileges and cell phone.

Defendant contends A.B.'s father's testimony supported an inference that A.B.'s father suspected A.B. might have been engaged in sexual activity with a boyfriend when he arrived to pick her up the night of the rape. No evidence shows A.B.'s boyfriend was present at the apartment or that someone else was engaged in sexual conduct with A.B. during the time the offenses occurred. A.B. testified Defendant turned on the lights and she recognized his eyes, nose, voice, and dreadlocks even with the mask over his face. Defendant admitted to police that when he went inside the apartment on the night of the rape, no one else was there other than A.B. and he observed she was asleep in her bed.

The trial court correctly excluded the evidence regarding A.B.'s past sexual activity. This evidence is precisely what the Rape Shield Statute was enacted to exclude: evidence with "little relevance to the case and [that] has a low probative value." *Younger*, 306 N.C. at 696, 295 S.E.2d at 456. A.B.'s past sexual activities and parental punishments were not tied in any substantive manner to the incidents which occurred on 21 February 2014 or to A.B.'s motive to fabricate these allegations. As the trial court also noted, even if relevant, this evidence would have been more prejudicial than probative. *See* N.C. Gen. Stat. § 8C-1, Rule 403.

B. Constitutional Right to Present a Complete Defense

[2] Defendant argues his constitutional right to present a complete defense was violated by the exclusion of the evidence showing A.B. had been punished for her previous sexual activity. We disagree.

The right of a defendant to cross-examine an adverse witness is a substantial right. *See Olden v. Kentucky*, 488 U.S. 227, 231-32, 102 L. Ed. 2d. 513, 519-20 (1988). As such, an unreasonable exclusion of relevant evidence about a witness's sexual behavior violates a defendant's ability to introduce evidence relevant to his defense. *Id.* at 232-33, 102 L. Ed. 2d. at 520-21. However, the Supreme Court of the United States has stated:

> "[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *Rock v. Arkansas*, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). We have explained, for example, that "trial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'

> safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986).

Michigan v. Lucas, 500 U.S. 145, 149, 114 L.E.2d 205, 212 (1991). In *Lucas*, the Supreme Court of the United States then held that the Michigan Rape Shield Statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id.* at 149-50, 114 L.E.2d at 212.

The Supreme Court of North Carolina has similarly concluded that "there is no constitutional right to ask a witness questions that are irrelevant." *Fortney*, 301 N.C. at 35, 269 S.E.2d at 112 (citations omitted). In *Fortney*, the Supreme Court considered a challenge to the Rape Shield Statute on Confrontation Clause grounds. *Id.* at 36, 269 S.E.2d at 112-13; *see* U.S. Const. Amend. 6. Even with North Carolina's wide-ranging policy of cross-examination, the Court held that "while a defendant may generally cross-examine to impugn the credibility of a witness, this right is not inviolate. Indeed . . . a court has a duty to protect a witness 'from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate . . . .' " *Id.* at 36, 269 S.E.2d at 113 (quoting *Alford v. United States*, 282 U.S. 687, 694, 75 L. Ed. 624, 629 (1931)).

The Court in *Fortney* considered the legislative and procedural purpose of the Rape Shield Statute and how the statute's exceptions "provide ample safeguards to insure that relevant evidence is not excluded." *Id.* at 41, 269 S.E.2d at 115. Concluding its analysis of the constitutional issue, the Court stated:

> All of [Rule 412's] exceptions define those times when the prior sexual behavior of a complainant *is* relevant to issues raised in a rape trial, and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.
>
> Nor does the statute stop with definitions. If any question arises concerning evidence of a victim's prior sexual history, that question may be presented at an *in camera* hearing where opposing counsel may present evidence, cross-examine witnesses and generally attempt to discern the relevance of proffered testimony in the crucible of an adversarial proceeding away from the jury. In summary, then, [the Rape Shield Statute] merely contains and channels long-held tenets of relevance by providing a statutory

> definition of that relevance and by providing a procedure to test that definition within the context of any particular case. Defendant's substantive right to cross-examine is not impermissibly compromised.

Id. at 42, 269 S.E.2d at 116 (emphasis in original).

When the trial court properly finds proffered evidence is irrelevant or its probative value is substantially outweighed by its prejudicial value, it correctly orders a defendant to abstain from asking about that evidence on cross examination. *See id.* Here, the trial court properly excluded the evidence Defendant sought to introduce as irrelevant under the Rape Shield Statute. The trial court did not violate Defendant's constitutional right to present a complete defense by preventing Defendant from cross-examining the witnesses on irrelevant evidence. *See id.*

V. Conclusion

The trial court correctly excluded the evidence that A.B. had previously engaged in unrelated sexual activity and was punished by her parents under the Rape Shield Statute. Since this evidence was irrelevant, Defendant's constitutional right to present a complete defense was not violated. Defendant received a fair trial free from the prejudicial errors he preserved and argued.

NO ERROR.

Judges CALABRIA and DAVIS concur

STATE v. McQUEEN

[249 N.C. App. 543 (2016)]

STATE OF NORTH CAROLINA
v.
BRIAN MICHAEL McQUEEN, DEFENDANT

No. COA15-1161

Filed 20 September 2016

Jury—selection—Batson challenge

The trial court did not commit clear error by rejecting defendant's *Batson* challenges in a first-degree murder and armed robbery prosecution. It was clear that the trial court properly considered the totality of the circumstances, the credibility of the State, and the context of the peremptory strikes.

Appeal by Defendant from judgments entered 23 July 2014 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 25 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Leslie C. Rawls for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Brian Michael McQueen ("Defendant") appeals following a jury verdict convicting him of first degree murder and robbery with a firearm. Following the verdicts, the trial court imposed a sentence of life without parole. On appeal, Defendant contends he is entitled to a new trial because the trial court clearly erred in denying his *Batson* challenges. We disagree and hold the trial court did not commit error.

I. Factual and Procedural Background

On 24 September 2009, a Lee County grand jury indicted Defendant, a Black male, on one count of first degree murder and one count of robbery with a dangerous weapon. On 30 November 2009, the case was declared a capital offense. At arraignment, Defendant pled not guilty. On 12 July 2012, defense counsel filed a pretrial motion entitled, "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." In it, Defendant requested the trial court "prohibit the District Attorney from exercising peremptory challenges as to potential black jurors, or in the alternative, to order that the District Attorney

state reasons on the record for peremptory challenges of such jurors." The trial court denied Defendant's motion.

The case was called for trial 5 May 2014. On the jury questionnaires, prospective jurors were asked to answer "yes" or "no" to the question, "Have you or a family member ever been charged with a crime?" Juror 2 answered "no," Juror 10 answered "yes," Juror 11 answered "no," and Juror 12 answered "yes."

On the second day of jury selection, 13 May 2014, prospective Juror 2 was called alone into the jury box. Juror 2 is a seventy-year-old black male who serves as a pastor and works as a security officer. He described his "thoughts about the death penalty" as follows:

> Well, I don't agree with the death penalty because of the fact that . . . my religion says, "Thou Shalt Not Kill," and I don't want to be responsible for taking somebody's life. So I don't agree with the death penalty under no circumstances. But now, as far as going to jail for life, I would agree to that, but not the death penalty. . . . I can't preach one thing and then turn around and do something else.

Juror 2 elaborated, "I'm totally against the death penalty, but maybe in some cases I might would change my mind," such as a defendant who "chop[ped] [a person] into pieces and then maybe burn[ed] them." The State asked to strike Juror 2 for cause, which the trial court denied. The State exercised a peremptory challenge and struck Juror 2. On *voir dire*, defense counsel raised a *Batson* challenge and the trial court found "there is no *prima facie* case" and summoned the next prospective juror.

Juror 10 was called to the jury box on 4 June 2014, the seventeenth day of jury selection. Juror 10 is a thirty-one-year-old black female who works as a line technician. On *voir dire*, the State asked her which crimes she or her family members were charged with. She did not state she was convicted of any crimes, though her records indicated she was convicted of three counts of driving without a license and charged with felony possession of cocaine and possession of drug paraphernalia. When asked about her thoughts about the death penalty, she stated, "no one has the right to take another person's life," because she believes in the Commandment, "Thou Shalt Not Kill."

The State used a peremptory challenge to strike Juror 10 and defense counsel raised a *Batson* challenge. The trial court found Defendant did not establish a *prima facie* case but gave "the State an opportunity to

state race-neutral reasons for the record." The State claimed it struck Juror 10 because of her thoughts regarding the death penalty, and because she failed to disclose her criminal history when the State questioned her. The trial court afforded defense counsel "an opportunity to provide surrebuttal and to show the reasons offered by the State were inadequate or pretextual." On surrebuttal, defense counsel stated religion was not a strong enough basis for a peremptory challenge and that the State did not ask Juror 10 about her criminal charges. The State responded by providing additional reasons for striking Juror 10: when asked whether she believed law enforcement treated her brother fairly, she responded, "I would hope so," with a "smirk" on her face; when asked whether her brother's situation would affect her ability to be fair and impartial to both sides in this case, she paused, looked away, and said, "I have no opinion about any of his situations, he did what he did." The trial court found Defendant did not make out a *prima facie* case for his *Batson* challenge and ordered Juror 10's criminal record to be included in the court file. The trial court stated:

> The Court finds that [the criminal] record certainly provides an additional basis for the State's exercise of a peremptory challenge. However, the Court also finds that the State's bases for the exercise of a peremptory challenge to this juror were adequate, race-neutral and non-discriminatory and non-pretextual, even in the absence of any evidence of the [juror] having any criminal record herself.

Juror 11 was called to the jury box on 9 June 2014, the twentieth day of jury selection. Juror 11 is a sixty-four-year-old black male who works for the North Carolina Department of Transportation. On *voir dire*, he stated his great-niece worked for a potential witness, Mr. Webb, Defendant's former attorney. Juror 11 stated he spoke with Mr. Webb on multiple occasions. Juror 11 also worked with Defendant's grandfather in the 1960s, whom he last saw twelve to fifteen years prior to trial. Although he did not indicate so on the jury questionnaire, Juror 11 was familiar with five names on the witness lists. The record shows Juror 11 pled guilty to four prior charges regarding worthless checks with restitution of $3,869.56 in one of those instances. When asked about the worthless check charges, Juror 11 stated, there were "two or three . . . and the bank would call me, notify me, I [would] go put the money there or what have you." The record also shows Juror 11 was twice charged with driving while his license revoked, though he only referred to a seatbelt violation when the State asked him about previous traffic offenses on *voir dire*.

The State used a peremptory challenge raised concern about Juror 11's truthfulness and criminal history, stating, "[I]f we cannot trust a juror to be honest with us about matters which are essentially public record, then I don't know that we could trust them in terms of them telling use about other matters which are not easily verifiable." Defense counsel raised a *Batson* challenge and alleged the State was disproportionately striking black jurors. In response, the State claimed it struck Juror 11 because of his criminal history, his truthfulness, he knew one of the State's witnesses and four of Defendant's witnesses, his great-niece currently worked for a potential witness, and he previously worked with Defendant's grandfather. The State reiterated, "It's a combination of things. It's a read you get from somebody." On surrebuttal, defense counsel stated there was a "double standard being applied" to black prospective jurors. The trial court denied Defendant's challenge and stated the following:

> The Court finds that the defendant—bear in mind the defendant's low hurdle for the defendant to get over, has stated a *prima facie* case with respect to a *Batson* challenge. However, the Court finds that the State has provided and acted upon race-neutral, non-discriminatory and non-pretextual reasons for exercising its peremptory challenge. . . . [I am] [g]etting a little bit concerned about the rate of challenges, so I just draw that to the attention of counsel. Certainly, as I've indicated, there was ample reason to challenge [Juror 11] and all of the previous jurors that have been struck by the State as well.

Juror 12 was called to the jury box on 11 June 2014, the twenty-second day of jury selection. Juror 12 is a forty-nine-year-old white male who is unemployed and previously worked in construction. He did "computer work" for potential witness Mr. Webb in the past, and Mr. Webb previously represented his wife for a traffic violation. Juror 12 had two worthless check charges with restitution of $10.00 and $20.00 respectively, and was previously charged with assault by pointing a gun and driving without a license. Juror 12 answered directly to all questions regarding previous criminal charges.

The State passed on Juror 12, prompting defense counsel to re-argue its *Batson* challenge regarding Juror 11. Defense counsel argued, "the State is now passing on a white juror when that juror . . . appears to have the same issues that the State used to excuse African American jurors." The State responded and distinguished Jurors 11 and 12, and

emphasized, "his answers regarding past involvement with the court system" were not the "sole reason for challenging [Juror 11]." The State contended Juror 12 had a previous business relationship Mr. Webb, whereas Juror 11's relative currently works for Mr. Webb, and Juror 11 has met with Mr. Webb "three to four times." Moreover, Juror 11's worthless check charges totaled to over $4,000.00 and Juror 12's only totaled to $30.00. Juror 11 did not acknowledge his prior charges and Juror 12 did so without additional questioning. On surrebuttal, defense counsel pointed out the similarities in Juror 11 and 12's criminal records and argued Juror 11 did not have a close relationship with his great-niece or Mr. Webb. The trial court denied defense counsel's *Batson* challenge again, and stated:

> The Court's prior rulings with respect to the *Batson* challenge to [Juror 11] are confirmed in all respects. The previous findings are confirmed. The defendant's . . . renewed *Batson* challenge is denied. State has offered race-neutral reasons for challenging [Juror 11] peremp-torily. Those reasons are non-discriminatory and are non-pretextual.

At the conclusion of jury selection, four out of the fifteen chosen jurors (26.6%) were African American, ten (66.7%) were Caucasian, and one (6.7%) was White American Indian. At trial, after the close of the evidence, the jury that heard the case consisted of three African Americans, eight Caucasians, and one White American Indian. The alternate jurors consisted of one African American and two Caucasians. The record shows the parties questioned eighty-six prospective jurors on *voir dire*. Twenty-one (24.4%) of those prospective jurors identified themselves as African American, fifty-nine (68.6%) as White, one (1.17%) as Asian, one (1.17%) as Hispanic, one (1.17%) as Multiracial, one (1.17%) as Spanish, one (1.17%) as White American Indian, and one (1.17%) as White-Hispanic Mix.

After opening statements, the State presented evidence of two eyewitnesses who identified Defendant, two expert witnesses, statements made by Defendant to police, and photos of the crime scene. The following is a summary of the evidence taken in the light most favorable to Defendant.

In April 2009, Imad Asmar ("Asmar"), a Palestinian, purchased the Jackpot Mini Mart, a convenience store in Sanford, North Carolina. Asmar worked with his brother Ali Mustafa ("Mustafa"), and his son, Ahmad Imad Asmar ("A.J."). Defendant regularly visited the Jackpot Mini Mart.

Around 9:00 p.m. on 17 August 2009, Asmar arrived at the Jackpot Mini Mart while A.J. and Mustafa were working. Asmar's wife and younger son waited in the car while Asmar went inside the store. Asmar told A.J. to take his wife and son something to drink. A.J. took drinks to the two in the parking lot and sat with them in the car. Mustafa came out of the store but returned when a customer arrived. The customer left and Defendant walked towards the store and flashed a peace sign with his hand towards A.J. A.J. recognized Defendant, who had visited the store earlier that day.

Asmar and Mustafa talked at the front counter when Defendant entered the store. Immediately, Defendant walked towards the counter, pulled out a .38 caliber revolver, and shot at Asmar and Mustafa multiple times. Four bullets struck Asmar in the chest, left shoulder, and both arms. Defendant demanded cash and stated, "I need hundreds." Defendant shot Asmar again as Asmar walked towards the exit. Defendant shot Mustafa in the neck, and Mustafa gave Defendant all of the money in the cash register and his pockets. The entire exchange lasted thirty seconds. Defendant walked out of the store and flashed a peace sign at A.J. again before walking into the nearby woods.

Thereafter, Mustafa rushed out of the store and called emergency medical services ("EMS"). Mustafa asked A.J. which direction Defendant fled, and Mustafa relayed Defendant's whereabouts to the 911 dispatcher. Sanford police officers and EMS personnel arrived minutes later. Paramedics took Asmar to the hospital where he later died. An autopsy revealed Asmar was shot four to five times.

Lead investigator Detective Keith Rogers of the Sanford Police Department and Detective Eric Pate presented photo lineups to A.J. and Mustafa separately. Both A.J. and Mustafa identified Defendant as the robber.

Five hours later, police arrested Defendant and took him to the police station. Detective Rogers interviewed Defendant and Defendant claimed he was not involved in the robbery. Later, Defendant stated he accompanied another person who shot the men. Ultimately, Defendant confessed and told police he decided to rob the store but the gun accidentally went off during the robbery when Asmar reached for it. Defendant told officers he got the gun from a man named "Cougar" to rob the store, and he and Cougar split the stolen money. Defendant told police he "didn't want to kill anybody."

On 15 July 2014, the jury convicted Defendant of first degree murder and robbery with a firearm. The trial court imposed a sentence of life without parole. Defendant timely entered his notice of appeal.

II. Standard of Review

"The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. James*, 230 N.C. App. 346, 348, 750 S.E.2d 851, 854 (2013) (citing *State v. Cofield*, 129 N.C. App. 268, 275 n.1, 498 S.E.2d 823, 829 n. 1 (1998)). "Since the trial judge's findings . . . largely will turn on evaluation of credibility a reviewing court ordinarily should give those findings great deference." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citations omitted). "The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *Id.* (citation omitted).

III. Analysis

In a capital murder case, the defendant and State are each afforded fourteen peremptory challenges during jury selection. N.C. Gen. Stat. § 15A-1217(a). However, Article I, Section 26 of the Constitution of North Carolina and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution "prohibit race-based peremptory challenges during jury selection." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citation omitted).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court announced a three-part test for *Batson* objections. Our Supreme Court utilized this analysis in *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008), and set out the following test:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Id. at 527, 669 S.E.2d at 254 (citations omitted). Defendant challenges the first and third prongs of the *Batson* test. He contends the trial court clearly erred in finding he did not make a *prima facie* showing that the State exercised a race-based peremptory challenge to Jurors 2, 10, and 11.

The burden of presenting a *prima facie* showing the State exercised a race-based peremptory challenge is a low hurdle for defendants. *James*, 230 N.C. App. at 349, 750 S.E.2d at 854. The defendant must show that he is a "member of a cognizable racial group and . . . the [State]

has used peremptory challenges to remove from the jury members of the defendant's race." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988). The showing only need be "sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *James*, 230 N.C. App. at 349, 750 S.E.2d at 854 (quoting *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)).

When the State volunteers its reasons for striking a juror, or the trial court requires the State to give such reasons, prior to making a finding, "the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are credible, nondiscriminatory basis for the challenges or simply pretext." *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996).

After the defendant's *prima facie* showing, the burden shifts to the State to give race-neutral reasons for its strike. Under this second prong, the State must articulate legitimate, clear, and specific reasons which provide a race-neutral explanation for exercising the challenge. *Jackson*, 322 N.C. at 254, 368 S.E.2d at 840. When analyzing these reasons, we "address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State." *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152–53 (1990). Our Supreme Court identified multiple race-neutral reasons a party may rely upon when exercising peremptory challenges: "[r]eservations of a juror concerning his or her ability to impose the death penalty;" a potential juror or relative of the juror's criminal history; reservations about whether law enforcement treated a family member fairly; a potential juror's familiarity with the defendant or defendant's family; excessive eye contact or failure to make appropriate eye contact; or other reasons which correspond to a valid for-cause challenge but do not rise to the level of for-cause excusal. *See State v. Cummings*, 346 N.C. 291, 310, 488 S.E.2d 550, 561; *Porter*, 326 N.C. at 499, 391 S.E.2d at 151; *State v. Carter*, 212 N.C. App. 516, 524, 711 S.E.2d 515, 523 (2011); *State v. Crummy*, 107 N.C. App. 305, 322, 420 S.E.2d 448, 457 (1992); *Hernandez v. New York*, 500 U.S. 352, 362–63 (1991).

Following the State's rebuttal, the defendant has a right of surrebuttal to show the State's race-neutral reasons are merely pretext. *Porter*, 326 N.C. at 497, 391 S.E.2d at 150. To determine whether the defendant makes such a showing, "the trial court should consider the totality of the circumstances, including counsel's credibility, and the context of the information elicited." *State v. Cofield*, 129 N.C. App. 268, 279, 498 S.E.2d 823, 831 (1998) (citing *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44,

59 (1997); *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991), *cert. denied*, 522 U.S. 824 (1997)).

Our Supreme Court utilized the following factors to determine if a party engaged in purposeful discrimination:

> (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated whites were accepted as jurors; (3) whether the [party at issue] used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate racial makeup of the jury. In addition, [a]n examination of the actual explanations given by the [party at issue] for challenging black veniremen is a crucial part of testing defendant's *Batson* claim. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

James, 230 N.C. App. at 351, 750 S.E.2d at 856 (citing *State v. Robinson*, 336 N.C. 78, 93–94, 443 S.E.2d 306, 312–13 (1994), *cert. denied*, 513 U.S. 1089 (1995)).

Recently, the United States Supreme Court reversed the Georgia Supreme Court and found the prosecution engaged in purposeful discrimination in a murder case involving a Black male defendant and an elderly white female victim. *See Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737 (2016). The jury venire list in *Foster* reveals the following: the State made a legend on the list indicating green highlighting "represents Blacks"; the State highlighted the names of Black prospective jurors; "[t]he letter 'B' also appeared next to each [B]lack prospective juror's name; the State wrote "B#1," "B#2," and "B#3," next to the names of three black prospective jurors; the State made a list of "definite NO's," with six names, five of which were black jurors; the State made a note that reads, "Church of Christ . . . NO. No Black Church."; and every jury questionnaire completed by a Black juror had the race circled. *Id.*, ___ U.S. at ___, 136 S.Ct. at 1744. The State gave reasons for striking the jurors that did not involve race. *Id.* ___ U.S. at ___, 136 S.Ct. at 1751. At oral argument Justice Kagan asked, "Isn't this as clear a *Batson* violation as a court is ever going to see?" Relying upon the State's case file and jury notes, the Court held the State's strikes of Black perspective jurors was pretextual and reversed and remanded the case. *Id.* ___ U.S. at ___, 136 at 1753.

When analyzing alleged disparate treatment of prospective jurors, we consider whether the jurors in question are in fact similarly situated. *State v. Waring*, 364 N.C. 443, 490–91, 701 S.E.2d 615, 645 (2010). Our Supreme Court held:

> Merely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged does not require finding the reasons were pretextual. A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics.

Porter, 326 N.C. at 501–502, 391 S.E.2d at 153 (quotations omitted). When there are additional factors that distinguish jurors who are excused from those who are not, and the defendant cannot make a showing of pretext, the defendant fails to meet his burden of proving purposeful discrimination. *See State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988).

Here, the two victims and the eyewitness in this case are Palestinian and Defendant is black. The State exercised a peremptory strike against Juror 2, a black male, who was questioned immediately following a third prospective juror, who was also black and seated on the jury. When questioned about his thoughts concerning the death penalty, Juror 2 stated he would not agree with the death penalty under any circumstances, elaborating he was a pastor and agreeing with the death penalty would make him a hypocrite, and that he might hypothetically agree to the death penalty if a defendant chopped someone into pieces and burned them. Our Supreme Court held that "[r]eservations of a juror concerning his or her ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge." *Cummings*, 346 N.C. at 310, 488 S.E.2d at 561.

The State exercised a peremptory strike against Juror 10, a black female. After Defendant raised a *Batson* challenge, the State explained their bases for the strike: Juror 10's thoughts about the death penalty; her failure to disclose past criminal charges; her reservations about whether law enforcement treated her brother fairly; and her lack of eye contact when asked whether her brother's prosecution would affect her ability to be fair and impartial to both sides of the case. Our courts held the aforementioned bases for exercising the peremptory challenge to be racially neutral. *Id.*; *Porter*, 326 N.C. at 499, 391 S.E.2d at 151; *Crummy*, 107 N.C. App at 322, 420 S.E.2d at 457.

The State exercised a peremptory strike against Juror 11, a black male. The State did not strike Juror 12, a white male. Jurors 11 and 12 were charged with writing worthless checks and driving while license revoked in the past, and both knew a potential witness, Mr. Webb. However, this "state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by [the State] were pretextual." *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). As in *Jackson*, there are additional factors distinguish Jurors 11 and 12: Juror 12 responded directly to questions about his criminal charges and Juror 11 minimized his criminal history; Juror 11 avoided questions regarding his family member's criminal charges; and Juror 12 had a business relationship with Mr. Webb, whereas Juror 11 spoke with Mr. Webb on multiple occasions and his great-niece worked for Mr. Webb. 322 N.C. at 257, 368 S.E.2d at 841.

After reviewing the record, it is clear the trial court properly considered the totality of the circumstances, the credibility of the State, and the context of the peremptory strikes against Jurors 2, 10, and 11. *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). Therefore, in light of the record, we hold the trial court did not commit clear error in rejecting Defendant's *Batson* objections.

IV. Conclusion

For the foregoing reasons we hold the trial court did not commit error.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED, DEFENDANT

No. COA16-33

Filed 20 September 2016

Search and Seizure—traffic stop—unlawfully extended

The trial court erred by denying defendant's motion to suppress evidence found during a traffic stop for exceeding the speed limit. Defendant's nervousness and possession of a female dog, dog food, coffee, energy drinks, trash, and air fresheners were not sufficient to give the trooper reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop had concluded.

Judge DILLON dissenting.

Appeal by Defendant from a judgment entered 21 July 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 June 2016.

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

Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

David Michael Reed ("Defendant") filed a motion to suppress evidence found during a traffic stop. On 14 July 2015, Judge Gale Adams entered an order denying Defendant's motion to suppress. On 21 July 2015, Defendant pled guilty, pursuant to a written agreement, to trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. In exchange for his guilty plea, the State agreed to dismiss charges against his co-defendant, consolidate his two trafficking charges for judgment, and stipulate to an active sentence of 70 to 93 months imprisonment with a $100,000.00 fine. The trial court accepted the plea agreement and sentenced Defendant to 70 to 93 months imprisonment and imposed a $100,000.00 fine and $3,494.50 in court costs. Defendant timely entered his notice of appeal and contends the trial

court committed error in denying his motion to suppress. We agree and reverse the trial court.

I. Factual and Procedural Background

At 8:18 a.m. on 9 September 2014, Defendant drove a rented Nissan Altima faster than the posted 65 mph speed limit on Interstate 95 ("I-95") in Johnston County, North Carolina. His fiancée, Usha Peart, rode in the front passenger seat and held a female pit bull in her lap. Trooper John W. Lamm, of the North Carolina State Highway Patrol, was parked in the median of I-95. Trooper Lamm used his radar to determine Defendant was traveling 78 mph, and performed a traffic stop for Defendant's speeding infraction. Trooper Lamm's patrol car had a camera that faced forwards towards the hood of the vehicle, and recorded audio inside and outside of the patrol car.

Defendant pulled over on the right shoulder of I-95, Trooper Lamm pulled behind him, and Trooper Lamm approached the passenger side of the Nissan. Trooper Lamm saw energy drinks, trash, air fresheners, and dog food scattered on the floor of the vehicle. He asked if the dog in Peart's lap was friendly and Defendant and Peart said that the dog was friendly.

Trooper Lamm stuck his arm inside the vehicle to pet the dog and asked Defendant for his driver's license and the rental agreement. Defendant gave Trooper Lamm his New York driver's license, a registration card, and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me" motioning towards his patrol car.

Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Defendant asked Trooper Lamm why the frisk was necessary, and Trooper Lamm replied, "I'm just going to pat you down for weapons because you're going to have a seat with me in the car." Trooper Lamm found a pocket knife, said it was "no big deal," and put it on the hood of the Nissan

Trooper Lamm opened the passenger door of his patrol car. His K-9 was in the back seat of the patrol car at that time. Defendant sat in the front passenger seat with the door open and one leg outside of the car. Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was "scared" to close the door; Lamm replied, "Shut the door. I'm not asking you, I'm telling you to shut the door. I mean you're not trapped, the door [is] unlocked. Last time I checked we were the

good guys." Defendant said, "I'm not saying you're not," and Trooper Lamm said, "You don't know me, don't judge me." Defendant said he was stopped before in North Carolina, but he was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm's orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant's New York license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant about New York, and "where are y'all heading to?" Defendant said he was visiting family in Fayetteville, North Carolina. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company.

Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to "sit tight."

Trooper Lamm approached the front passenger side of the Nissan Altima and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first rental car they had, the Kia Rio, was struck by another car and the rental company gave them the Nissan Altima as a replacement. She could not find the rental agreement for the Nissan Altima and continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would "be on [their] way."

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the Nissan Altima rental, but informed Trooper Lamm that Peart still needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant that his driver's license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket and asked Defendant if he had any questions.

Then, Trooper Lamm told Defendant he was "completely done with the traffic stop," but wanted to ask Defendant additional questions. Defendant did not make an audible response, but at the suppressing hearing, Trooper Lamm testified Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave.

Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan Altima. Defendant responded, "No liquor, no nothing, you can break the car down." Trooper Lamm continued questioning Defendant and said, "I want to search your car, is that okay with you?" Defendant hesitated, mumbled, and told Trooper Lamm to ask Peart. Defendant stated, "I'm just saying, I've got to go to the bathroom, I want to smoke a cigarette, we're real close to getting to the hotel so that we can see our family, like, I don't, I don't see a reason why." Trooper Lamm responded, "[W]ell let me go talk to her then, sit tight," and walked to the front passenger side of the Nissan Altima. By this time, two additional officers were present at the scene.

Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, "No. There's nothing in my car, I mean . . . ." Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan Altima and found cocaine under the back passenger seat.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

Defendant contends the trial court made findings of fact that are not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation."

Further, he contends Trooper Lamm seized him without consent or reasonable suspicion of criminal activity when Trooper Lamm told him to "sit tight" in the patrol car. Defendant contends Trooper Lamm unlawfully seized items from the car during the search, and these items are fruit of the poisonous tree that must be suppressed. After carefully reviewing the record and video footage of the traffic stop, we agree.

On appeal, Defendant challenges the following findings of fact and conclusion of law:

> FINDINGS OF FACT
>
> 11. That the Defendant complied with Trooper Lamm's request[1] to accompany him back to the patrol vehicle where Trooper Lamm told the Defendant, while the Defendant was still outside the vehicle, that he was stopped for speeding, which the Defendant acknowledged stating that he "was running about 84" . . . .
>
> 21. That while Ms. Peart looked for the current rental agreement, which was never found, Trooper Lamm engaged her in casual conversation and learned from her that she was unsure of their travel plans, but believed they were visiting family in "Fayetteville or maybe Tennessee or Georgia. . . ."
>
> 26. That after asking the Defendant if he could search his car, the [D]efendant expressed reluctance before directing Trooper Lamm to ask Ms. Peart since she was the lessee of the vehicle. At which time, Trooper Lamm left the patrol car, asked the Defendant to sit tight, and went to ask Ms. Peart. . . .
>
> CONCLUSIONS OF LAW
>
> 2. That Trooper Lamm was at all times casual and conversational in his words and manner.

"[T]he tolerable duration of police inquires in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *State v. Bedient*, ___ N.C. App. ___, 786 S.E.2d 319, 322 (2016) (quoting *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S.Ct. 1609, 1614 (2015)

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1. Defendant contends the trial court's "determination of [Trooper] Lamm's statement to be a 'request' rather than a command or order is actually a conclusion of law . . . because it requires the exercise of judgment."

(internal citations omitted)). In addition to deciding whether to issue a traffic ticket, a law enforcement officer's "mission" includes "'ordinary inquires incident to the traffic stop.' " *Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615). This inquiry typically includes checking the driver's license, determining if the driver has any outstanding warrants, inspecting the vehicle's registration and proof of insurance, or a rental agreement for a rental car, which is the equivalent of inspecting a vehicle's registration and proof of insurance. *See Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322–23 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615); *See also State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746, 751 (2016), *writ of supersedeas allowed*, 786 S.E.2d 927 (2016).

The trial court held its suppression hearing 1 June 2015 and issued an order denying Defendant's motion to suppress on 10 July 2015. If the trial court had the benefit of this Court's guidance in *Bullock*, ___ N.C. App. ___, 785 S.E.2d 746, it may have ruled in Defendant's favor.

In *Bullock*, this Court examined a fact pattern that is nearly identical to the case *sub judice* and applied the principles of *Rodriguez*, ___ U.S. ___, 135 S.Ct. 1609. In *Bullock*, the defendant sped and followed another vehicle too closely on the highway. *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 747–48. When the officer pulled Bullock over, he asked for Bullock's license and rental agreement. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 748. The rental agreement did not list Bullock's name, though it appeared he wrote his name on the form below the renter's signature. *Id.* The officer saw two cell phones in the car and noticed Bullock's hands were "trembling a little." *Id.* The officer asked Bullock where he was traveling. *Id.* Bullock said he was driving to meet a girl and missed his exit on the highway. *Id.* The officer "asked [Bullock] to step back to his patrol car while he ran [Bullock's] driver's license." *Id.* The officer "shook hands with [Bullock] and told him that he would give him a warning for the traffic violation." *Id.* The officer "then asked if he could briefly search [Bullock] for weapons before he got into his patrol car." *Id.* Bullock "agreed and lifted his arms up in the air . . . ." *Id.* Bullock sat in the front seat of the patrol car as the officer ran his driver's license through a mobile computer. *Id.* The officer's K-9 was in the back seat. *Id.* While the officer and Bullock sat in the front seats, the officer questioned Bullock. *Id.* The officer thought Bullock "looked nervous while he was questioning him . . ." and saw he was "'breathing in and out in his stomach' and not making much eye contact." *Id.* The officer attributed this nervousness "to something other than general anxiety from a routine traffic stop" because he already told Bullock he was going to

issue a warning ticket. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 751. The officer asked Bullock "if there were any weapons or drugs in the car and if he could search the vehicle." *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 748. Bullock consented to the search except for his personal belongings, which included a bag, some clothes, and condoms. *Id.* The officer called for a backup officer and explained he could not search without another officer present. *Id.* While they waited approximately ten minutes for a backup officer to arrive, Bullock asked "what would happen if he did not consent to a search of the car," and the officer stated "he would then deploy his K-9 dog to search the car." *Id.* "At that time, [Bullock] and [the officer] spoke some more about the girl [Bullock] was going to see and other matters unrelated to the traffic stop." *Id.* The backup officer arrived, searched the car, and found 100 bindles of heroin. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 749.

The *Bullock* Court applied the United States Supreme Court's guidance in *Rodriguez* and held the officer could check Bullock's license and rental agreement, but he "was not allowed to 'do so in a way that prolonged the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.' " *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 751 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615). This Court held, "[the officer] completed the mission of the traffic stop when he told [Bullock] that he was giving [Bullock] a warning for the traffic violations as they were standing at the rear of [Bullock's] car." *Id.*

Here, Trooper Lamm's authority to seize Defendant for the speeding infraction ended "when tasks tied to the traffic infraction [were]—*or reasonably should have been*—completed." *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1614 (emphasis added) (citation omitted). At the very latest, this occurred when Trooper Lamm told Defendant he was going to issue a warning ticket and gave him a hard copy of the warning ticket. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. Beyond this identifiable point in time, this Court notes an officer may not delay telling a driver they are going to receive a ticket (or warning ticket), withhold writing or providing a written copy of the ticket (or warning ticket), withhold the driver's license, car registration, rental agreement, or other pertinent documents, in such a way that prolongs "'the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.' " *Id.* (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615).

Prior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop. *See State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) (citations omitted). Historically, the *de minimis* intrusion of asking a driver to exit a vehicle was outweighed

by "the government's 'legitimate and weighty' interest in officer safety . . . ." *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam)). However, "under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 752. Therefore, an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. *See Id.* The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down.[2] It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car's front passenger door, while the officer questions the driver about matters unrelated to the traffic stop. Further, this Court notes officer safety is put at risk an increased number of times when an officer adds additional steps to delay the traffic stop, such as ordering the driver to step out of the vehicle, patting the driver down, having the driver sit in the patrol car, and sitting next to the driver to ask them questions and observe their demeanor.

To detain a driver beyond a traffic stop, an officer must have "reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (citing *Florida v. Royer*, 460 U.S. 491, 497–98 (1983)) (citation omitted). An officer is "required to have reasonable suspicion before asking [a] defendant to go to his patrol vehicle to be questioned." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 753. During a lawful traffic stop, an officer "may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, *when the officer is justified in believing that the individual is armed and presently dangerous*." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 24 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)) (emphasis added).

Here, the trial court found Trooper Lamm had "sufficient reasonable suspicion of criminal activity to continue the traffic stop beyond the speeding enforcement action" for the following reasons:

> a. Defendant was overly nervous for a traffic stop for speeding.

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2. "By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop's mission and the routine checks authorized by *Rodriguez*." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 753 (citing *State v. Castillo*, ___ N.C. App. ___, 787 S.E.2d 48 (2016)).

b. Defendant would not close the patrol car door until ordered to do so, stating that he was "scared to do that" and had one leg out of the door.

c. Defendant gave the Trooper a rental agreement for a different car than he was operating and that car was paid for in cash.

d. Defendant was operating the car outside of the approved area for travel, New York, New Jersey, and Connecticut.

e. He noted the presence of numerous air fresheners in the vehicle.

f. The vehicle had a lived in look showing hard travel, such as, coffee, energy drinks, and trash.

g. The presence of a female dog in the car and dog food scattered throughout the car.

h. The driver and passenger provided inconsistent travel plans.

The trial court's findings do not support its conclusion that Trooper Lamm had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop concluded. The various legal behaviors in the trial court's findings do not amount to a "reasonable articulable suspicion that illegal activity is afoot." *Williams*, 366 N.C. at 116, 726 S.E.2d at 166–67 (citing *Royer*, 460 U.S. at 497–98) (citation omitted). "In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [a suspicious but legal behavior] is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel." *State v. Fields*, 195 N.C. App. 740, 745, 673 S.E.2d 765, 768 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9 (1989)). Reasonable suspicion may arise from "wholly lawful conduct." *Reid v. Georgia*, 448 U.S. 438, (1980) (citing *Terry*, 392 U.S. at 27–28). However, "'the relevant inquiry is . . . the degree of suspicion that attaches to particular types of noncriminal acts.' " *Sokolow*, 490 U.S. at 10 (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 n. 13 (1983)).

Here, Defendant's nervousness is "an appropriate factor to consider," but it must be examined "in light of the totality of the circumstances" because "many people do become nervous when [they are] stopped by an officer . . . ." *State v. McClendon*, 350 N.C. 630, 638, 517

S.E.2d 128, 134 (1999) (citations omitted). The degree of suspicion attached to Defendant's possession of a female dog, dog food, coffee, energy drinks, trash, and air fresheners is minimal, as it is consistent with innocent travel.

Most importantly, the trial court's findings are based upon facts that were discovered after the "tolerable duration" of the speeding stop expired, namely Defendant's nervousness and his fear about closing the front passenger door of the patrol car. *See Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322 (quoting *Rodriguez*, ___ U.S. ___, ___, 135 S.Ct. at 1614). *Rodriguez* clearly changes the law and traffic stop procedures that existed prior to its issuance on 21 April 2015. To affirm the trial court, as the dissent suggests, is to ignore the United States Supreme Court's direction in *Rodriguez*, ___ U.S. ___, 135 S.Ct. 1609.

IV. Conclusion

For the foregoing reasons, we reverse the trial court.

REVERSED.

Chief Judge McGEE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I agree with the State that Judge Adams' findings support a conclusion that Trooper Lamm obtained Defendant's consent to search the rental vehicle *after* the traffic stop had concluded and Defendant was otherwise free to leave, I respectfully dissent.

Assuming, *arguendo*, that Trooper Lamm's exchange with Defendant following the conclusion of the traffic stop was non-consensual and that Defendant's "consent" was coerced, I believe that Trooper Lamm had *reasonable suspicion* of separate, independent criminal activity to support an extension of the traffic stop beyond the time necessary to complete the mission of citing Defendant for the traffic violation.

I. There Was the Consensual Search After Traffic Stop Had Concluded and Defendant Was Free to Leave.

Judge Adams' findings support her conclusion that Trooper Lamm obtained Defendant's voluntary consent after Defendant was otherwise free to leave the scene.

The majority contends that Defendant's consent to search the car was ineffective since Trooper Lamm impermissibly extended the traffic stop in violation of the principles set out in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). *See also Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (holding that a defendant's consent to a search is ineffective to justify the search when the consent is obtained while the defendant is being illegally detained). *Rodriguez* is certainly an important development in Fourth Amendment law, clarifying that even a *de minimis* extension of a traffic stop to investigate matters unrelated to the mission of the traffic stop without reasonable suspicion of separate criminal activity is impermissible. However, this principle in *Rodriguez* is inapplicable here as Trooper Lamm did not extend the traffic stop to question Defendant and then search Defendant's rental vehicle. Rather, Judge Adams' findings show that Trooper Lamm concluded the traffic stop and then obtained Defendant's consent only *after* his exchange with Defendant evolved into a consensual encounter. For the same reasons, our case is distinguishable from our recent decision in *State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746 (2016), which is cited by the majority, where we applied *Rodriguez* to invalidate a search based on the impermissible extension of a traffic stop. *Bullock* did not involve a situation where a traffic stop had concluded and the encounter became consensual.

There is no detention for Fourth Amendment purposes when law enforcement engages with a defendant unless a reasonable person in the defendant's position "would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In the context of a traffic stop, the detention of a motorist is a seizure for Fourth Amendment purposes. However, when the traffic stop is over and the detainee is free to leave, the traffic stop transforms into a consensual encounter: the officer may ask questions, and the detainee can choose to answer them or simply refuse to answer and leave.

Our Court has held on a number of occasions that "[g]enerally, an initial traffic stop concludes and the encounter becomes consensual . . . after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009). *See also State v. Henry*, 237 N.C. App. 311, 324, 765 S.E.2d 94, 104 (2014) (recognizing that "a traffic stop is not terminated until after the officer returns the driver's license or other documents to the driver"); *State v. Cottrell*, 234 N.C. App. 736, 742-43, 760 S.E.2d 274, 279 (2014) (restating the general principle that the return of motorist documentation typically renders any subsequent exchanges between motorist and law enforcement consensual). In *State v. Kincaid*, we recognized that "subject to

a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave." 147 N.C. App. 94, 99, 555 S.E.2d 294, 298 (2001).

Likewise, the Fourth Circuit Court of Appeals has consistently held that a motorist is no longer detained after the officer gives the motorist his or her license and other paperwork, absent some other factor which might indicate restraint. *See, e.g.*, *United States v. Sullivan*, 138 F.3d 126, 133-34 (4th Cir. 1998); *United States v. Whitney*, 391 F. App'x. 277, 280-81 (4th Cir. 2010); *United States v. Meikle*, 407 F.3d 670, 673-74 (4th Cir. 2005).

Here, Judge Adams found that Trooper Lamm did not seek Defendant's consent to search the rental car until *after* returning Defendant's paperwork back to him and informing Defendant that the traffic stop had concluded. There is no finding to suggest any restraint or compulsion by Trooper Lamm when he obtained Defendant's consent to search the rental vehicle. That is, Trooper Lamm did not simply launch into an interrogation after returning to Defendant his license and other paperwork. Rather, Judge Adams found that Trooper Lamm took the extra step of first *asking* Defendant for his consent to question him further. *See Kincaid*, 147 N.C. App. at 102, 555 S.E.2d at 300 (holding in a similar situation when the officer "asked if he could question defendant . . . [,] [he] did not deprive defendant of freedom of action in any significant way. After [the officer] handed back defendant's license and registration, defendant was free to leave and free to refuse to answer questions"). Judge Adams also found that Trooper Lamm "was at all times casual and conversational in his words and manner."[1] *See Sullivan*, 138 F.3d at 133 (finding relevant that "there is no indication that [the officer] employed any physical force or engaged in any outward displays of authority"). Also significant is that the questioning occurred on a public highway during the daytime.

It is true that there is no indication (or finding) that Trooper Lamm ever told Defendant that he "was free to leave." The United States Supreme Court, however, has held that an officer is *not required* to inform a detainee that he is free to leave to transform a traffic stop into a consensual encounter. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (concluding that it would "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may

1. Defendant challenges the finding regarding the casualness of the conversation; however, he does not challenge this finding with regards to any portion of the encounter occurring after Trooper Lamm informed Defendant that the traffic stop was completed.

be deemed voluntary."). The Fourth Circuit has reached this same conclusion. *Sullivan*, 138 F.3d at 133 ("While [the officer] never told [the defendant] that he was free to go, that fact alone is not dispositive.") And our Court has also reached this same conclusion. *Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297 (affirming the trial court's conclusion that the defendant was free to leave "although the officer never told defendant that he was free to leave").

It is also true that Judge Adams found that *after* Defendant gave Trooper Lamm consent to search the rental vehicle (subject to Ms. Peart's consent), Trooper Lamm asked Defendant to "sit tight" in the unlocked patrol car while he returned to the rental vehicle to ask Ms. Peart for her consent, which she gave. Given the context of Trooper Lamm's request that Defendant "sit tight," I believe that a reasonable person in Defendant's position would have still felt that he could have withdrawn his consent and terminated the encounter.[2] Trooper Lamm only "asked" Defendant to sit tight and only did so *after* Defendant had already given his consent and *after* Defendant "direct[ed] Trooper Lamm to ask Ms. Peart" for her consent.[3]

In conclusion, I believe that Defendant gave consent to search the car after the traffic stop concluded and the encounter between Defendant and Trooper Lamm became consensual. Therefore, I would affirm Judge Adams' order.

II. Trooper Lamm Otherwise Had Reasonable Suspicion to Extend the Stop.

Assuming, *arguendo*, that the traffic stop did not become consensual after Trooper Lamm returned all of the paperwork to Defendant, informed Defendant that the traffic stop had concluded, and asked Defendant for his consent to question him further, I believe that Judge Adams' findings support her conclusion that Trooper Lamm had reasonable suspicion that Defendant was transporting illegal drugs.

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2. By this point, another officer was on the scene who remained with Defendant while Trooper Lamm sought Ms. Peart's consent to search the vehicle. Defendant could have simply told this other officer that he was withdrawing his consent and that he was going to leave.

3. Defendant does not make any argument concerning whether *Ms. Peart* would not have felt free to leave when *she* gave *her* consent to search the vehicle or any argument about the impact the validity of Ms. Peart's consent should have on our analysis in this prosecution of Defendant. Therefore, any issue concerning Ms. Peart's consent is not before us.

The majority likens this case to our recent decision in *Bullock*, which applied *Rodriguez* and held that a traffic stop cannot be extended beyond the time necessary to complete the mission of the traffic stop (issuing the citation, processing tags, reviewing driver's license information, etc.), without reasonable suspicion of some other crime being afoot. *Bullock* , ___ N.C. App. at ___, 785 S.E.2d at 752. Admittedly, there are similarities between the facts in *Bullock* and Judge Adams' findings in the present case. Specifically, in *Bullock*, our Court determined that the defendant's presence on a busy interstate typically used for drug trafficking, the defendant's unauthorized operation of a rental vehicle,[4] the defendant's nervous behavior, and the defendant's statement that he had missed an exit to explain his erratic driving did not give rise to a "particularized suspicion of criminal activity" permitting extension of the traffic stop to conduct a frisk of the defendant. *Id.* at ___, 785 S.E.2d at 753-56. In reaching its conclusion, our Court relied on the Fourth Circuit's acknowledgment that:

> [T]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion. On the other hand, the articulated innocent factors collectively *must serve to eliminate a substantial portion of innocent travelers* before the requirement of reasonable suspicion will be satisfied.

Id. at ___, 785 S.E.2d at 754 (quoting *U.S. v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011)) (emphasis added) (internal citations and marks omitted).

Judge Adams found additional facts which, I believe, distinguish this case from *Bullock*. For instance, the trial court found that the following events occurred before Trooper Lamm committed any act which could arguably be related to the traffic stop:

> 6. Trooper Lamm observed a female in the front passenger seat holding an adult female pit bull dog and defendant in driver's seat.
>
> 7. Trooper Lamm noticed the presence of . . . dog food scattered throughout the interior of the vehicle.
>
> 8. Trooper Lamm knew that the presence of a female dog and dog food are sometimes used to distract a male canine during a dog sniff.

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4. The rental agreement in the present case only allowed the vehicle to be driven in New York, New Jersey, and Connecticut.

> 9. Trooper Lamm noticed several air fresheners which Trooper knew are sometimes used to mask the odor of a controlled substance.

Indeed, in *Digiovanni*, which was relied upon by our Court in *Bullock*, the Fourth Circuit opined that the presence of air fresheners would have had an impact on their determination that no reasonable suspicion existed to extend the stop. *Digiovanni*, 650 F.3d at 513. I believe that these additional findings were sufficient to "eliminate a substantial portion of innocent drivers," *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 754, and supported the conclusion that Trooper Lamm had reasonable suspicion that criminal activity was afoot to justify an extension of the traffic stop. *See State v. Warren*, ___ N.C. App.___, ___, 775 S.E.2d 362, 365-66 (2015) (holding that *Rodriguez* was not violated and that there was reasonable suspicion to conduct a dog sniff search).

STATE OF NORTH CAROLINA
v.
ANTHONY MAURICE ROBINSON, DEFENDANT

No. COA15-1358

Filed 20 September 2016

1. Appeal and Error—notice of appeal—timely but imperfect—writ of certiorari

Defendant's petition for writ of certiorari to review his prior record calculation and a Satellite Based Monitoring Order was granted where his written notice of appeal was timely but imperfect. Defendant had a statutory right to appeal both issues and the petition for writ of certiorari was granted in the interest of justice.

2. Sentencing—prior record level—Michigan offense—prior record level

The trial court did not err by sentencing defendant as a record level IV offender where a Michigan felony made the difference between a record level III and IV. Neither the State nor defendant attempted to prove at trial that the Michigan conviction was substantially similar to a North Carolina felony or misdemeanor, and defendant argued on appeal that the worksheet did not clearly show that the Michigan conviction was a felony in Michigan. However, defendant stipulated to the Michigan conviction and its

classification at the default level of a Class I felony, both on his worksheet and during his plea agreement, and the stipulation and his agreement were effective and binding.

3. Sentencing—boxes checked on form—clerical error

The trial court's error in checking an additional, inapplicable, box on the form for the sex offender registry and Satellite Based Monitoring when sentencing defendant for attempted statutory rape and other offenses. The error was merely clerical, to be corrected on remand.

On writ of certiorari to review judgments entered on or about 6 July 2015 by Judge Jeffrey P. Hunt in Superior Court, Burke County. Heard in the Court of Appeals 26 April 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.

Hollers & Atkinson, by Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

Defendant Anthony Maurice Robinson appeals from the judgments entered on his plea of guilty to one count of attempted statutory rape consolidated with one count of attempted statutory sex offense and one count of indecent liberties with a minor child. Defendant contends that the trial court erred in sentencing him as a prior record level IV offender and in finding that he had been convicted of an offense against a minor as a basis for imposing its sex offender registry and satellite-based monitoring orders. Defendant seeks the judgments against him to be vacated and remanded for new hearings. We affirm in part and remand in part to the trial court for the correction of clerical errors.

I. Background

On 6 July 2015, defendant pled guilty pursuant to a plea agreement to one count of attempted statutory rape consolidated with one count of attempted statutory sex offense and one count of indecent liberties with a minor child. The State provided a factual summary to the court noting that defendant, age 39 at the time, and Rachel,[1] age 13 at the time,

1. A pseudonym is used to protect the identity of the minor child.

met through a mutual friend in December 2011. The two began a sexual relationship, in which they engaged in multiple instances and various forms of sexual contact over two months. This relationship continued until February 2012, when Rachel's mother discovered text messages between Rachel and defendant on Rachel's phone as well as a letter from Rachel to defendant expressing her love for him and desire to bear his child.

Defendant stipulated to a prior record level worksheet presented by the State which listed defendant's prior convictions in North Carolina. The worksheet showed a total of 11 points, including 9 points from North Carolina convictions and 2 points for a Michigan conviction, so defendant was a prior record level IV offender for sentencing purposes. During his plea colloquy, defendant again stipulated to the calculation and his status as a prior record level IV offender.

The trial court sentenced defendant in the presumptive range to consecutive terms, a minimum of 190 and a maximum of 288 months imprisonment for the consolidated attempted statutory rape and sex offense charges, followed by a minimum of 20 months and a maximum of 33 months imprisonment for the charge of indecent liberties with a minor child. Defendant was further ordered upon release to register as a sex offender and to enroll in satellite based monitoring ("SBM"), both for the remainder of his natural life.

On or about 13 July 2015, defendant filed a *pro se* written notice of appeal, but defendant's notice failed to designate the judgment or order from or the court to which the appeal was taken, failed to provide certificate of service on the State, and was not signed by defendant. On 27 January 2016, defendant filed a petition for writ of certiorari seeking review of his prior record level calculation for sentencing purposes and the judgment committing him to sex offender registry and SBM for the rest of his natural life.

II. Right to Appeal

[1] We must first determine whether defendant has a right to appeal his prior record level calculation or the SBM order. " 'A defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings.' " *State v. Singleton*, 201 N.C. App. 620, 623, 689 S.E.2d 562, 564 (2010)(quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)) (brackets omitted). N.C. Gen. Stat. § 15A-1444(a2)(1) (2015) provides, in pertinent part:

> (a2) A defendant who has entered a plea of guilty . . . to a felony . . . in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> > (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21.

A plea of guilty to a felony does not extinguish a defendant's right to appeal, but that right "is not without limitations." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). "If a defendant who has pled guilty does not raise the specific issues enumerated in subsection (a2) and does not otherwise have a right to appeal, his appeal should be dismissed." *Id.*

Here, defendant pled guilty to the charged offenses pursuant to a plea arrangement. Yet defendant does not seek to appeal his guilty plea but rather he seeks review of his prior record level calculation and sentencing based upon that calculation. Defendant gave timely, though imperfect, written notice of appeal. He then filed a petition for certiorari, which we address below. But defendant did have a right to appeal his prior record level calculation pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) despite his guilty plea since defendant contends that his prior record level was calculated erroneously. *See State v. Mungo*, 213 N.C. App. 400, 403-04, 713 S.E.2d 542, 544-45 (2011) (holding the defendant had a right to appeal the calculation of his prior record level pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1)).

Regarding defendant's right to appeal the trial court's SBM order, this Court has held that such "proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (quotation marks and brackets omitted). "As the SBM order is a final judgment from the superior court, we hold that this Court has jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27." *Singleton*, 201 N.C. App. at 626, 689 S.E.2d at 566. Defendant seeks to appeal the trial court's SBM order against him because he contends that the order was based on an erroneous finding. Despite the fact that defendant pled guilty, we recognize, as we did in *Singleton*, defendant's right to appeal the trial court's SBM order pursuant to N.C. Gen. Stat. § 7A-27 (2015).

"[T]his Court has generally granted *certiorari* under N.C.R. App. P. 21(a)(1) when a defendant has pled guilty but lost the right to appeal the calculation of [his] prior record level through failure to give proper

oral or written notice." *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013). Furthermore, this Court has recognized the right of a defendant to appeal from an SBM order and granted certiorari when a defendant failed to give proper notice of appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. *Brooks*, 204 N.C. App. at 195, 693 S.E.2d at 206 ("N.C.R. App. P. 3(a) requires that a party file notice of appeal with the clerk of superior court and serve copies thereof upon all other parties." (Quotation marks and brackets omitted)).

Defendant's failure to file proper notice of appeal would necessitate the dismissal of his appeal despite this Court's recognition of defendant's right to appeal in this matter. Therefore, "[i]n the interest of justice, and to expedite the decision in the public interest," we grant defendant's petition for writ of certiorari and address the merits of both issues on appeal. *Brooks*, 204 N.C. App. at 195, 693 S.E.2d at 206.

II. Prior Record Level

[2] Defendant first argues that the trial court erred by sentencing him as a prior record level IV offender since the State failed to provide information to the trial court as to whether defendant's prior Michigan conviction for failure to register as a sex offender was classified as a felony or a misdemeanor in Michigan or if it was substantially similar to a North Carolina felony. Had the Michigan conviction not been counted as a Class I felony, defendant would have been considered a prior record level III offender with nine prior record level points for sentencing purposes. Defendant claims the trial court erred and requests his case be remanded for resentencing. We disagree.

> We review the calculation of an offender's prior record level as a conclusion of law that is subject to *de novo* review on appeal. It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review.

Mungo, 213 N.C. App. at 404, 713 S.E.2d at 545 (quotation marks and brackets omitted).

When considering convictions from other jurisdictions for calculation of a defendant's prior record level, the trial court must consider them as follows:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina

> is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2015).

Neither the State nor defendant proved or attempted to prove that the Michigan conviction was substantially similar to a North Carolina felony or misdemeanor, respectively, and neither brief attempts to argue that point. The State did not seek to prove that the Michigan conviction was substantially similar to a North Carolina felony of a higher class in defendant's prior record level calculation. Thus, the State chose to use the prior Michigan conviction at the default level as a Class I felony for the purpose of calculating defendant's prior record level. Therefore, we only review whether the trial court erred in calculating defendant's prior record level in considering the Michigan conviction as a Class I felony.

Defendant's argument arises entirely from the way that the Michigan crime is listed on the worksheet. The worksheet includes a typed list of 15 North Carolina convictions, with all but one identified in the last column of the list -- entitled "Class" -- as either F, A1m, 2m, 3m, 1t, or 2t.[2] These abbreviations indicate the class of the offense, respectively:

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2. Defendant's record level was calculated on the standard form entitled "Worksheet Prior Record Level for Felony Sentencing and Prior Conviction Level for Misdemeanor Sentencing," Form AOC-CR-600, Rev. 4/11.

felony; misdemeanor class A1, 2, or 3; and misdemeanor class 1 or 2 under Chapter 20 (traffic offenses). N.C. Gen. Stat. § 15A-1340.21(b) (2015). Only the Michigan conviction is handwritten on the form, described as follows:

Source code	Offenses	File No.	Date of Conviction	County (name of State if not NC)	Class
	Failure to Register -- Sex Offender	6207711-FH	5-12-06	Oakland Co., MI	I

The appropriate number of points are assigned to each offense as listed on the worksheet, treating the Michigan offense at issue as a Class I felony.

Defendant argues that since the worksheet does not clearly show that his Michigan conviction is classified as a felony in Michigan, "[t]his leaves us with a stipulation to imprecise facts beyond the existence of the conviction and the name of the offense, which does not explicitly state its category as felony or misdemeanor." The State did not present any evidence regarding the Michigan conviction or its classification in Michigan. The State argues that the Michigan conviction was clearly identified on the worksheet and was classified as "I," which is the default classification for an out-of-state felony conviction.

In addition, the State points out that a defendant can stipulate to whether an out-of-state conviction is a felony or misdemeanor, although he cannot stipulate to whether the conviction is "substantially similar" to a North Carolina felony classified above Class I.

> According to the statute, the default classification for out-of-state felony convictions is Class I. Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony. . . . However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I

> felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes.
>
> Thus, while the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

State v. Bohler, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009) (citations, quotation marks, and brackets omitted).

This Court has noted that "[w]hile we recognize that a prior record level worksheet alone is insufficient to prove the *existence* of a prior conviction, . . . it is the *classification*, rather than the mere existence, of the [out-of-state] conviction that is at issue in the instance case." *State v. Threadgill*, 227 N.C. App. 175, 179, 741 S.E.2d 677, 680 (2013), *cert. denied*, __ U.S. __, 187 L. Ed. 2d 821, 134 S. Ct. 961 (2014). In *Threadgill*, this Court concluded that the defendant's silence "regarding the worksheet's classification of the [out-of-state] conviction as a Class I felony constituted a stipulation with respect to that classification." *Id.* at 180, 741 S.E.2d at 681. *See also State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) ("Likewise, we hold that the statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet. We also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist.").

Here, the plea colloquy shows that defendant similarly raised no questions or objections regarding the information listed on the worksheet and that he stipulated to the record level as calculated on it:

> THE COURT: All right, then we have an agreement of a prior record level of IV; is that right?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [THE STATE]: Yes, sir.

In *State v. Edgar*, __ N.C. App. __, 777 S.E.2d 766 (2015), we held that the trial court may accept a stipulation that an out-of-state offense is classified as a misdemeanor or a felony:

> "[W]hile [the] trial court may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction."

Id. at __, 777 S.E.2d at 769-70 (quoting *Bohler*, 198 N.C. App. at 637-38, 681 S.E.2d at 806). A stipulation to a defendant's prior out-of-state conviction being classified as the default Class I felony, as opposed to a stipulation as to the similarity of his Michigan offense to a North Carolina offense, does not implicate a question of law. *Id.* at __, 777 S.E.2d at 769.

Although the worksheet did not specifically classify the Michigan conviction as a "felony," the classification of "I" clearly showed that defendant was stipulating that the conviction was in fact a felony which would be classified at the default level. Under these facts, defense counsel's statements can "reasonably be construed as a stipulation" to the prior convictions listed on his worksheet. *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. Because defendant stipulated to the Michigan conviction and its classification as a Class I felony, both on the worksheet and during his plea, the "stipulation as to his prior record level and his agreement to the sentence imposed in his plea arrangement were effective and binding." *Edgar*, __ N.C. App. at __, 777 S.E.2d at 770. This argument is without merit.

III. Sex Offender Registry and Satellite Based Monitoring

[3] Defendant next argues that the trial court erred in finding that defendant had been convicted of an offense against a minor and requests that this Court vacate and remand the sex offender registry and SBM orders due to this erroneous finding.

In SBM cases, " 'we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *Singleton*, 201 N.C. App. at 626, 689 S.E.2d at 566 (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (brackets omitted)).

The issue before this Court concerns a clerical error that occurred when the trial court filled out the form orders pertaining to both sex offender registry and SBM. The State essentially conceded the existence

of this error but argues that the error is harmless since defendant would still be required to register as a sex offender and enroll in SBM even without the erroneous findings.

This Court has previously recognized that

> in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating a clerical error which can be corrected upon remand. 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. A clerical error has been defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.

State v. May, 207 N.C. App. 260, 262-63, 700 S.E.2d 42, 44 (2010) (citations, quotation marks, and brackets omitted).

In *May*, the trial court mistakenly checked Box 1(a) instead of Box 1(b) under the findings of fact section of the SBM order. *Id.* at 262, 700 S.E.2d at 44. Although the trial judge noticed the mistake during the hearing and called attention to its need for correction, the filed order in the record on appeal still contained the erroneously checked Box 1(a) and unchecked Box 1(b). *Id.* We held that such error was "clerical in nature[.]" *Id.* at 263, 700 S.E.2d at 44. Because the defendant admitted "that he pled guilty to one count of taking indecent liberties with a child, which he concedes is a 'sexually violent offense,' [this Court remanded] this matter to the trial court for limited purpose of correcting the clerical error[.]" *Id.*

Here, the trial court's findings for both the sex offender registry and SBM orders included checked boxes for Box 1(b) -- that defendant had been convicted of "a sexually violent offense under G.S. 14-208.6(5)"; Box 3 -- that defendant is a recidivist; and Box 5 -- that the offenses "did involve the physical, mental, or sexual abuse of a minor." However, the form orders also included the checked box for Box 1(a), finding that defendant had been convicted of "an offense against a minor under G.S. 14-208.6(1m)," which only applies to kidnapping, abduction of children, and felonious restraint.

Although the trial court did mistakenly find that defendant had been convicted of an offense against a minor, such error merely amounts to a

clerical error. Because defendant admits that he pled guilty to attempted statutory rape and indecent liberties with a minor child and does not contest that those offenses are not, in fact, reportable sexually violent offenses, and because we find that the mistake in the trial court's order amounts only to clerical error, we, therefore, "remand this matter to the trial court for the limited purpose of correcting the clerical error[s]." *May*, 207 N.C. App. at 263, 700 S.E.2d at 44.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in calculating defendant's prior record level. Furthermore, the trial court's mistakes on the judgment forms for the sex offender registry and SBM orders amount only to clerical errors which may easily be corrected on remand.

AFFIRMED IN PART AND REMANDED IN PART.

Judges BRYANT and DIETZ concur.

DALE THOMAS WINKLER AND DJ'S HEATING SERVICE, PETITIONERS
v.
STATE BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLERS CONTRACTORS, RESPONDENT

No. COA15-1257

Filed 20 September 2016

Licensing Boards—disciplinary action—plumbing, heating, and fire sprinklers contractors—jurisdiction—HVAC system—pool heater—exhaust system

Although respondent Board's finding that petitioner Winkler was not qualified to install an HVAC system in a hotel was affirmed, the Board lacked jurisdiction to impose discipline regarding his inspection of the pool heater and exhaust system, which was ultimately the primary basis of the disciplinary provisions of the Board's order. The case was reversed and remanded for entry of a new order with sanctions solely based on Winkler's planned installation of the HVAC system.

WINKLER v. STATE BD. OF EXAM'RS OF PLUMBING, HEATING & FIRE SPRINKLERS CONTRACTORS

[249 N.C. App. 578 (2016)]

Appeal by petitioners from order entered 22 June 2015 by Judge Jeff Hunt in Watauga County Superior Court. Heard in the Court of Appeals 12 April 2016.

Bailey & Dixon, L.L.P., by Jeffrey P. Gray, for petitioners-appellants.

Young Moore & Henderson, P.A., by Angela Farag Craddock, John N. Fountain, and Reed N. Fountain, for respondent-appellee.

STROUD, Judge.

Petitioners Dale Thomas Winkler and DJ's Hearing Service ("Winkler"[1]) appeal from the trial court's order affirming respondent State Board of Examiners of Plumbing, Heating, and Fire Sprinklers Contractors (the "Board")'s order revoking Winkler's license. This case arises out of a series of failures by many different people to prevent or discover the source of a deadly leak of carbon monoxide into a hotel room at a Best Western Hotel in Boone, North Carolina, until after three people had died and one was injured by the carbon monoxide leak. But the question presented to this Court is not who is responsible for these tragedies. Our question is simply whether the Board had jurisdiction and authority to impose disciplinary action upon Winkler for the work he performed at the hotel. Based upon the applicable statutes and regulations, we find that the Board did not have jurisdiction over Winkler's inspection of the pool heater and exhaust system, although it did have jurisdiction over the later planned installation of an HVAC system in another part of the hotel. Because the discipline imposed was tailored to address the pool heater issue instead of the HVAC installation issue, we reverse and remand for entry of a new order with sanctions based solely upon Winkler's planned installation of an HVAC system which was not within his license.

I. Background

The basic facts regarding the relevant events at the Best Western Hotel in Boone are not in dispute. The hotel was managed by Appalachian Hospitality Management (the "hotel management"). Sometime in 2011, the hotel maintenance staff "replaced a propane gas pool heater with

1. Although Mr. Winkler appeals in both his individual capacity and through his business, DJ's Heating Service, for ease of reading, we refer to petitioners simply as "Winkler" throughout this opinion.

a used propane gas pool heater" which had previously been used "at another hotel managed by Appalachian Hospitality Management." In February 2012, the replacement propane pool heater "was converted from propane gas to natural gas [by] Independence Oil and Gas." The converted heater was permitted and inspected by "the local Authority Having Jurisdiction," the Town of Boone. The pool heater was in "an equipment room adjacent to the pool."

Over a year after the conversion of the heater to propane gas, the hotel maintenance staff was concerned the pool heater was "not functioning or the pilot light would not light." On or about 13 April 2013, the hotel management's maintenance staff asked Winkler, who was operating his business at the time as DJ's Heating Service, "to examine the pool heater and get it running." Mr. Winkler was licensed by the Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors with a "Heating Group 3 Class II (H-3-II)" license which is "limited to HVAC work on detached residential structures." The Board also issues a different level of license, H-3-I, which covers "all H-3 systems regardless of location unless the combined systems at the site exceed 15 tons." Mr. Winkler's employment history and experience before going into business as DJ's Heating Service included service and installation of HVAC systems. He had also been employed "by a propane gas company where he was actively involved in service on gas lines and setting tanks for propane fuel." Some members of the maintenance staff at the hotel knew Mr. Winkler because he had done some work on their residential properties.

Exactly what Mr. Winkler was asked to do, and what he did, on 13 April 2013 is crucial to the determination of jurisdiction in this case, so we will focus on these facts. The Board found as follows:

> 10. On or about April 13, 2013, [Winkler] examined the heater, and found that the gas supply had been cut off. Along with the Best Western Motel maintenance staff, [Winkler] cut the fuel on, and put the pool heater in operation. [Winkler] did not examine or inspect the exhaust or venting system for the pool heater at that time, and was not asked to do so.

In his testimony before the Board, Mr. Winkler described what he did that day as follows:

> [T]he only thing we done was [sic] broke the union loose. Verified the unit did not have any gas. Let maintenance know that. They went searching for the reason, being they

> are the ones that said gas was turned off in the ceiling. They turned the gas back on. We verified the pool heater had gas. Checked for leak. They lit the pool heater back. We left.

Testimony of various hotel employees was consistent with Mr. Winkler's description of what he did that day. Thus, in short, the pool heater was not working because the gas was not turned on; they turned the gas back on and relit the pool heater. It is not entirely clear from either the evidence or findings whether Mr. Winkler personally turned the gas to the heater back on or the hotel maintenance staff did, but either way, no physical change was made to the pool heater other than turning the gas back on and lighting the heater. No parts were removed or installed. No one knew why the gas had been cut off. The hotel maintenance staff did not ask Mr. Winkler to "examine or inspect the exhaust or venting system" that day and he did not do so.

Three days later, two people died in Room 225, which was "above the pool equipment room."

> 11. On April 16, 2013, Daryl Jenkins and Shirley Jenkins rented Room 225 at the Best Western Motel, which room was located above the pool equipment room where the pool heater was located.
>
> 12. On April 16, 2013, Daryl Jenkins and Shirley Jenkins died in Room 225. Autopsies were performed on Daryl Jenkins and Shirley Jenkins shortly thereafter and blood samples were submitted for a toxicology report.

Carbon monoxide poisoning was not immediately identified -- or even suspected -- when Mr. and Mrs. Jenkins died, by either the emergency medical personnel who responded or by the fire department for the Town of Boone, which assisted on the call, or by the hotel maintenance staff, or by the police department. Despite the simultaneous deaths of the husband and wife, everyone involved believed the deaths to be from "natural causes." But apparently the possibility of a gas leak may have occurred to the hotel owner, Mr. Mallatere, because he closed the room and asked that the gas fireplace in Room 225 be checked.

About three or four days after the Jenkins' deaths in Room 225, the hotel maintenance staff again called Mr. Winkler, this time to check for gas leaks to the fireplace in the room; he found none. After this, Mr. Malaterre asked the maintenance staff to have Mr. Winkler come back to the hotel again to check the venting from the pool heater. Mr. Winkler

came a few days later to check the exhaust from the pool heater, and he and the hotel maintenance manager confirmed that it was venting. Mr. Winkler also advised the hotel maintenance staff that he did not have equipment to check for carbon monoxide leaks but gave them the name of a company which would have the proper equipment to do carbon monoxide testing. No one called that company to have the room checked for carbon monoxide.

Room 225 remained closed for several more weeks, until 31 May 2013, not because of any problem with the room, but "just out of respect" due to the death of Mr. and Mrs. Jenkins there, according to the assistant general manager. The next day, on 1 June 2013, the toxicology report for the Jenkins was completed and "[a] lethal concentration of carbon monoxide" was found in their blood. But the results of the toxicology tests were not immediately provided to the hotel maintenance staff or the Board.

Still unaware of the results of the Jenkins' toxicology test results, on 8 June 2013, the hotel rented Room 225. Jeffrey Williams, a minor, and his mother stayed there. Jeffrey died and his mother was injured. When the fire department responded to this second call for a death in Room 225, they "immediately called for a rescue truck which carried [the carbon monoxide] monitoring equipment at the time, and . . . that's when we got some positive hits on the monitor." Due to the positive carbon monoxide readings, the fire department "isolated a much larger area than what we had, and called for one of the Hazmat teams" from Asheville, and "secured the building overnight." At this point, a variety of inspectors descended upon the hotel building, doing many tests and inspections and ultimately determining that carbon monoxide was coming from the pool heater into Room 225. Carbon monoxide was leaking from the pool heater in the equipment room, up through the wall into Room 225 above, and was venting from the pipe that ended on the outer wall of the hotel just below the intake for the air conditioner for Room 225. Toxicology reports regarding Jeffrey and his mother confirmed that "[e]xcessive amounts of carbon monoxide were found in their blood."

Unrelated to the pool heater issues, during the period from 4 June 2013 to 7 June 2013, the hotel maintenance staff also called Mr. Winkler "regarding the HVAC systems servicing the breakfast area, the lobby area and the laundry room" because they "were not operating properly." Mr. Winkler determined that "one system needed a relay, another needed a blower or fan motor and a third needed replacement." The hotel ordered the parts, and Mr. Winkler was to "install or repair the systems when the

equipment arrived." After installing the new equipment, the breakfast area system still did not work, so a "complete replacement was then ordered. The new equipment arrived, addressed to [Winkler] at the Best Western, on June 7, 2013." Mr. Winkler was to install the new equipment, but

> Upon his arrival at the Best Western on June 8, 2013, . . . Winkler observed the yellow tape placed around the scene by the police. [Winkler] then informed the maintenance staff that he (Winkler) should not be present, and stated that he had previously told hotel staff he did not have a commercial license. The maintenance staff denied [Winkler] made such prior statement."

The Board noted that Winkler's license did not qualify him to "contract, install or replace HVAC installations at the Best Western Motel" because it is "not a single family residential structure" and "[t]he aggregate tonnage" of the equipment at the hotel "was far in excess of the 15 ton limitation of any H-3 license, let alone an H-3-II license."

The investigations of the source of the carbon monoxide in Room 225 that followed the third death in the room found an egregious series of errors, going all the way back to the initial installation of the pool heater in 2011. The Board's order in this case identified the following deficiencies, listed here in roughly chronological order:

1. The manufacturer of the replacement pool heater installed by the hotel maintenance staff in 2011 "specified that the equipment not be converted from propane to natural gas."

2. Room 225 had a "combustible gas detector and alarm which had been located near the floor as appropriate for a facility using propane. An occupied structure using natural gas should locate such devices near the ceiling, as natural gas is lighter than air. This device would not detect CO in either location."

3. The pool heater was a "natural draft appliance" which is "required to be vented or exhausted either by a flue extending higher than the roof, or by the use of a forced draft system or power venter."

4. "The non-functioning power venter was rated at approximately 75000 BTU capacity while the pool heater which had been substituted at the Best Western had a capacity of 250,000 BTU's as reflected on the equipment label. Even when functioning, such a power venter was unlikely to exhaust all the harmful gasses."

5. The pool equipment room where the pool heater was located "also contained standard pool chemicals, which . . . were highly corrosive to metal, such as the venting pipes from the pool heater to the exterior of the building, and corrosive air and gasses were being drawn into and through the pool heater and exhaust flue. Evidence of corrosion was visible without the use of any equipment."

6. "In plain sight near the pool heater were a group of wires hanging in the air not connected to the pool heater but terminated with wire nuts. The wires were intended to supply power for a power venter which had been disconnected, likely well before [Winkler's] arrival."

7. "[T]he pool heater was utilizing a side wall to connect the vent pipe to the exterior of the Motel but no power venter was functioning; in addition, the rise of the slope of the flue pipe did not comply with the State Mechanical Code."

8. Despite the improper conversion from propane to natural gas and other deficiencies, including its location in the equipment room and lack of proper venting, the replacement pool heater was permitted and passed inspection by the Town of Boone.

9. Someone "had installed or altered penetrations of the fire-rated walls without adequate firestopping, eventually allowing products of combustion to travel into and through a stud cavity and enter room 225."

10. "[T]he vent pipe for the pool heater had multiple holes in both the double wall and the improperly used single wall vent pipe as a result of extensive corrosion." This corrosion had "developed and existed over a substantial period of time."

On or about 24 January 2014, the Board filed a Notice of Hearing instituting disciplinary action against Winkler, alleging violations of N.C. Gen. Stat. § 87-23(a) arising out of Mr. Winkler's "service call[s]" to the hotel (1) on or about 13 April 2013 regarding the pool heater; (2) in "late April or early May" 2013 regarding venting of the pool heater; and (3) from 4 June 2013 to 7 June 2013 regarding the HVAC system in the breakfast area. On or about 9 May 2014, Winkler moved to dismiss the Notice of Hearing, alleging that the Board did not have jurisdiction over his actions arising out of the inspection or evaluation of the pool heater because "[t]he Board's enabling statute, Article 2 of the Chapter 87 of the General Statutes, only contemplates 'installation,' or possibly

an intent to install, such as contracting to install without a license of [sic] the appropriate license."

On 13 May 2014, the Board held a hearing "to determine whether to revoke or suspend the license of [Winkler] on grounds of violation of G.S. 87-23(a) which provides that the Board may revoke or suspend the license of any plumbing, heating or fire sprinkler contractor who fails to comply with any provision or requirement of Chapter 87, Article 2, or for gross negligence, incompetence, or misconduct in the practice of or in carrying on the business of either a plumbing, heating or fire sprinkler contractor[.]" The Board issued its order on 10 June 2014, denying Winkler's motion to dismiss and imposing various sanctions upon Winkler, including suspension of his license for one year and imposing requirements during that year to "enroll in, attend and complete" several "courses intended to remedy the deficiencies in knowledge revealed by this order," as well as other requirements. Winkler's failure to complete all of the courses and other requirements would result in permanent revocation of his license.

On 25 July 2014, Winkler filed a petition for judicial review and stay of decision and order with the Superior Court of Watauga County, for review under N.C. Gen. Stat. § 150B-43 *et seq.* and N.C. Gen. Stat. § 87-23(a). The superior court stayed the Board's order pending review. Winkler's appeal was heard on 20 April 2015, and the superior court entered its order affirming the Board's decision on 22 June 2015. In the order, the court noted that its standard of review was "dictated by the issues presented[,]" citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002). The superior court engaged in *de novo* review of whether the Board violated "subsections G.S. 150B-51(b)(1), (2), (3), or (4) of the APA," and "[w]here the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), the reviewing court applies the "whole record test.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004) (citation omitted). The order concluded that upon whole record review of "each Finding of Fact contained in the Order entered by the Board," "each Finding of Fact is supported by substantial evidence contained in the Record" and that the Board's "Conclusions of Law are supported by the Finding[s] of Fact[.]" The court also addressed Winkler's motion to dismiss for lack of jurisdiction under N.C. Gen. Stat. § 87-21, and using *de novo* review, concluded that

> the acts and omissions of [Winkler] fell within the statutory authority of the Board to regulate and discipline

> [Winkler]. The Court also notes [Winkler was] involved in activities beyond simply the acts and omissions relating to the pool heater.

The superior court thus denied Winkler's motion to dismiss for lack of jurisdiction, affirmed the Board's order, and dissolved the stay issued during the pendency of the appeal. On 1 July 2015, Winkler gave notice of appeal from the order. The trial court granted Winkler's motion for stay of the Board's decision and order pending review by this Court.

II. Standard of Review

The standard of review on appeal to this Court depends upon the issue presented.

> On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. Reversal or modification of the agency's final decision is permitted only when the reviewing court determines a petitioner's substantial rights may have been prejudiced as a result of the agency's findings, inferences, conclusions, or decisions being:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious, or an abuse of discretion.
>
> The first four grounds are "law-based" inquiries warranting *de novo* review. The latter two grounds are "fact-based" inquiries warranting review under the whole-record test. Under *de novo* review, a court considers the matter anew and freely substitutes its own judgment for the agency's. Under the whole-record test, a court examines all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to

> support them -- to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 120-21, 619 S.E.2d 862, 863-64 (2005), *aff'd per curiam*, 360 N.C. 396, 627 S.E.2d 462 (2006) (citations, quotation marks, and brackets omitted).

III. Disciplinary Jurisdiction

Winkler's first argument on appeal is that "[t]he trial court erred as a matter of law by rejecting the N.C. Supreme Court's opinion in [*Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 498 S.E.2d 616 (1998),] and thereby concluding the Board was not in excess of its statutory authority and jurisdiction and its action was not based on unlawful procedure." Winkler contends that "the Board lacks jurisdiction over the activity of a licensee that does not amount to an 'installation,' and was a mere inspection, evaluation or equipment check." Winkler challenges the Board's jurisdiction under N.C. Gen. Stat. Chapter 87, Article 2 as a matter of law. Because this argument presents a legal question, we review it *de novo*. *Trayford*, 174 N.C. App. at 121, 619 S.E.2d at 864. For purposes of this argument, we will assume that the Board's findings of fact were supported by substantial evidence.

Winkler's jurisdictional argument is based primarily upon the enabling statutes of the Board in Chapter 87, Article 2, of the North Carolina General Statutes. Specifically, N.C. Gen. Stat. § 87-21(a)(5) (2015) defines those who "shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting" as follows:

> (5) Any person, firm or corporation, who for a valuable consideration, (i) *installs*, *alters or restores*, *or offers to install*, *alter or restore*, either plumbing, heating group number one, or heating group number two, or heating group number three, or (ii) lays out, fabricates, installs, alters or restores, or offers to lay out, fabricate, install, alter or restore fire sprinklers, or any combination thereof, as defined in this Article, *shall be deemed and held to be engaged in the business of plumbing*, *heating*, *or fire sprinkler contracting*; provided, however, that nothing herein shall be deemed to restrict the practice of qualified registered professional engineers. Any person who installs a plumbing, heating, or fire sprinkler system on property

> which at the time of installation was intended for sale or to be used primarily for rental is deemed to be engaged in the business of plumbing, heating, or fire sprinkler contracting without regard to receipt of consideration, unless exempted elsewhere in this Article.

Id. (Emphasis added).

Winkler holds a Class II license under N.C. Gen. Stat. § 87-21(b)(1) (2015), which covers "plumbing and heating systems in single-family detached residential dwellings." North Carolina General Statute § 87-23 (2015) sets forth the Board's authority to "revoke or suspend" a license or to "order the reprimand or probation of" a licensed contractor:

> (a) The Board shall have power to revoke or suspend the license of or order the reprimand or probation of any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is guilty of any fraud or deceit in obtaining or renewing a license, or who fails to comply with any provision or requirement of this Article, or the rules adopted by the Board, or *for gross negligence*, *incompetency*, *or misconduct*, *in the practice of or in carrying on the business of a plumbing*, *heating*, *or fire sprinkler contractor*, or any combination thereof, as defined in this Article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, or the rules of the Board, against any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is licensed under the provisions of this Article. All of the charges shall be in writing and investigated by the Board. Any proceedings on the charges shall be carried out by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

N.C. Gen. Stat. § 87-23(a) (emphasis added).

But N.C. Gen. Stat. § 87-21(c) (2015) exempts certain acts from "[t]he provisions" of Article 2 of Chapter 87:

> (c) **To Whom Article Applies.** -- The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing, heating, or fire sprinkler contracting, or

> any combination thereof as defined in this Article. *The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning, but shall apply to those who make repairs, replacements, or modifications to an already installed fire sprinkler system. Minor repairs or minor replacements within the meaning of this subsection shall include the replacement of parts in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping. Parts shall include a compressor, coil, contactor, motor, or capacitor.*

Id. (emphasis added).

The Board has also adopted regulations, by its authority under Chapter 87, which exclude certain repairs or alterations to an existing system from the ambit of "minor repairs" within the meaning of N.C. Gen. Stat. § 87-21(c). Specifically, any "connection, repair or alteration which if poorly performed creates a risk" of carbon monoxide exposure is not a "minor repair" or "alteration":

> .0506 MINOR REPAIRS AND ALTERATIONS.
> (e) Any connection, repair or alteration which if poorly performed creates risk of fire or exposure to carbon monoxide, open sewage or other gases is not a minor repair, replacement or alteration.
>
> (f) The failure to enumerate above any specific type of repair, replacement or alteration shall not be construed in itself to render said repair, replacement or alteration as minor within the meaning of G.S. 87-21(c).

21 N.C. Admin. Code 50.0506(e)-(f) (2016).

In addition, the regulations include the following relevant "Guidelines on Disciplinary Actions":

> (a) The provisions of G.S. 87, Article 2, the rules of the Board and the matters referenced therein are the guidelines by which the conduct of an entity subject to the authority of the Board are evaluated.
>
> . . . .

> (f) The Board may revoke the license of any licensee where it is found that the licensee through a violation of G.S. 87, Article 2, has increased the risk of:
>
> > (1) exposure to carbon monoxide or other harmful vapors . . . .
>
> (g) This Rule is not intended to limit the authority of the Board or the variety of facts for which action is required in a particular situation.
>
> (h) Any of the foregoing actions may result in a probation period or combination of suspension and probation. Condition of probation may include remediation, education, reexamination, record-keeping or other provisions likely to deter future violation or remedy perceived shortcomings.

21 N.C. Admin. Code 50.0412(e) (2016).

The parties agree that we review the interpretation of the applicable statutes *de novo*.

> The interpretation of a statute is a question of law and thus is reviewed *de novo* in an administrative appeal. But because this statute instructs a state agency to promulgate regulations to administer it, there is an additional layer of review. If the statutory language is unambiguous and the statutory intent clear, this Court must give effect to that unambiguous language regardless of the agency's interpretation. But if the statute is silent or ambiguous on an issue, this Court must defer to the agency's interpretation as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.

Total Renal Care of N.C., LLC, v. N.C. Dept. of Health and Human Servs., __ N.C. App. __, __, 776 S.E.2d 322, 326 (2015) (citations and quotation marks omitted). In addition, North Carolina common law did not provide for the regulation of the businesses of installation of heating systems, so these statutes are "in derogation of the common law and penal in nature." *Elliott*, 348 N.C. at 235, 498 S.E.2d at 619. We are therefore required to strictly construe them. *Id.* ("It is well settled that statutes which are in derogation of the common law and which are penal in nature are to be strictly construed.").

In strictly construing these regulatory statutes, our Supreme Court has directed that we must focus upon "the conduct specifically

prohibited" and not upon the "underlying objectives and general principles" of Article 2 of Chapter 87. *Id.* at 236, 498 S.E.2d at 620.

> Instead, as noted above, the Court of Appeals focused on the policy objectives and general purpose of the Ethics Code.
>
> The Court of Appeals agreed that the Ethics Code prohibits sexual relations with clients. However, it noted that the Code never suggests that dual relationships of a sexual or social nature are permissible after therapy is terminated. By focusing on the underlying objectives and general principles of the Ethics Code, rather than the conduct specifically prohibited, the Court of Appeals erred. Accordingly, we reverse the Court of Appeals and hold that the Ethics Code must be strictly construed.

Id. (citations and quotation marks omitted). Yet we are also not to construe the statutes " 'stintingly . . . to provide less than what their terms would ordinarily be interpreted as providing. Strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined.' " *Id.* at 237, 498 S.E.2d at 620 (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)).

Winkler argues that the Board has "neither standing nor authority to conduct a hearing or attempt to discipline anyone of any allegation related to anything other than an installation (or contracting to install)." Winkler notes that Article 2 of Chapter 87 "never once uses the word 'inspection' (or 'evaluation' or any similar word or term.)". The Board strenuously argues that "installation" of a system is not required and that Winkler's "incompetence" in failing to recognize the hazards posed by the pool heater and increased risk of exposure to carbon monoxide are sufficient to confer jurisdiction upon the Board. The Board contends that the harm to the occupants of Room 225 in this case was "the precise kind of harm the legislature intended to bring under the authority of the Board 'in order to protect the public health, comfort and safety.' " More specifically, the Board contends:

> When, as here, the risk of exposure to carbon monoxide is increased by the work of one holding himself out to be a heating contractor who lacks the skill and proficiency to even ascertain the risk for that harm, regardless of whether that risk flowed from repair work on an existing

> system or installation of a new system, the lethal consequence of exposure to the carbon monoxide is the same. For reason of public safety, the Board therefore expressly retains jurisdiction to regulate work involving "*any* connection, alteration or repair which if poorly performed increases the risk of exposure to carbon monoxide."

Although we agree that this is most likely the type of harm which the Legislature intended to avoid by its regulation of heating contractors, our review is not based upon the Legislature's intent or general policy concerns. As directed by *Elliott*, we are guided by "the conduct specifically prohibited" and not upon the "underlying objectives and general principles." *Id.* at 236, 498 S.E.2d at 620. Thus we must examine the "conduct specifically prohibited" in this case to see if Winkler's actions fall within Article 2. *Id.*

As noted above, Winkler does not challenge the Board's findings of fact in this portion of his argument but only the legal conclusion that his actions in the "service calls" for the pool heater were actions in violation of Article 2. It is undisputed that Winkler did not "install" or offer to install the pool heater, as the Findings of Fact show that the installation had been done -- and very poorly done -- years before. The Board therefore focuses upon the words "alter" and "restore" as used in N.C. Gen. Stat. § 87-21(a)(5):

> Any person, firm or corporation, who for a valuable consideration, (i) installs, *alters* or *restores*, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three . . . shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting[.]

(Emphasis added).

The Board argues that Winkler " 'restored' " the pool heater on "13 April 2013 when he restored the gas connection to the unit," thereby putting it back into operation. The Board relies upon the definition of "restore" from the Merriam-Webster Dictionary, 6th Ed. 2005, " 'to put back into use or service' " or " 'to put or bring back into a former or original state.' " Essentially, this reading of "restore" is so broad as to cover simply turning the heater on. Nonetheless, even if the meaning of "restore" is so broad as to cover the mere act of turning an existing heating system on, there is no dispute that Winkler is "engaged in the

business of" heating contracting and that he is licensed by the Board to engage in this business. N.C. Gen. Stat. § 87-21(a)(5). Thus, the question here is whether his actions as to the pool heater fall within Article 2's authorization of disciplinary action, as it clearly exempts certain actions. The actions for which the Board may impose discipline are more specifically limited and delineated by N.C. Gen. Stat. § 87-21(c).

Article 2 generally applies to anyone in business as a heating contractor, but N.C. Gen. Stat. § 87-21(c) *exempts* certain acts from "[t]he provisions" of Article 2 of Chapter 87:

> The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning, ... Minor repairs or minor replacements within the meaning of this subsection shall include the replacement of parts in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping. Parts shall include a compressor, coil, contactor, motor, or capacitor.

N.C. Gen. Stat. § 87-21(c).

Thus, the disciplinary provisions of Article 2 do *not* "apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning." *Id.* The pool heater was installed in 2011 and thus it was an "already installed system," so Winkler's actions are subject to discipline only if they were *more than* "minor repairs" or otherwise included under Article 2's coverage. *Id.* It is undisputed that Winkler did not *replace* any parts of the pool heater or its exhaust system and he did not change the "energy source, fuel type, or routing or sizing of venting or piping" so he did not "repair" the system or "replace" any component of the system as contemplated by N.C. Gen. Stat. § 87-21(c).

Furthermore, even if we take the factual findings as true and Winkler did all that the Board claims and found he did, none of those actions are actions regulated by N.C. Gen. Stat. § 87-21(a)(5). At most, the facts would show that Winkler turned the gas on. This is not enough to constitute an installation, alteration, or restoration under N.C. Gen. Stat. § 87-21(a)(5). As a practical matter, if we were to read the statute as the Board requests, a contractor would have to hold the highest level license before he could even examine or inspect a problem with an existing system to determine if he is capable of fixing it, since he could be subject to

discipline in the event of any future harm caused by the system even if he did not actually repair it. There would be no practical use for different levels of licensure by the Board.

The Board, however, argues that Winkler's actions constituted more than "minor repairs" and thus were covered by Article 2 based upon the regulations addressing risk of carbon monoxide exposure, so our analysis is still not over. The applicable regulations further define "minor repairs" or "minor alterations" by *excluding* from this category "any connection, repair or alteration which if poorly performed creates risk of . . . exposure to carbon monoxide." 21 N.C. Admin. Code 50.0506. But this regulation first requires that something be *done* to the "already installed system," N.C. Gen. Stat. § 87-21(c) -- a "connection, repair or alteration." 21 N.C. Admin. Code 50.0506. It also does not cover all connections, repairs or alterations but only those which "if poorly performed" create a risk of carbon monoxide exposure. *Id.* But based upon the Board's findings of fact, Winkler did not "repair" the pool heater as defined by N.C. Admin. Code 50.0506, nor did he perform, poorly or otherwise, any "connection, repair or alteration[,]" *id.*, to the "already existing system." N.C. Gen. Stat. § 87-21(c).

At this point, the Board falls back to the "Guidelines on Disciplinary Actions" which provide that "The Board may revoke the license of any licensee where it is found that the licensee through a violation of G.S. 87, Article 2, has increased the risk of: (1) exposure to carbon monoxide or other harmful vapors. . . ." 21 N.C. Admin. Code 50.0412(f). Once again, however, this regulation *first* requires "a violation" of Article 2, which takes us back to the above analysis, which finds Winkler's actions were exempted from Article 2, since Winkler did not replace or repair the already-existing system. Essentially, based upon the Board's findings, Winkler inspected or evaluated the pool heater and its exhaust system, but the words "inspection" and "evaluation" are not included under Article 2. Article 2 addresses installations of systems and non-minor repairs or replacements to existing systems, but it does not cover inspections or evaluations of existing systems, no matter how poorly performed.

The Board's order does not make any findings addressing any connection, repair, or alteration to the existing system which would be covered under Article 2 but relies generally upon the increase of risk of carbon monoxide exposure. Specifically, the Board made the following relevant conclusions of law:

> 19. The actions of . . . Winkler and his firm increased the risk of exposure to carbon monoxide for persons in

> the vicinity of the venting system within the meaning of Board rules 21NCAC.0506, and Board Rule 21NCAC.0412.
>
> 20. The foregoing evidence, particularly Findings of Fact numbers 9, 10, and 16 through 26 establish incompetence and violations of 87-23.

The findings of fact upon which the Board relied in making this conclusion are as follows:

> 9. On or about April 13, 2013, Mr. Winkler, doing business as DJ'S Heating Service, was asked by the maintenance staff employed by Appalachian Hospitality Management to *examine* the pool heater and get it running. The maintenance staff was concerned the heater was not functioning or the pilot light would not light.
>
> 10. On or about April 13, 2013, [Winkler] *examined* the heater, and found that the gas supply had been cut off. Along with the Best Western Motel maintenance staff, [Winkler] cut the fuel on, and put the pool heater in operation. [Winkler] did not examine or inspect the exhaust or venting system for the pool heater at that time, and was not asked to do so.
>
> . . . .
>
> 16. At the time of Mr. Winkler's *examination* of the venting and exhaust system of the pool heater, he was aware that there had been two deaths at that time in Room 225, thought to be from natural causes, and knew that Appalachian Hospitality Maintenance had sufficient concern . . . as to the proper venting of flue gasses to ask [Winkler] to check the systems.
>
> 17. Simple and reasonable *observation* of the pool heater by a heating contractor should cause the contactor to observe that the pool heater was a natural draft appliance. A heating contractor should know that such a system is required to be vented or exhausted either by a flue extending higher than the roof or by the use of a forced draft system or power venter. In addition, a heating contractor should know that a natural draft appliance draws air from the room as well as exhaust from the flame and discharges both into the flue.

18. Mr. Winkler knew or should have noticed that the room and the humid air in the room containing the pool heater also contained standard pool chemicals, which chemicals were highly corrosive to metal, such as the venting pipes from the pool heater to the exterior of the building, and corrosive air and gasses were being drawn into and through the pool heater and exhaust flue. Evidence of corrosion was visible without the use of any equipment.

19. Mr. Winkler knew or should have known that a vent pipe in such a location was prone to corrosion and that any holes in the flue would result in discharge of dangerous flue gasses inside the Best Western Motel and thereby expose its occupants to the same.

20. In plain sight near the pool heater were a group of wires hanging in the air not connected to the pool heater but terminated with wire nuts. The wires were intended to supply power for a power venter which had been disconnected, likely well before [Winkler's] arrival. Evidence of that disconnection was readily discernible by a minimally appropriate *visual inspection*.

21. During all relevant times, the pool heater was utilizing a side wall to connect the vent pipe to the exterior of the Motel but no power venter was functioning; in addition, the rise of the slope of the flue pipe did not comply with the State Mechanical Code.

22. [Winkler] also went outside the building to *examine* the terminus of the exhaust vent. He or one of the maintenance men was able [to] place his hand inside the metal cover over the end of the exhaust and feel warm air coming out when the pool heater was running, and those present discussed that fact. It was not necessary to remove the cover because it was severely corroded. The flue gasses exiting the pipe were rising and heat waves in the air were visualized. A heating contractor should know that the heat should be blowing out, not drifting up, if the power vent was operating properly.

23. A heating contractor would be placed on notice of the existence of hazardous conditions by *observing* the natural draft appliance, the corrosion visible inside

> the equipment room and outside at the terminus of the flue pipe, the disconnected wires, the manner in which the exhaust was discharging and the fact there was no vent extending higher than the roof of the building.
>
> 24. As a result of the absence of both a power venter and a flue pipe or exhaust extending above the roof, the exhaust venting system was dependent upon an insufficient natural draft to vent dangerous gasses such as carbon monoxide.
>
> 25. The non-functioning power venter was rated at approximately 75000 BTU capacity while the pool heater which had been substituted at the Best Western had a capacity of 250,000 BTU's as reflected on the equipment label. Even when functioning, such a power venter was unlikely to exhaust all the harmful gasses.
>
> 26. Mr. Winkler failed to shut the system down, failed to instruct the maintenance staff not to operate it, failed to call the gas company and advise them to shut off the gas, nor replace the power venter and connect the control wiring to the power venter, nor carry out investigation or evaluation of the efficacy of the venting between the ceiling of the room where the pool heater was located and the exterior of the building. [Winkler] left the pool heater in operation, despite the readily observable hazards.

(Emphasis added).

In the next finding, the Board notes that Winkler made "two visual examinations" of the system. Overall, the findings demonstrate that Winkler examined or inspected the system visually. He did not perform any "repair" or "replacement" of parts; instead the Board found that he *failed* to "replace the power venter" and *failed* to "connect the control wiring." Of course, his "failure" to do these things would be consistent with the fact that his license would not allow him to "*replace* the power venter" or to "*connect* the control wiring." At the most, what Winkler did would be commonly called an "evaluation" or "inspection" -- or an "examination" as noted in the findings of fact. We have no doubt that a poorly-done or incompetent evaluation or inspection might fail to discover problems with a heating system which allow exposure to carbon monoxide to continue -- that is exactly what happened here, more than once, and not only by Winkler -- but Article 2 simply does not cover "evaluations" or "inspections" of existing systems. Even if we accept the

Board's findings that many of the hazardous features of the pool heater and its exhaust system were clearly visible and should have been obvious to any heating contractor -- despite the fact that neither the inspector for the Town of Boone nor the licensed gas company which converted the heater to natural gas had ever noticed them -- inspections and evaluations are simply not covered by Article 2.[2]

We do not know *why* the Legislature chose not to include inspections of already-installed systems in the coverage of Article 2, or for that matter why it chose to exclude "minor repairs" and "minor replacements," N.C. Gen. Stat. § 87-21(c), but we are required to strictly construe the statute and to focus on "the conduct specifically prohibited" and not upon the "underlying objectives and general principles." *Elliott*, 348 at 236, 498 S.E.2d at 620. Under that standard, the Board acted beyond its disciplinary jurisdiction by imposing sanctions for Winkler's inspections of the pool heater and exhaust system. To the extent that the Board's order imposed discipline for these actions, it must be vacated.

Winkler has raised three other issues on appeal related to his examination of the pool heater and exhaust system, including whether the Board's findings of fact were supported by substantial evidence and whether the Superior Court properly conducted whole record review, but given our determination that the Board did not have jurisdiction to impose discipline for Winkler's actions as to his examination of the pool heater and exhaust system, we need not address these arguments. Yet we note, however, that the Board also made findings and imposed discipline based upon Winkler's plan to replace the HVAC system for the lobby and breakfast area of the hotel. These actions occurred from 4 June 2013 through 7 June 2013 and are related to the matters discussed above only because they occurred at the same hotel and came to the attention of the Board because of the tragic events of 8 June 2013.

Winkler's brief does not challenge the findings of fact as to the HVAC system and makes no legal argument challenging the Board's conclusion that Winkler was not qualified to install the new HVAC system which had been delivered to the hotel. Winkler simply states that he "knew the limitation of his license, but thought he could do 'like kind' installations since he could service any size system and the Board's law and administrative rules allow for certain like-kind installations." It is essentially

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2. In fact, only an extensive multidisciplinary evaluation of the hotel building and equipment by many experts after the second incident revealed all of the problems with the system as described by the Board's order.

undisputed that Winkler was mistaken in his belief that his license qualified him to install the new HVAC system in the hotel because it was a "like kind" installation, and the Board did have jurisdiction to impose discipline for this violation of 21 Admin. Code 50.0403 (2016). But the Board's order found multiple violations by Winkler, and the violations related to the pool heater and exhaust system were the primary focus of the order and the disciplinary measures imposed. We therefore remand the matter to the Board to enter a new order addressing only the disciplinary matters related to the planned installation of the HVAC system in the breakfast and lobby area of the hotel. In the order on remand, the discipline imposed should be based only upon the violations occurring during the period of 4 June 2013 through 7 June 2013, without consideration of the earlier events related to the pool heater or exhaust system. The Board does not have jurisdiction to impose discipline beyond that appropriate to address the violation of 21 N.C. Admin. Code 50.0403 by contracting to install the HVAC system.

IV. Conclusion

Accordingly, while we affirm the Board's finding that Winkler was not qualified to install the HVAC system, we find that the Board lacked jurisdiction to impose discipline regarding his inspection of the pool heater and exhaust system, which was ultimately the primary basis of the disciplinary provisions of the Board's order. We reverse and remand for entry of a new order with sanctions solely based on Winkler's planned installation of the HVAC system.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 SEPTEMBER 2016)

BAILEY v. McCORKLE No. 16-105	Cabarrus (14CVD2902)	Affirmed
IN RE A.G. No. 16-175	Catawba (15JA140-141)	Affirmed
IN RE A.L.H. No. 16-124	Rockingham (12JT104) (12JT105)	Affirmed in part; vacated and remanded in part
IN RE C.B. No. 16-144	Gaston (13JA175)	Affirmed
IN RE I.C. No. 16-157	Jackson (13JA25-27) (14JA44)	Affirmed
IN RE J.F.G. No. 16-205	Forsyth (13JT46)	Affirmed
IN RE M.A.P. No. 16-279	New Hanover (15JB78)	Vacated
IN RE P.E.P. No. 16-156	Guilford (13JT387)	Affirmed
McMILLAN-ERVIN v. ERVIN No. 16-209	Orange (15CVD625)	Dismissed
McNEELY v. HART No. 15-1274	Catawba (13CVD471)	Vacated and Remanded
NEWBRIDGE BANK v. HEDGEPETH No. 15-1372	Davidson (07CVD26)	Dismissed
PINKNEY v. PINKNEY No. 15-1362	Wake (13CVD3788)	Dismissed
SATTERFIELD v. SATTERFIELD No. 15-1194	Orange (11CVD1515)	Affirmed
SHOWFETY v. SHOWFETY No. 15-1328	Rowan (08CVD2853)	Remanded in part; affirmed in part
SIMON v. SIMON No. 15-1231	Iredell (07CVD2853)	Affirmed

STATE v. BANKS No. 16-182	Transylvania (14CRS51028)	New Trial
STATE v. BEST No. 16-27	Sampson (13CRS757)	No Error
STATE v. GOODE No. 16-83	Wake (13CRS225960)	No Error
STATE v. HAQQ No. 16-168	Catawba (15CRS52107)	No Error
STATE v. INGRAM No. 16-120	Durham (12CRS50666-67)	Affirmed
STATE v. JAMES No. 16-35	Wayne (14CRS51011) (14CRS51012)	No Error
STATE v. JOYNER No. 15-442-2	Iredell (13CRS53209)	No Plain Error
STATE v. McDONALD No. 15-1375	Wayne (13CRS53473)	Dismissed
STATE v. McGUIRE No. 16-198	Forsyth (14CRS57803)	Affirmed
STATE v. MEARS No. 16-286	Cleveland (13CRS52153-54)	No Error
STATE v. METZGER No. 15-1093	Wayne (11CRS53949)	No Error
STATE v. PINEDA No. 15-800-2	Wake (11CRS203626-27) (11CRS203631-37) (14CRS196)	No Error
STATE v. POTEAT No. 15-1339	Alamance (12CRS50800)	No Error
STATE v. REAVES No. 16-92	Columbus (13CRS50034)	Vacated and Remanded
STATE v. RICE No. 15-1258	Mecklenburg (12CRS255562-65) (12CRS255567-68) (12CRS255570)	No Error

STATE v. RIDDLE No. 16-197	Buncombe (15CR87529) (15CR87630)	No Error
STATE v. SANCHEZ No. 16-249	Craven (11CRS54863) (14CRS664)	No Error
STATE v. SMITH No. 16-61	Hoke (14CRS51077) (14CRS51097)	No Error
STATE v. WINT No. 16-244	Durham (07CRS44293)	Dismissed
THOMPSON v. EVERGREEN BAPTIST CHURCH No. 15-1031	Columbus (14CVS278)	Affirmed
UHLIG v. CIVITARESE No. 15-891	Alexander (10CVD289)	Reversed and Remanded
YARBOROUGH v. DUKE UNIV. No. 16-86	N.C. Industrial Commission (13-003239)	Affirmed
YOUNG v. LOWES HOME CTR., INC. No. 15-1077	N.C. Industrial Commission (Y02943)	Affirmed

BALDELLI v. BALDELLI

[249 N.C. App. 603 (2016)]

SUSAN J. BALDELLI; TRAVEL RESORTS OF AMERICA, INC.; AND TRIDENT DESIGNS, LLC, PLAINTIFFS
v.
STEVEN R. BALDELLI, INDIVIDUALLY AND AS PRESIDENT OF TRAVEL RESORTS OF AMERICA, INC.; TRAVEL RESORTS OF NORTH CAROLINA, LLC; DERBY INVESTMENT COMPANY, LLC; AND TRIDENT CAPITAL, LLC, DEFENDANTS

No. COA16-142

Filed 4 October 2016

Divorce—equitable distribution—prior pending action

Where Plaintiff (Susan Baldelli) and Defendant (Steven Baldelli) incorporated a number of businesses during their marriage and subsequently filed claims for equitable distribution of their marital property, the trial court erred by dismissing, for lack of subject matter jurisdiction, Plaintiffs' (Susan Baldelli, together with two businesses) claims. The prior pending action doctrine did not divest the superior court of jurisdiction over Plaintiffs' breach of fiduciary duty claim. Further, the breach of fiduciary duty claim should be held in abeyance by the superior court until the district court equitable distribution action is resolved, and all of Plaintiffs' superior court claims should be held in abeyance so that the record can be more fully developed through resolution of the district court action.

Appeal by Plaintiffs from orders entered 22 October 2015 and 9 December 2015 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 8 August 2016.

Poyner Spruill LLP, by Daniel G. Cahill and Caroline P. Mackie, for Plaintiffs-Appellants.

Robinson & Lawing, LLP, by C. Ray Grantham Jr. and L. Bruce Scott, for Defendant-Appellee Steven R. Baldelli.

The Bomar Law Firm, by J. Chad Bomar, for Defendants-Appellees Travel Resorts of North Carolina, LLC; Derby Investment Company, LLC; and Trident Capital, LLC.

McGEE, Chief Judge.

Susan J. Baldelli ("Plaintiff"), together with Travel Resorts of America, Inc. ("TRA") and Trident Designs, LLC ("Trident Designs") ("Plaintiffs")

and Steven R. Baldelli, ("Defendant"), individually and as president of TRA, together with Travel Resorts of North Carolina ("TNC"), Derby Investment Company, LLC ("Derby") and Trident Capital, LLC ("Trident Capital") ("Defendants") are parties to this action. Plaintiff and Defendant were married on 15 September 1979 and separated in 2013. Both Plaintiff and Defendant filed claims for equitable distribution of their marital property in District Court, Moore County. During the course of their marriage Plaintiff and Defendant incorporated a number of businesses, including those named above as parties to this action. Along with Plaintiff and Defendant, Trident Capital and TRA are parties to both the district court action and the present superior court action. Derby, TNC, and Trident Designs are not named parties in the district court equitable distribution action. Plaintiff and Defendant are in agreement that TRA and Trident Designs constitute marital property. Plaintiff contends that Trident Capital, TNC, and Derby are marital property. Defendant contests this contention.

Plaintiffs filed the complaint in this action on 23 February 2015, in Superior Court, Moore County, and filed an amended complaint on 4 May 2015, in which they set forth five claims: (1) breach of fiduciary duty against Defendant, relative to his actions as president of TRA; (2) demand for accounting, also related to Defendant's role as president of TRA; (3) breach of contract against TNC and Trident Capital; (4) breach of contract against Derby; and (5) an alternate claim against Derby for *quantum meruit*. Defendant moved to dismiss Plaintiffs' complaint on 8 June 2015, pursuant to the prior pending action doctrine, arguing that superior court did not have jurisdiction over the claims because of the ongoing district court action for equitable distribution which, according to Defendant, encompassed substantially similar claims and parties. Defendant further asked the trial court to dismiss the breach of fiduciary duty claim because it was required to be brought as a derivative action, and Plaintiffs had failed to do so; in the alternative, Defendant asked the superior court to hold the present action in abeyance until the district court matter was settled. The remaining Defendants also filed motions to dismiss, based in part on arguments that the prior pending action doctrine served to divest the superior court of jurisdiction. Plaintiffs filed a motion to file a second amended complaint on 14 July 2015, requesting that they be allowed to amend the complaint in order to "assert the breach of fiduciary duty claim directly by TRA against Defendant[.]"

Defendants' motions were heard on 16 September 2015 in superior court. Plaintiffs' action was dismissed by order entered 22 October 2015, because the superior court ruled that it "lack[ed] subject matter

jurisdiction over the matters asserted." The superior court, also by order entered 22 October 2015, further denied Plaintiffs' motion to file a second amended complaint as moot. Plaintiffs appeal.

Plaintiffs argue that the trial court erred by dismissing Plaintiffs' claims for lack of subject matter jurisdiction. We agree.

Specifically, Plaintiffs argue that the trial court "improperly concluded the prior pending domestic action precluded the [trial court] from considering Plaintiffs' claims." This Court has stated:

> 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, 438, 713 S.E.2d 28, 37 (2011) (citations omitted).

In *Burgess v. Burgess*, 205 N.C. App. 325, 698 S.E.2d 666 (2010), the plaintiff filed an action in superior court alleging, *inter alia*, "breach of fiduciary duties, inspection, and accounting" related to a business, Burgess & Associates, that had been jointly owned by the plaintiff and her husband ("the defendant") during their marriage. *Id.* at 330-31, 698 S.E.2d at 670. At the time the superior court action was filed, the plaintiff and the defendant were already involved in an equitable distribution action involving Burgess & Associates. *Id.* at 326, 698 S.E.2d at 667. The defendant moved to dismiss the plaintiff's action based in part on his argument that the prior pending action doctrine served to divest the superior court of jurisdiction because the parties and subject matter of the two actions were substantially similar. *Id.* at 326, 698 S.E.2d at 668. This Court held that the superior court had not erred in ruling that it had jurisdiction to hear the claims of breach of fiduciary duties, inspection, and accounting. This Court reasoned:

> It is apparent that if plaintiff is successful in her equitable distribution action, she can only receive a portion of the issued shares of Burgess & Associates, along with any

> other marital or divisible property she may be awarded in the trial court's discretion. Should she prove that she is entitled to an unequal distribution, she may, at the most, receive a larger portion of marital or divisible property as an offset—property which she assisted in contributing to the marriage. She would not be entitled to any of [the defendant's] separate property.
>
> In stark comparison, if plaintiff is successful in prosecuting her derivative suit for breach of the duties of good faith and due care, she may obtain a judgment against [the defendant] in the right of the company in excess of $10,000 from a jury verdict. The judgment would be against [the defendant] in his individual capacity, and Burgess & Associates would be able to enforce the judgment against [the defendant's] separate property. Despite the breadth and variety of the factors in section 50–20, there is no similarity between the relief sought in plaintiff's equitable distribution action and the derivative suit. In particular, plaintiff sets out several factual allegations in the shareholder suit predating [the defendant's] and plaintiff's separation. Were we to follow defendants' suggestion to lump the derivative suit here into subsection (11a) of N.C.G.S. § 50–20(c), those allegations would not be available to plaintiff in the distribution of marital property. N.C.G.S. § 50–20(c)(11a) (only waste or neglect occurring "during the period *after separation* of the parties and *before the time of distribution*" considered in making an unequal distribution) (emphasis added). Even if pre-separation acts could be considered pursuant to N.C. Gen. Stat. § 50–20(c)(12) (allowing consideration of "[a]ny other factor which the court finds to be just and proper," the district court cannot, as we have already noted, reach [the defendant's] separate property in equitable distribution.

Burgess v. Burgess, 205 N.C. App. 325, 331–32, 698 S.E.2d 666, 671 (2010).

In *Ward v. Fogel*, the plaintiff and the defendant were already involved in an action for equitable distribution when the plaintiff filed a second action in superior court alleging, *inter alia*, "(1) fraudulent inducement; (2) constructive fraud; (3) and breach of fiduciary duty[.]" *Ward v. Fogel*, 237 N.C. App. 570, 573, 768 S.E.2d 292, 296 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 302 (2015).

Though this Court held that Florida courts had exclusive jurisdiction, it further reasoned:

> 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. 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.

Ward, 237 N.C. App. at 577–78, 768 S.E.2d at 299 (citation omitted).

In the case before us, Plaintiffs allege, *inter alia*, breach of fiduciary duty against Defendant for which Plaintiffs claim damages in excess of $25,000.00. If Plaintiffs prevail in this breach of fiduciary duty claim, they will collect from Defendant's separate property, which is a remedy not available to them in the district court equitable distribution action. Although it is possible that the equitable distribution action could resolve the issues underlying Plaintiffs' claim for breach of fiduciary duty, it is also possible that the equitable distribution action will leave these issues unresolved or, as stated above, leave Plaintiffs without the full remedy that would be provided in the superior court action. Further, as in *Burgess*, at least some of the acts that Plaintiff contends constituted a breach of Defendant's fiduciary duties occurred before the date of separation. These acts will generally not be relevant to equitable distribution decisions concerning how to divide marital property. *Burgess*, 205 N.C. App. at 332, 698 S.E.2d at 671. We therefore hold that the prior pending action doctrine did not serve to divest the superior court of jurisdiction over Plaintiffs' breach of fiduciary duty claim, and we reverse the order of the trial court and remand for further action as provided below.

However, because the parties and subject matter of Plaintiffs' breach of fiduciary duty claim are closely related – when not identical – to the parties and the subject matter to be decided in a portion of the district court action, and because there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions.

> We have addressed a similar situation of potential unresolvable conflict between two courts with jurisdiction in *Jessee v. Jessee*, 212 N.C. App. 426, 713 S.E.2d 28 (2011). In *Jessee*, the plaintiff-husband had commenced an action in Forsyth County alleging that the defendant-wife had fraudulently converted funds to her own use after the defendant had filed an action for equitable distribution in Alamance County. Because the claims brought in the Forsyth County action concerned acts which occurred after the date of separation and the equitable distribution action would only address what had occurred prior to separation, we concluded that the equitable distribution action did not deprive the superior court in Forsyth County of jurisdiction under the prior pending action doctrine. Nevertheless, because of the "clear interrelationship" between the two cases, we concluded that "the Forsyth County case should be held in abeyance pending resolution of the Alamance County domestic relations case."

Johns v. Welker, 228 N.C. App. 177, 182, 744 S.E.2d 486, 490–91 (2013) (citations omitted); *see also Jessee*, 212 N.C. App. at 439, 713 S.E.2d at 38 (citations omitted) ("[D]espite our belief that . . . the 'prior pending action' doctrine [does not] mandate dismissal of the [superior court] action, there is a clear interrelationship between the two cases, such that the equitable distribution portion of the [district court] domestic relations case should be resolved prior to the determination of the [superior court] case. For that reason, we further conclude that the [superior court] case should be held 'in abeyance pending resolution of the' [district court] domestic relations case, and the results of that equitable distribution case taken into consideration in the resolution of the [superior court] case.").

We hold that Plaintiffs' breach of fiduciary duty claim in this case should be held in abeyance by the superior court until the district court

equitable distribution action is resolved. Concerning Plaintiffs' additional superior court claims, they are similar in that though the underlying issues might be resolved in the equitable distribution action, we cannot say for certain that unresolved issues would not remain. Further, the record before us has not been developed to an extent as to provide this Court full confidence in making a determination on subject matter jurisdiction.

> The determination of subject matter jurisdiction is a question of law and this Court has the "power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." However, the record is devoid of evidence from which we may ascertain whether or not the trial court possessed subject matter jurisdiction[.] We vacate the order filed 22 October 2002 and remand this case for findings of fact based on competent evidence to support the trial court's conclusion of law regarding subject matter jurisdiction[.]

In re J.B., 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004) (citations omitted). Though the record before us is not "devoid" of evidence from which to determine whether dismissal based upon lack of subject matter was proper, we believe it is appropriate, based upon the facts before us, to hold all of Plaintiffs' superior court claims in abeyance so that the record can be more fully developed through resolution of the district court action. Following resolution of the equitable distribution action in district court, Plaintiffs can decide whether to proceed with any unresolved claims in the present superior court case. If Plaintiffs decide to advance any of their superior court claims, the superior court, based in part on the resolution of the equitable distribution action, will then decide which claims, if any, should be allowed to proceed.

We further vacate the superior court's 22 October 2015 order denying Plaintiffs' motion for leave to file a second amended complaint as moot. Plaintiffs may, if needed, file for the superior court's consideration a motion for leave to file a second amended complaint at the appropriate time following resolution of the district court action.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

IN RE DIPPEL

[249 N.C. App. 610 (2016)]

IN THE MATTER OF LYLE DIPPEL, RESPONDENT

No. COA16-54

Filed 20 September 2016

Clerks of Court—appeal from order—adjudication of competency

The trial court erred by dismissing petitioner son's appeal seeking an adjudication that respondent father was incompetent and the appointment of a guardian. N.C.G.S. § 35A-1115 allows appeals to superior court from any order of the clerk of court adjudicating the issue of incompetence.

Appeal by petitioner from order entered 22 September 2015 by Judge Phyllis M. Gorham in Columbus County Superior Court. Heard in the Court of Appeals 11 August 2016.

Christopher W. Livingston for petitioner-appellant.

No brief filed for respondent-appellee.

ZACHARY, Judge.

Kenneth Dippel (petitioner) appeals from the trial court's order dismissing his appeal from an order of the Clerk of Superior Court for Columbus County. The clerk ruled that respondent Lyle Dippel, petitioner's father, was not incompetent and dismissed the proceeding initiated by petitioner seeking an adjudication that respondent was incompetent and the appointment of a guardian for respondent. The trial court dismissed petitioner's appeal from the clerk's order on the grounds that under N.C. Gen. Stat. § 35A-1115 (2015) petitioner lacked standing to appeal and the trial court lacked jurisdiction to entertain the appeal. For the reasons that follow, we reverse.

I. Factual and Procedural Background

On 8 June 2015, petitioner filed a petition seeking an adjudication that respondent was incompetent and applying for appointment of a general guardian for respondent and of an interim guardian *ad litem*. Petitioner alleged that respondent was classified as totally disabled by the United States Department of Veterans Affairs due to complications of diabetes, and that respondent had granted a durable power of attorney to petitioner's brother, Michael Dippel, although respondent was

"unable to fully understand the full consequences of executing a power of attorney[.]"

On 18 June 2015, Attorney John Alan High was appointed as interim guardian *ad litem* (GAL) for respondent. On 16 July 2015, petitioner filed a motion for recusal of the Columbus County Clerk of Court and transfer of the case to Robeson County. Petitioner asserted that the Clerk had a "conflict of interest" due to his friendship with Michael Dippel's wife. The record does not include an order on petitioner's motion; however it is clear from Columbus County's continued exercise of jurisdiction over the case that the motion was denied.

On 12 August 2015, an assistant clerk of court entered an order on petitioner's petition, using Administrative Office of the Courts form No. AOC-SP-202 for this purpose. The order stated that "[a] hearing was held before the Clerk of Superior Court and, after hearing the evidence, the Court does not find by clear, cogent, and convincing evidence that the respondent is incompetent[,]" and that "[i]t is adjudged that Respondent is not incompetent and the proceeding is dismissed." On 17 August 2015, petitioner appealed the clerk's order to the Superior Court of Columbus County. On 22 September 2015, respondent and Michael Dippel filed motions to dismiss petitioner's appeal, asserting that petitioner lacked standing to appeal the clerk's order and the superior court lacked jurisdiction to entertain petitioner's appeal, because "there was no order adjudicating the Respondent to be incompetent."

On 7 October 2015, the trial court filed an order dismissing petitioner's appeal. The court stated that its order was "based upon N.C. Gen. Stat. § 35A-1115 and applicable caselaw," that the "Petitioner lacks standing to appeal the dismissal of the Petition for Adjudication of Incompetence by the Assistant Clerk of Superior Court," and that the trial court "lacks jurisdiction to hear any such appeal[.]" Petitioner noted a timely appeal to this Court from the trial court's dismissal of his appeal from the order of the assistant clerk of court adjudging that respondent was not incompetent and dismissing petitioner's petition.

II. Standard of Review

The trial court dismissed petitioner's appeal from the order entered by the assistant clerk of court based upon the court's interpretation of N.C. Gen. Stat. § 35A-1115, which governs the right of appeal from an order of the clerk of court on a petition seeking an adjudication that an individual is incompetent. Thus, "the issue before the appellate court is one of statutory construction, which is subject to *de novo* review."

Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc., 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (citing *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010)).

"The primary objective of statutory interpretation is to give effect to the intent of the legislature." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (citations omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, 'a statute is ambiguous, judicial construction must be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Burgess v. Your House of Raleigh*, 326 N.C.205, 209, 388 S.E.2d 134, 136-37 (1990)) (other citation omitted). The language of a statute is ambiguous when it is "fairly susceptible of two or more meanings." *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (citation omitted).

III. Discussion

The clerk of court has exclusive jurisdiction over the initial determination of whether an individual is incompetent. N.C. Gen. Stat. § 35A-1102 (2015) states that Chapter 35A of our General Statutes "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." Pursuant to N.C. Gen. Stat. § 35A-1103(a) (2015), "[t]he clerk in each county shall have original jurisdiction over proceedings under this Subchapter."

We next consider the right of appeal from the clerk of court. The general rule, expressed in several statutes, is that an aggrieved party may appeal from an order of the clerk of court to superior court. N.C. Gen. Stat. § 7A-251(a) (2015) states that:

> In all matters . . . which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

Chapter 1 of the General Statutes in turn provides in N.C. Gen. Stat. § 1-301.1(b) (2015) that "[a] party aggrieved by an order or judgment entered by the clerk may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a trial or hearing *de novo*[.] N.C. Gen. Stat. § 1-301.2 (2015) specifies that:

> (e) . . . [A] party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing *de novo*. . . .
>
> (g)(1) [Regarding] [p]roceedings for adjudication of incompetency[,] . . . Appeals from orders entered in these proceedings are governed by Chapter 35A to the extent that the provisions of that Chapter conflict with this section.

The above-quoted statutes establish that an aggrieved party may appeal to superior court from an order of the clerk of court in a competency proceeding, unless the right is countermanded by a different statute in N.C. Gen. Stat. § Chapter 35A. In this case, the specific statute addressing appeals from the clerk of court in competency proceedings is N.C. Gen. Stat. § 35A-1115, which states that "[a]ppeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals." We conclude that N.C. Gen. Stat. § 35A-1115 does not conflict with other statutes and that it permits appeal from the clerk's order in the instant case.

We discern no legal basis or policy consideration that suggests a legislative intent to deprive an aggrieved party from appealing a clerk's determination that a respondent is not incompetent. We note that in the present case, petitioner moved for recusal of the Clerk of Court on the grounds that the clerk had a conflict of interest. Petitioner's motion highlights the benefit of allowing review of the clerk's order, without regard to the merits of petitioner's motion. We conclude, given the ubiquity of the right of appeal from the clerk of court to superior court and the absence of any limiting or restrictive language in the statute, that the only reasonable interpretation of N.C. Gen. Stat. § 35A-1115 is that the statute allows appeal to superior court from any order of the clerk of court "adjudicating [the issue of] incompetence."

In reaching this conclusion, we have rejected an alternate interpretation, suggested in respondent's motion to dismiss petitioner's appeal, that would limit the right of appeal to orders "adjudicating [that an individual meets the definition of] incompetence." We observe that N.C. Gen. Stat. § 35A-1115 provides for appeal from orders adjudicating *incompetence*, a noun, rather than from orders adjudicating that a specific person is *incompetent*, an adjective. We conclude that respondent's proposed interpretation of N.C. Gen. Stat. § 35A-1115 is not reasonable.

Although the trial court's order also references petitioner's standing to appeal, there is no question that petitioner is an aggrieved party and thus entitled to appeal. We hold that N.C. Gen. Stat. § 35A-1115 allows an aggrieved party to appeal from an order of the clerk of court determining the issue of incompetence, whether the order adjudges (as in the present case) that the evidence was insufficient to establish that the respondent is incompetent, or whether the clerk adjudges that the respondent is incompetent. We conclude that the trial court erred by dismissing petitioner's appeal, but note that the trial court's ruling was made without the benefit of this opinion, which is the first to directly address the scope of N.C. Gen. Stat. § 35A-1115. We conclude that the trial court's order must be

REVERSED.

Judges STEPHENS and McCULLOUGH concur.

IN THE MATTER OF E.B.

No. COA16-382

Filed 4 October 2016

Termination of Parental Rights—jurisdiction—guardian ad litem—verified termination motion

The trial court did not err by terminating parental rights even though respondent mother alleged the trial court lacked jurisdiction since the guardian ad litem (GAL) did not verify the termination motion. The trial court's statement, the affidavit from the deputy clerk, and the properly verified and file-stamped motion attached to the clerk's affidavit sufficed to show that the GAL filed a verified termination motion.

Appeal by Respondent-Mother from order entered 11 January 2016 by Judge Jeannie Houston and order entered 28 January 2016 by Judge Robert Crumpton in Alleghany County District Court. Heard in the Court of Appeals 19 September 2016.

Kilpatrick Townsend & Stockton LLP, by Phillip A. Harris, Jr. and Susan Holdsclaw Boyles, for Appellee Guardian ad Litem.

James N. Freeman, Jr. for Petitioner-Appellee Alleghany County Department of Social Services.

Richard Croutharmel for Respondent-Appellant-Mother.

DILLON, Judge.

Respondent-Mother ("Mother") appeals from orders ceasing reunification efforts and terminating her parental rights to her minor child, E.B. ("Ed").[1] Because the motion to terminate parental rights was verified and properly invoked the trial court's jurisdiction, we affirm.

In May 2014, the Alleghany County Department of Social Services ("DSS") obtained non-secure custody of Ed and filed a petition alleging he was neglected. The trial court entered an order adjudicating Ed neglected. The trial court also entered a disposition order continuing custody of Ed with DSS and directing Ed's parents to comply with their Family Services Case Plan. In June 2015, the trial court entered an order ceasing reunification efforts between Ed and his father, while also establishing reunification as the permanent plan for Ed and Mother.

Nevertheless, Ed's Guardian ad Litem (the "GAL") moved to terminate Mother and father's parental rights, alleging neglect, failure to correct the conditions that led to Ed's removal from their home, failure to pay a reasonable portion of the cost of care for Ed, dependency, and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2015). DSS filed a response joining the GAL's motion.

After an interim permanency planning hearing, the trial court entered an order ceasing reunification efforts between Mother and Ed, and directed DSS to pursue termination of parental rights if the GAL did not procced on the termination motion. After another hearing on the matter, the trial court entered an order terminating both parents' parental rights to Ed.[2] Mother filed timely notice of appeal from both the order ceasing reunification efforts and the order terminating her parental rights.

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1. The pseudonym "Ed" is used throughout for ease of reading and to protect the juvenile's privacy.

2. Ed's father is not a party to this appeal.

Mother's sole argument on appeal is that the trial court lacked jurisdiction over the termination proceedings as the GAL did not verify the termination motion. *See In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007). In response, the GAL has filed a motion to amend the record on appeal to include a copy of the motion which contains the necessary verification. The GAL has included an affidavit from Deputy Clerk of Court Veronica Williams with the motion to amend. Ms. Williams avers that a verification page was attached to the GAL's termination motion, but that when Mother's appellate counsel requested the court file to prepare the record, the verification was inadvertently retained in the Clerk's office and was not sent as a proper part of the court file. Ms. Williams offers no explanation for how a single page could be mistakenly retained by her office.

Mother objects to the GAL's attempt to amend the record to include a copy of the verified termination motion, contending that it is unclear if the trial court relied upon the verified motion. However, in its order terminating Mother's parental rights, the trial court states that it made its findings of fact "[b]ased upon the verified Motion heretofore filed in this juvenile proceeding[.]" We hold that this statement by the trial court, the affidavit from the deputy clerk, and the properly verified and file-stamped motion attached to the clerk's affidavit, suffice to show that the GAL filed a verified termination motion and that the trial court acted upon that motion. Accordingly, we allow the GAL's motion to amend the record on appeal and reject Mother's argument.

Mother has not challenged the trial court's order terminating her parental rights or the 11 January 2016 order ceasing reunification efforts on any other grounds, and they are hereby affirmed.

AFFIRMED.

Judges McCULLOUGH and ENOCHS concur.

IN RE J.M.

[249 N.C. App. 617 (2016)]

IN THE MATTER OF J.M., A.C. AND R.S-C., PETITIONERS
v.
S.F.M. AND D.N.G., RESPONDENTS

No. COA16-265

Filed 4 October 2016

Termination of Parental Rights—subject matter jurisdiction—wrong county

The trial court lacked subject matter jurisdiction over a parental termination proceeding and thus the order was vacated. The minor child did not reside in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County Department of Social Services.

Appeal by respondent-mother from order entered 19 October 2015 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 September 2016.

Cheri C. Patrick for petitioners-appellees.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant mother.

No brief filed for guardian ad litem.

ZACHARY, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor child, J.M. ("Jacob").[1] Because the trial court lacked subject matter jurisdiction over the termination proceeding, we vacate the order.

On 24 January 2012, one day after Jacob was born, the Durham County Department of Social Services ("DSS") took Jacob into non-secure custody and placed him with Mr. and Ms. C ("petitioners"). According to the nonsecure custody order, DSS met with respondent-mother to help avoid Jacob's placement with petitioners, but "[a]dditional efforts were precluded by the incarceration of [respondent-]

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

mother and the unknown whereabouts of [Jacob's] father." Jacob has resided with petitioners ever since the initial placement.

Respondent-mother, who lived with Jacob's maternal grandmother, did not begin visiting with Jacob until he was six months old. Although petitioners drove respondent-mother to visits with Jacob, they stopped providing transportation assistance when respondent-mother failed to attend visits and stated that she needed a break from visitation. Respondent-mother also lacked independent living skills, and there was concern that Jacob's maternal grandmother would pose a risk to his safety if he was returned to respondent-mother's care.

Consequently, on 28 May 2013, the trial court issued a limited custody order placing Jacob into the guardianship and physical custody of petitioners in order for them to obtain information and services for Jacob, as needed, without unnecessary delay pending a more comprehensive order. It is unclear when Jacob's initial permanency planning hearing was conducted. However, after holding a permanency planning review hearing in May 2013, the trial court entered an order on 16 July 2013 again naming petitioners as guardians and physical custodians of Jacob and setting guardianship as the permanent plan.

Petitioners filed a petition to terminate respondent-mother's parental rights in Durham County District Court on 30 June 2015 alleging the following grounds: (1) willfully leaving Jacob in a placement outside the home for more than 12 months without making reasonable progress, and (2) willful abandonment of Jacob. *See* N.C. Gen. Stat. § 7B-1111(a)(2) and (7) (2015). After a hearing, the trial court entered an order on 19 October 2015 terminating respondent-mother's parental rights to Jacob based on willful abandonment. Respondent-mother timely appealed.[2]

Respondent-mother first argues that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding because the petition was filed in Durham County and Jacob resided in Wake County, was not found in Durham County, and was not in the custody of Durham County DSS or a Durham County child-placing agency at the time the petition to terminate parental rights was filed. Therefore, respondent-mother contends that the order terminating her parental rights should be vacated. We agree.

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2. Although the termination order was entered in October 2015, respondent-mother was not served with the order until 8 January 2016. Thus, her 8 January 2016 written notice of appeal is timely. *See* N.C. Gen. Stat. § 7B-1001(b) (2015).

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007). "The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal." *In re B.L.H.*, ___ N.C. App. ___, ___, 767 S.E.2d 905, 909 (2015). Jurisdiction over termination of parental rights proceedings is governed by N.C. Gen. Stat. § 7B-1101, which provides:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, *or is in the legal or actual custody of a county department of social services* or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101 (2015) (emphasis added).

Here, it is undisputed that Jacob resided with petitioners in Wake County at the time the petition to terminate respondent-mother's parental rights was filed in Durham County District Court. There is no evidence that Jacob was found in Durham County or was in the custody of a child-placing agency in Durham County at the time the petition was filed.

As to DSS custody, Durham County DSS was initially granted custody of Jacob pursuant to a 24 January 2012 nonsecure custody order. However, in the 28 May 2013 limited order and again in the 16 July 2013 permanency planning review order, the trial court placed Jacob in the guardianship and physical custody of petitioners and named guardianship as the permanent plan. The trial court also released DSS and the guardian *ad litem* from "further court responsibility" and waived further review hearings.

Pursuant to N.C. Gen. Stat. § 7B-600, once appointed by a trial court,

> [t]he guardian shall have the care, *custody*, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the Armed Forces

> of the United States, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile.

N.C. Gen. Stat. § 7B-600(a) (2015) (emphasis added).

The 28 May 2013 order removed Jacob from DSS custody and granted custody to petitioners by naming them as the guardians and physical custodians of Jacob. *See id.*; *see also In re J.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009) (noting that by making a couple the guardians for the child, the trial court modified the child's custody from DSS to the couple). Thus, at the time petitioners filed their petition to terminate respondent-mother's parental rights on 30 June 2015, Jacob was not residing in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County DSS. *See* N.C. Gen. Stat. § 7B-1101.

Because none of these requirements were met, the Durham County District Court lacked jurisdiction to hear the termination of parental rights petition. Accordingly, we vacate the order terminating respondent-mother's parental rights.

VACATED.

Judges BRYANT and TYSON concur.

IN THE MATTER OF K.P. & C.P.

No. COA16-295

Filed 4 October 2016

Child Abuse, Dependency, and Neglect—writ of certiorari—adjudication and disposition—appointed counsel

Respondent mother's petition for writ of certiorari was allowed in a neglected and dependent juveniles case for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders were vacated. The case was remanded for a new hearing on the petition filed by DSS in 15 JA 63 with regard to Carl and to hold a hearing to determine respondent's eligibility and desire for appointed counsel.

IN RE K.P.

[249 N.C. App. 620 (2016)]

Appeal by respondent-mother from order entered 20 November 2015 by Judge Joseph Moody Buckner and order entered 24 November 2015 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 7 September 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

W. Michael Spivey for respondent-appellant mother.

Battle Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

ZACHARY, Judge.

Respondent-mother ("respondent") appeals from an order denying her motion to vacate an order that had adjudicated respondent's children "Kate" and "Carl"[1] to be neglected and dependent juveniles. Although respondent failed to appeal in a timely fashion from the underlying order adjudicating the children to be neglected and dependent, we have granted respondent's petition for a writ of certiorari in order to reach the merits of her appeal. Respondent also appeals from a permanency planning order. For the reasons discussed below, we reverse the adjudication and disposition order, vacate all subsequent orders resulting from that order, and remand for further proceedings with respect to Carl.[2]

I. Factual and Procedural History

On 14 July 2015, the Orange County Department of Social Services ("DSS") filed juvenile petitions alleging that 17-year-old Kate and 13-year-old Carl were neglected and dependent. The petitions alleged that respondent was "abusing or misusing" anti-anxiety and pain medications, and that on 2 April 2015, respondent had been involuntarily committed to UNC Hospital for several days. In addition, the petitions alleged that Kate and Carl did not want to live with respondent until she was treated for substance abuse. Judge Joseph Moody Buckner conducted a hearing on the petitions on 6 August 2015. On 27 August 2015, Judge Buckner entered an order that adjudicated Kate and Carl to be

1. We use these pseudonyms to protect the juveniles' privacy.

2. Kate reached the age of majority in June 2016 and is no longer within the jurisdiction of the juvenile court. *See* N.C. Gen. Stat. § 7B-201(a) (2015).

neglected and dependent, placed them in the legal and physical custody of respondent's brother, "Mr. R.," and scheduled a permanency planning hearing for 5 November 2015.

On 14 September 2015, respondent, who was then represented by appointed counsel James E. Tanner, III, filed a *pro se* motion seeking the removal of her court-appointed counsel and asking the court to vacate the adjudication and disposition order due to "lack of consent, misrepresentation/facts not presented to the Court, and ineffective assistance of counsel." Respondent's motions were first heard by Judge Beverly Scarlett on 1 October 2015. At that hearing, Judge Scarlett told respondent that if the court removed Mr. Tanner, she would then be left with the choice of retaining private counsel or proceeding without counsel. Although the record contains no ruling on respondent's motion for removal of her appointed counsel, respondent proceeded without the assistance of counsel after the 1 October 2015 motion hearing. Judge Scarlett continued the hearing on the motion to vacate the adjudication order until it could be heard by Judge Buckner.

Judge Buckner held a hearing on respondent's motion to vacate the adjudication order on 22 October 2015, and entered an order denying respondent's motion on 20 November 2015. On 5 November 2015, after the hearing on respondent's motion to vacate the order for adjudication and disposition but before the entry of Judge Buckner's order denying respondent's motion, Judge Scarlett conducted a permanency planning hearing. On 24 November 2015, Judge Scarlett entered a permanency planning order that established a permanent plan of guardianship for Kate and Carl and appointed Mr. R. as their guardian. The order granted respondent supervised visitation with the children, declared the case "closed to further reviews" and released DSS and the guardian *ad litem* from their involvement in this matter.

Respondent filed timely notice of appeal from the order denying her motion to vacate the adjudication order and from the permanency planning order. However, respondent failed to enter a timely notice of appeal from the underlying order for adjudication and disposition. Counsel appointed to represent respondent on appeal has filed a petition for writ of certiorari asking this Court to review the original adjudication order entered on 27 August 2015. N.C.R. App. P. 21(a)(1) (2015) provides that the "writ of certiorari may be issued in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action[.]" Our courts have generally interpreted the term "appropriate circumstances" in Rule 21(a) to mean that "the right of appeal has been lost through no fault of the petitioner[,]" *Johnson v. Taylor*, 257

N.C. 740, 743, 127 S.E.2d 533, 535 (1962), and "that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). Ultimately, however, our decision to issue the writ is discretionary. *State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005). In this case, the record shows that respondent lost her right of appeal through no fault of her own and, as discussed below, we conclude that respondent has shown error by the trial court. In our discretion, we allow her petition for writ of certiorari to review the order.

II. Order of Adjudication and Disposition

On appeal, respondent argues that the court erred by entering the order adjudicating her children to be neglected and dependent, on the grounds that the trial court neither conducted a proper adjudicatory hearing nor properly established respondent's consent to the adjudication. We conclude that respondent's argument has merit.

A. Legal Principles and Standard of Review

When a juvenile is alleged to be abused, neglected, or dependent, N.C. Gen. Stat. § 7B-802 (2015) requires the court to conduct an "adjudicatory hearing" in the form of "a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." "In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." *Id.* "[T]he allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015). Moreover, the trial court may accept a stipulation to adjudicatory facts only as follows:

> A record of specific stipulated adjudicatory facts shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.

N.C. Gen. Stat. § 7B-807(a) (2015).

"An adjudication of abuse, neglect or dependency in the absence of an adjudicatory hearing is permitted only in very limited circumstances." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002). N.C. Gen. Stat. § 7-801(b1) (2015) authorizes the court to enter "a consent adjudication order" only if: (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile

is represented by counsel; and (3) the court makes sufficient findings of fact.

N.C. Gen. Stat. § 7B-807(b) (2015) requires that an "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." " '[T]he trial court's findings must consist of more than a recitation of the allegations' contained in the juvenile petition. '[T]he trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law.' " *In the Matter of S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 711-12 (2011) (quoting *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal quotation omitted)). In addition:

> In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. . . . [However,] the trial court may not delegate its fact finding duty. Consequently, the trial court should not broadly incorporate these written reports from outside sources as its findings of fact.

In re J.S., 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (citing *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003), and *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). On appeal from an adjudication of neglect, abuse, or dependency, this Court must "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) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008).

B. Discussion

The record on appeal shows that the parties attended a Child Planning Conference on 21 July 2015, and that a report submitted by DSS to the trial court indicated that a "Consent Agreement could not be reached" at the conference. The case was scheduled for adjudication and disposition on 6 August 2015. The entire adjudication hearing consisted of the following exchange between the trial court and counsel:

> [DSS COUNSEL]: Handing up the reports in [Kate and Carl's] case and I understand there's a consent.
>
> THE COURT: Okay. I appreciate everybody's consent and hard work in this case. It's going to work out fine. We'll

approve the placement as recommended by [the guardian *ad litem*] and [the DSS social worker]. And we need a three-month [hearing] date.

[FATHER'S COUNSEL]: Oh. Your Honor, if I could be heard.

THE COURT: Of course.

[FATHER'S COUNSEL]: Yes, Your Honor. [Father] is in agreement with the children being with Mr. [R]. He has a couple of concerns. One being that there is a fairly substantial amount of money that comes to - that the children get by virtue of his disability. And that money is still going to Mother—

THE COURT: And it's going to change.

. . . .

[COUNSEL FOR FATHER]: . . . Okay. And also, just to specify that he can have unsupervised visitation at the permission—- at the desire of the children. . . .

. . . .

[COUNSEL FOR DSS] And how should the order read with regards to the children's disability benefits?

THE COURT: That [Mr. R. will] become the payee and recipient.

. . .

MR. TANNER: Your Honor. So my client has a couple of requests. She's willing to comply with the recommendations. She would like to have some ability to have further visitation.

THE COURT: Well, there's nothing restricting her from that.

MR. TANNER: Okay.

THE COURT: There won't be anything in the order doing that.

MR. TANNER: There won't be anything restricting it?

THE COURT: No.

. . . .

> MR. TANNER: Second issue as it says: That [Father] is to assist with providing transportation. I was informed that there was some history of substance use, drunk driving, prior custody orders from some years past.
>
> . . . .
>
> THE COURT: Everybody that's providing transportation have a license and insurance. How about that?
>
> . . .
>
> THE COURT: Okay. Have a license and insurance and not be impaired.
>
> MR. TANNER: Okay.
>
> THE COURT: Or using. All right? Thank you.

The hearing concluded with counsel for DSS announcing a subsequent hearing date of 5 November 2015.

The order of adjudication and disposition recites that its findings of fact are being made "based on clear, cogent and convincing evidence" and that the court's conclusions are based on these findings of fact. However, the trial court received no testimony at the 6 August 2015 hearing, and the parties did not stipulate to any adjudicatory facts pursuant to N.C. Gen. Stat. § 7B-807(a). Instead, the adjudication of the minor children as neglected and dependent was supported solely by two written reports submitted by DSS at the hearing. As a result, the trial court's findings of fact consist of recitations from the facts alleged in the petitions and wholesale incorporation of reports prepared by DSS. We conclude that the trial court entered its adjudication order without conducting an adjudicatory hearing as required by N.C. Gen. Stat. § 7B-802.

We further conclude that the order for adjudication and disposition is not a valid consent order and did not meet the requirements of N.C. Gen. Stat. § 7-801(b1). The order contains no findings stating that the parties had stipulated to adjudicative facts or had consented to the children being adjudicated as neglected and dependent. Nor is there any evidence that a consent order had been drafted for the parties' agreement. In sum, the record contains no evidence that the parties had reached a consent agreement or that respondent had consented to her children being adjudicated as neglected and dependent.

In *In re J.N.S.*, 207 N.C. App. 670, 678, 704 S.E.2d 511, 517 (2010), the record showed that the *respondent's* attorney had drafted a proposed consent order. In addition, the parties were informed in open court that the trial court intended to enter an adjudication order based upon the consent of the parties. In that factual context, this Court held that the respondent's failure to object to entry of the consent order constituted a waiver of the right to challenge the order on appeal. In contrast, in the present case, there is no evidence in the record that a consent agreement had been reached for adjudication or that a consent order had been drafted. Moreover, although the attorney for DSS and the trial court referred to "consent" several times, none of those present stated the nature of the purported "consent" for the record. Specifically, neither of the parties' attorneys nor the trial court ever stated that respondent was consenting to the adjudication of her children as neglected and dependent.[3]

"As the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 396 (2000) (citation omitted). In the present case, the adjudication and disposition order neither resulted from a proper adjudicatory hearing under N.C. Gen. Stat. § 7B-802, nor met the requirements of a valid consent adjudication order under N.C. Gen. Stat. § 7B-801(b1). Therefore, we reverse the order and remand to the trial court for further proceedings as to Carl.

III. Remaining Issues

As we have reversed the trial court's order for adjudication and disposition, we vacate the orders based upon the adjudication order, including the order that denied respondent's motion to vacate the adjudication order and the 24 November 2015 permanency planning order. Accordingly, we need not address respondent's arguments challenging these orders.

Respondent also argues that the court erred by treating her motion for removal of her court-appointed counsel as a waiver of her right to

3. Respondent's attorney stated that respondent had agreed to "comply with the recommendations." We conclude that this was likely a reference to the "recommendations" in respondent's case plan, as there is no evidence in the record that any party had "recommended" that respondent consent to the adjudication.

appointed counsel under N.C. Gen. Stat. § 7B-602(a) (2015) and by requiring her to proceed *pro se* without conducting the inquiry mandated by N.C. Gen. Stat. § 7B-602(a1). As we have reversed the underlying order for adjudication and disposition and have vacated the subsequent orders arising from that order, we find it unnecessary to reach this issue.

IV. Conclusion

Respondent's petition for writ of certiorari is allowed for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders entered by the trial court, including the permanency planning order entered on 24 November 2015, are hereby vacated. We remand the cause for a new hearing on the petition filed by DSS in 15 JA 63 with regard to Carl. The trial court shall hold a hearing to determine respondent's eligibility and desire for appointed counsel in accordance with N.C. Gen. Stat. § 7B-602.

REVERSED AND REMANDED IN PART; VACATED IN PART.

Judges BRYANT and TYSON concur.

IN THE MATTER OF L.Z.A.

No. COA16-200

Filed 4 October 2016

1. Child Abuse, Dependency, and Neglect—findings of fact —sufficiency

The trial court's finding of fact 3 in a child abuse and neglect case, with the exception of finding of fact 3(i), was supported by clear and convincing competent evidence. To the extent that finding of fact 3(i) was not supported by clear and convincing competent evidence, there was no prejudicial error.

2. Child Abuse, Dependency, and Neglect—adjudication

The trial court did not err by adjudicating the minor child abused and neglected where the child sustained unexplained, non-accidental injuries while in respondent parents' custody. The Department of Social Services was not required to rule out every remote possibility or prove abuse beyond a reasonable doubt.

3. Child Visitation—visitation plan—memorialized in previous court order

The trial court did not abuse its discretion in a child abuse and neglect case by allegedly failing to set out a minimum visitation plan. The current visitation plan was memorialized in the trial court's previous order.

4. Child Abuse, Dependency, and Neglect—reunification plan—concurrent plan of adoption

The trial court did not abuse its discretion in a child abuse and neglect case by implementing a concurrent plan of adoption in addition to the reunification plan. Assuming arguendo it was error, there was no prejudice.

Appeal by Respondent-Mother and Respondent-Father from order entered 25 November 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 19 September 2016.

Christopher C. Peace for Petitioner-Appellee Mecklenburg County Department of Social Services, Youth and Family Services.

N. Elise Putnam for Appellant-Respondent Mother.

Miller & Audino, LLP, by Jay Anthony Audino, for Appellant-Father.

Ellis & Winters LLP, by James M. Weiss, for the Guardian ad Litem.

DILLON, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively referred to as "Parents") appeal from an order adjudicating L.Z.A. ("Lisa")[1] abused and neglected and continuing custody with the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS"). After careful review, we affirm.

I. Background

The instant action stems from a report YFS received alleging that four-month-old Lisa had been admitted to the hospital on either

1. The pseudonym "Lisa" along with other pseudonyms are used throughout.

3 December 2014 or 4 December 2014 with bilateral bleeding in the brain, a shifting of the brain off of the midline, and a skull fracture. Lisa was in Parents' custody when she sustained these injuries. Due to the nature of her injuries, medical personnel performed a non-accidental trauma ("NAT") series on Lisa, which revealed that Lisa had fractured her arm around the same time she sustained her other injuries.

Parents' recount of the events leading up to Lisa's admission to the hospital is as follows. During the week of Thanksgiving,[2] Mother noticed that Lisa was behaving differently—Lisa appeared sad, angry, and uncomfortable. This behavior continued after Thanksgiving. In addition, Lisa began drinking less milk. On 1 December 2014, Parents took Lisa to the hospital because she was sweating and had a fever. Lisa was discharged and prescribed an antibiotic.

When Lisa's condition failed to improve, Parents took her to a different hospital. Lisa was admitted with vomiting and a fever, and a computerized topography ("CT") scan revealed bilateral subdural hematomas and a linear left parietal skull fracture. Lisa's attending examiner opined that the "constellation of findings raises the possibility of non-accidental trauma." Due to the possibility of non-accidental trauma, Lisa was given a full skeletal survey. In addition to the left skull fracture, the skeletal survey revealed a linear right parietal fracture. The skeletal survey also revealed a "healing fracture of the distal left humerus."

On 8 December 2014, Dr. Marc Mancuso, a pediatric radiologist, reviewed the CT scan results and skeletal survey. His observations regarding the fractures to the back of Lisa's head are as follows: "[t]here was a linear fracture of the left parietal calvarium . . . that also involved a suture -- that's where bones of the head are separate -- and another fracture on the other side which may have been connected through the sutures to the fracture on the right side." He was unsure whether Lisa had two distinct fractures or one fracture that "communicate[d] through a suture." Dr. Mancuso opined that "either a blow to the skull or the skull being struck against a hard object" was the cause of the skull fracture. Dr. Mancuso reasoned that the fracture(s) could have been caused by a fall only if Lisa fell over three feet onto a hard surface.

Dr. Mancuso also explained that Lisa had a fracture to her left humerus, the large bone of her upper arm. He noticed some new bone formation, which indicated that Lisa's arm was healing. The arm fracture was above the elbow; Dr. Mancuso noted that fractures of these sorts in

2. This Court takes judicial notice that Thanksgiving Day fell on 27 November 2014.

infants are most commonly caused by twisting or bending the joint. Dr. Mancuso concluded that "infants of [Lisa's] age are not able to cause fractures of this sort under their own power."

After reviewing the skeletal survey, Dr. Mancuso determined that Lisa's arm fracture was "highly specific for nonaccidental trauma," and that the additional skull fracture "increases specificity." He opined that the injuries occurred anywhere from one to three weeks prior to the skeletal survey.

On 15 December 2014, Lisa was discharged from the hospital. On 17 March 2015, she had a CT scan, which appeared to indicate recent brain bleeding. It was later determined that this bleeding resulted from her original injuries. Another CT scan conducted on 28 April 2015 indicated that Lisa's brain injuries were improving, with no recent bleeding.

Parents affirmed that they were Lisa's sole caregivers at all relevant times. After Lisa's birth in August 2014, Mother returned to work shortly thereafter, and a neighbor named "Doris" cared for Lisa. Doris, however, stopped caring for Lisa during the last week of October. Father was out of town working when Lisa was born. He returned to North Carolina for two weeks shortly after her birth, and then left again. Father returned home on 14 November 2014 and was Lisa's sole caregiver after his return. Doris did not provide any babysitting for Lisa in November 2014.

Father indicated that a woman named "Ana" babysat Lisa on one occasion after Thanksgiving while he was attempting to purchase a house. Father's testimony appeared to waver on the exact date Ana babysat Lisa. Nevertheless, Father testified that Ana did not babysit Lisa at any time between 14 November 2014 and Thanksgiving.

During the Thanksgiving holiday, Parents visited other family members at a relative's house. Mother held Lisa for the majority of the visit due to Lisa's discomfort. While Father's ten-year-old daughter was present during the visit, she never had any unsupervised time with Lisa.

On 8 December 2014, YFS interviewed Parents separately; however, neither Mother nor Father had any explanation for Lisa's injuries. They denied that Lisa had fallen, been dropped or thrown, endured trauma, or been mistreated in any way.

In December 2014, YFS filed a petition alleging that Lisa was abused and neglected. The petition alleged, among other things, that the medical findings were consistent with non-accidental trauma, that the cause of Lisa's injuries was unknown, and that Parents were Lisa's sole caregivers

during the relevant time period. YFS was granted non-secure custody of Lisa, after which Lisa was placed with Father's ex-girlfriend.

On 25 November 2015, the trial court entered an order adjudicating Lisa abused and neglected. The trial court also concluded that it was in Lisa's best interest to remain in YFS custody. Parents appeal.

II. Standard of Review

Review of a trial court's adjudication of dependency, abuse, and neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citation omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

III. Analysis

A. Finding of Fact 3 is Largely Supported by Competent Evidence

[1] We first address Parents' challenge of finding of fact 3, which provides as follows:

> a. On December 8, 2014, [YFS] received a referral alleging that this child had been admitted to CMC-Levine Children's Hospital in the late evening of December 3 or early morning of December 4. The juvenile was found to have bilateral bleeding in the brain, a shifting of the brain off the midline (line from the crown of one's head down to the tip of one's nose) and a skull fracture. The referral further stated that an NAT (non-accidental trauma) series was going to be performed.
>
> b. On December 8, 2014, medical personnel at Levine informed [YFS] that on or about December 1, 2014, the child had been taken to CMC-Pineville and was treated and released, that the child was currently responsive to stimuli, that the parents had no explanation for the injuries that led to this referral, and that there was a ten-year-old sibling that visited the

parents and this child but that the sibling did not have unsupervised time with this child.

c. On that same day, the parents were interviewed separately. . . . Their sentiments were similar to those expressed to [YFS] by the medical personnel.

d. Prior to the above incident, the parents brought the child to the hospital due to a fever and vomiting, and the hospital released the child with medication. The parents later brought the child back when she was not improving.

e. The juvenile was also exposed to out-of-state relatives with small children during the time that she was injured, but the juvenile was supervised at all times.

f. A CT scan performed on December 8, 2014 indicated that the child had subdural hematomas (bleeding on the brain) on the left side and on the right side of her brain that were at least a week old, that the size of the hematomas caused a shift of her brain off of her midline by approximately 5 millimeters, and that there was evidence of a linear left parietal skull fracture (approximately the back part of the skull behind left ear).

g. The NAT series indicated the following: the child had a right parietal skull fracture and a left humeral (upper arm) fracture. It was undetermined whether the right parietal skull fracture was part of the same fracture as the above-noted left parietal skull fracture or whether it was a separate fracture.

h. The findings noted by the medical personnel were consistent with non-accidental trauma.

i. Dr. Marc Mancuso testified, and this Court finds, that the fracture to the child's arm could not be caused by the child. The child's arm fracture was in a healing stage at the time of her hospitalization, indicating it had occurred prior to the skull fracture.

j. At this time, it is not known how the child sustained the aforesaid injuries. Per the parents, the child did have [Doris] as a babysitter. However, the Court finds

> that the babysitting timeframe did not coincide with the injuries timeframe as determined by medical personnel nor did any injuries manifest themselves during that babysitting time.
>
> k. [CMPD] has been investigating the matter, including subjecting the parents to lie detector tests, but neither parent has been charged with any criminal offenses.
>
> l. The parents identified an alternative placement for the juvenile prior to the petition being filed.

We now review Parents' specific arguments regarding the subsections of finding of fact 3 in turn.

1. Parents' Argument that Certain Findings Are Invalid Because They Are Recitations of Petition Allegations Fails

Mother argues that many of these findings do not support the abuse and neglect adjudications as they are verbatim, or near verbatim, recitations of the allegations in the petition. "When a trial court is required to make findings of fact, it must find the facts specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (internal quotation marks omitted). "Thus, the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' " *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (quoting *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337). Consequently, "the trial court's findings must consist of more than a recitation of the allegations" contained in the juvenile petition. *O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853.

However, "it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015). As we noted in *In re J.W.*:

> [T]his Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

Id.

We acknowledge that several of the trial court's findings are verbatim recitations of the petition allegations. However, after reviewing the record, we are satisfied that "the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *Id.*

First, the order contains additional, substantive findings of fact that do not track the language of the petition allegations. Second, the trial court made its findings following several days of witness testimony and admitting medical records. Lastly, the trial court's interactions with the parties during the hearing demonstrates that the court engaged in an independent, decision-making process in rendering its findings. At the close of the adjudicatory phase of the hearing, the trial court announced that it was "taking the matter under advisement to issue both its ruling with regard to the adjudication and specific findings." In between the adjudication and disposition hearings, the trial court and the parties apparently discussed a proposed order, and the court even modified a proposed finding of fact at Father's request. At the outset of the disposition hearing, the trial court discussed this modification with the parties, asked if they wished to be heard, and finalized the order. We are satisfied that the trial court's order is not invalidated due to some of the findings mirroring language in the petition.

2. Finding of Fact 3(e) is Supported by Competent Evidence

In finding of fact 3(e), the trial court found that "[t]he juvenile was also exposed to out-of-state relatives with small children during the time that she was injured, but the juvenile was supervised at all times." Mother admits that she and Father visited with out-of-state relatives on Thanksgiving, but avers that Lisa began acting differently prior to that date. Thus, Mother appears to take issue with any inference that Lisa's injuries occurred on Thanksgiving Day. Mother's contention is ultimately irrelevant. Dr. Mancuso testified that the injuries occurred anywhere from one to three weeks prior to the 8 December 2014 skeletal survey. Therefore, Thanksgiving Day was included as a possible date of injury. Furthermore, both a police officer and YFS social worker testified that Lisa was never unsupervised during the family's visit with out-of-state relatives on Thanksgiving Day. Therefore, even if Parents are to be believed, this finding is still supported by the evidence on record.

3. Finding of Fact 3(h) is Supported by Competent Evidence

In finding of fact 3(h), the trial court found that "[t]he findings noted by the medical personnel were consistent with non-accidental trauma."

Father argues that this finding of fact is not supported by evidence as neither Parents nor the medical professionals could pinpoint the cause or date of Lisa's injuries. Father offers a number of speculative "what-ifs" as to the cause of Lisa's injuries and essentially asks this Court to re-weigh the evidence. The trial court's finding, however, is directly supported by Dr. Mancuso's testimony, and it is not our duty to re-weigh the evidence. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). We disregard this challenge.

4. Finding of Fact 3(i) is Not Supported by Competent Evidence, However This Error is Non-Prejudicial

Parents challenge finding of fact 3(i), which provides that "[t]he child's arm fracture was in a healing stage at the time of her hospitalization, indicating it had occurred prior to the skull fracture." Parents argue that this finding is not supported by the evidence as Dr. Mancuso could not narrow down a specific time frame for the fractures and testified that it was "possible they all occurred at roughly the same time." It is true that Dr. Mancuso's testimony does not appear to support this finding. However, the record establishes that Lisa sustained multiple non-accidental injuries; therefore, pinpointing the precise time these injuries occurred is not necessary to sustain the trial court's adjudications. Accordingly, we find no prejudicial error in this finding.

5. Finding of Fact 3(j) is Supported by Competent Evidence

Finding of fact 3(j) provides that while Doris was Lisa's babysitter, "the babysitting timeframe did not coincide with the injuries timeframe as determined by medical personnel nor did any injuries manifest themselves during that babysitting time." Parents aver that this finding of fact is not supported by the evidence as Dr. Mancuso could not pinpoint the date of the injuries and could only give a range of several weeks. Again, we are not persuaded by this argument, and conclude that this finding is supported by the evidence. Father testified that Doris last babysat for Lisa in October 2014. Dr. Mancuso opined that the injuries occurred anywhere from one to three weeks prior to the skeletal survey, which would have included the last two weeks in November 2014. There is clear and convincing evidence supporting this finding.

In conclusion, we hold that the trial court's findings, with the exception of finding of fact 3(i), are supported by clear and convincing

competent evidence. To the extent that finding of fact 3(i) is not supported by clear and convincing competent evidence, we find no prejudicial error.

B. The Abuse and Neglect Adjudications Were Warranted

[2] We now turn to Parents' arguments regarding the trial court's abuse and neglect adjudications.

1. The Abuse Adjudication is Warranted

Parents contend that the trial court erred in concluding that Lisa was abused. An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C. Gen. Stat. § 7B-101(1) (2015). Parents contend that the findings of fact and evidence do not support an abuse adjudication as: (1) the medical experts had no definitive time frame or explanation for Lisa's injuries, and (2) there is no indication that there was or has been a pattern of abuse or any risk factors for abuse, such as domestic violence, substance abuse, or mental illness. Parents also argue that Lisa's injuries might have been caused by an accident. We hold that the trial court did not err in adjudicating Lisa abused.

This Court has previously upheld abuse adjudications where a child sustains unexplained, non-accidental injuries. *See*, *e.g.*, *In re C.M.*, 198 N.C. App. 53, 60-62, 678 S.E.2d 794, 798-800 (2009) (affirming abuse adjudication where the findings of fact established that the juvenile sustained a head injury that doctors testified was likely non-accidental, despite the fact that there was uncertainty as to when or how the injury occurred). *See also State v. Wilson*, 181 N.C. App. 540, 543, 640 S.E.2d 403, 406 (2007) ("[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." (alteration in original) (internal quotation marks omitted)). The caselaw does not require a pattern of abuse or the presence of risk factors.

The findings of fact and evidence establish that Lisa sustained bilateral skull fractures, subdural hematomas, and an arm fracture. Medical personnel, including an expert witness at the hearing, determined that Lisa's injuries were likely the result of "non-accidental trauma." Parents offered no explanation for Lisa's injuries and were her sole caretakers at the time she sustained the injuries. Based on the time frame established by Dr. Mancuso, the injuries could not have occurred when Doris

was Lisa's caregiver. While Father testified that Lisa was cared for by Ana the day after Thanksgiving, Parents' own testimony indicates that Lisa's symptoms predated Thanksgiving. Thus, the findings of fact demonstrate that Lisa sustained severe, unexplained, non-accidental injuries while in Parents' custody. YFS was not required to rule out every remote possibility; nor was it required to prove abuse beyond a reasonable doubt. The trial court's findings of fact are sufficient to establish abuse.

2. Neglect Adjudication is Warranted

Likewise, Parents challenge the trial court's neglect adjudication. A 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). This Court has consistently required that "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (alteration in original) (internal quotation marks omitted).

Here, the evidence supporting the abuse adjudication also supports the neglect adjudication. *See T.H.T.*, 185 N.C. App. 337, 345–46, 648 S.E.2d 519, 525 (2007). Lisa's unexplained, non-accidental injuries while in Parents' custody establish that: (1) she either failed to receive proper care, supervision, or discipline from Parents or lived in an environment injurious to her welfare; and (2) she was physically impaired as a result. We therefore hold that the trial court's neglect adjudication is supported by clear and convincing competent evidence.

C. The Trial Court's Failure to Set Out a Minimum Visitation Plan in the Disposition Order was not an Abuse of Discretion

[3] Parents argue that the trial court abused its discretion by failing to set out a minimum visitation plan. Visitation in juvenile matters is governed by N.C. Gen. Stat. § 7B–905.1, which provides as follows:

> If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised. Unless the court orders otherwise, the director shall have discretion to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances.

N.C. Gen. Stat. § 7B-905.1(b) (2015). Here, the trial court made the following dispositional finding of fact regarding visitation:

> Visitation shall take place as follows: ***Supervised in accordance with the current plan***. YFS has discretion to expand the supervised visitation, with GAL input. If therapeutic guidance is needed, YFS shall obtain that. YFS may explore the paternal aunt for provision of the supervision, as well as the current placement providers.

Parents argue that this finding of fact violates § 7B-905.1(b) because it fails to provide specific information regarding the frequency and length of visits. Parents, however, overlook the fact that this finding of fact provides that visits would occur "in accordance with the current plan." The current visitation plan was memorialized in the trial court's previous order, which provided the following:

> Parents shall have visits on Tuesdays and Saturdays from 12 pm to 2 pm at a YFS facility. YFS/parents have discretion to modify the dates and times of visits as needed. YFS has discretion to expand visitation. The parents may also have an extended visit on Christmas Day. Parents visitation are to be supervised.

Viewing these two orders in conjunction, it is clear that the visitation plan authorizes supervised, twice-weekly two-hour visits with Parents. *See J.W.*, ___ N.C. App. at ___, 772 S.E.2d at 255 (affirming a disposition order's visitation plan as the disposition order provided that all previous orders remained in full force and effect unless specifically modified, and a prior court order specified the frequency and duration of visits). These provisions satisfy the requirements of N.C. Gen. Stat. § 7B-905.1(b), and we therefore find no abuse of discretion.

D. The Trial Court Did Not Err in its Implementation of a Concurrent Adoption Plan

[4] Finally, Father argues that the trial court erred by implementing a concurrent plan of adoption in addition to the reunification plan. In the decretal portion of the trial court's disposition order, the trial court ruled that "[t]he plan of care shall be reunification. . . . The concurrent plan of care shall be adoption." At the hearing, the trial court elaborated on this issue:

> The Court will still remind all the parties that the Court still has pause and concern as there has not been any identified perpetrator in this matter. The Court is providing that the recommendations be adopted with the Department maintaining legal and physical custody. Will note, both [Mother] and [Father], your cooperation at least with the Department and your follow-up on the plan. So the Court was glad to see that.
>
> The Court adopts the goal for reunification with a concurrent goal of the TPR/adoption.

Father's argument appears to be that the trial court's implementation of a concurrent adoption plan runs afoul of N.C. Gen. Stat. § 7B-901(c)(2015), which permits a trial court at disposition to "direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to [one of several aggravating factors]." Father submits that none of the aggravating factors were present in this case, and that the trial court's order therefore violated N.C. Gen. Stat. § 7B-901(c). However, the trial court did not cease reunification efforts and therefore was not required to make written findings of fact regarding the presence of one or more aggravating factors. On the contrary, the trial court adopted reunification as the primary plan and even suggested that reunification could begin after expanded visitation. Hence, the record establishes that the trial court did not attempt to cease reunification pursuant to N.C. Gen. Stat. § 7B-901(c).

Father also contends that the trial court erred in implementing a concurrent adoption plan as the trial court neglected to make the necessary findings under the section of our Juvenile Code governing permanency planning hearings. We find no error.

Specifically, Father argues that the trial court's order never made the following findings: (1) whether reunification efforts would be futile or inconsistent with the juvenile's need for a safe, permanent home within a

reasonable period of time; (2) when and if termination of parental rights should be considered; (3) whether it was possible for the juvenile to be returned home within the next six months; (4) whether guardianship should be established; and (5) whether adoption should be pursued. *See* N.C. Gen. Stat. § 7B-906.1(d)(3), (6), (e)(1)-(3). Father, however, overlooks the fact that the trial court was conducting a disposition hearing rather than a permanency planning hearing, and therefore was not required to issue the findings of fact required under Section 7B-906.1(d) and Section 7B-906.1(e). Accordingly, the trial court did not err in failing to issue these findings.

Lastly, Father argues that the trial court's order was erroneous as Parents' actions did not support a plan of adoption. We disagree.

"The district court has broad discretion to fashion a disposition . . . based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). We review a trial court's disposition order only for an abuse of discretion. *Id.* "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. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (internal quotation marks omitted). Here, the trial court implemented a concurrent adoption plan due to the court's concern that a perpetrator still had not been identified. The trial court's order was based on a reasoned decision.

Furthermore, assuming, *arguendo*, that the trial court's implementation of a concurrent adoption plan was erroneous, Father cannot show prejudice. The primary plan of care was still reunification and Parents were still receiving services pursuant to a case plan. Father fails to establish that YFS is actively pursuing adoption. Lastly, we note that because the trial court ordered Lisa to remain in the custody of YFS, it is required to hold permanency planning hearings in accordance with Section 7B-906.1 and Section 7B-906.2 and make the requisite findings of fact at that time. We therefore discern no prejudicial error on the part of the trial court.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in adjudicating Lisa abused and neglected. Accordingly, we affirm the trial court's disposition order.

AFFIRMED.

Judges McCULLOUGH and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
ADAM ROBERT JACKSON, DEFENDANT

No. COA15-876

Filed 4 October 2016

1. Appeal and Error—failure to indicate appeal from judgment suspending sentence—petition for writ of certiorari granted

Where defendant's notice of appeal failed to indicate that he was appealing from the Judgment Suspending Sentence entered against him as a result of his plea of no contest, as was required by N.C.G.S. § 15A-979(b)—instead only indicating that he was appealing from the order denying his motion to suppress—the Court of Appeals granted defendant's petition for writ of certiorari to review the appeal on the merits.

2. Search and Seizure—substantial basis for warrant—informant

Where the trial court denied defendant's motion to suppress and defendant pled no contest to one count of manufacturing marijuana, the Court of Appeals held that the warrant application provided a substantial basis to support the magistrate's finding of probable cause. The information provided by the informant was obtained first-hand, it was against the informant's penal interest, it was timely and not stale, and it was adequately corroborated by the investigating officers.

Judge HUNTER, JR. concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 11 February 2015 by Judge Joseph N. Crosswhite in Alexander County Superior Court. Heard in the Court of Appeals 14 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph A. Newsome, for the State.

Gerding Blass, PLLC, by Danielle Blass, for Defendant-Appellant.

INMAN, Judge.

Adam Robert Jackson ("Defendant") appeals from a Judgment Suspending Sentence following his plea of no contest to one count of

manufacturing marijuana. On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence obtained pursuant to a search warrant because the warrant application was insufficient to support the magistrate's finding of probable cause. After careful review, we hold that the warrant application provided a substantial basis to support the magistrate's finding of probable cause. Accordingly, we affirm.

I. Factual & Procedural Background

On 30 January 2013, Detective Jessica Jurney and another officer with the Narcotics Division of the Iredell County Sheriff's Office conducted a knock-and-talk at the home of a person they had never met. The officers indicated to the person that she could face criminal charges based on her[1] possession of marijuana. The person ("confidential informant" or "informant") agreed to provide information regarding where she obtained the marijuana. The informant told Detective Jurney that she had purchased marijuana from Defendant, a male in his early 20s, "with long dark hair."

The informant provided Defendant's name, stated that she had purchased marijuana at Defendant's residence on multiple occasions, and noted that she had most recently purchased marijuana from Defendant at his residence two days earlier. The informant explained that during her most recent purchase, Defendant asked her to wait for him in a front room and went into a bedroom located on the right side of his house. The informant then heard the sound of a key turning in a lock. Defendant returned with a mason jar containing marijuana and sold a portion of it to the informant.

The informant told Detective Jurney that Defendant's residence was located off Old Mountain Road in a wooded area across from a development called "Old Mountain Village." The informant described Defendant's home as a "modular home/trailer." The informant then led Detective Jurney to a driveway with a mailbox marker that read 2099 Old Mountain Road. The informant explained to Detective Jurney that the driveway forked in two separate directions at the end and stated that Defendant's residence was located on the left side of the fork. Subsequently, Captain Clarence Harris of the Iredell County Sheriff's Office drove to the same location and confirmed that a light-colored modular home was located on the left side of a fork in the driveway.

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1. Defendant's brief notes that the suppression hearing seemed to indicate that the confidential informant was female. For this reason, and for ease of reading, we will refer to her as such in this opinion.

Detective Jurney searched the CJ LEADS database, a database wherein law enforcement officers can refer to DMV information or criminal charges, for "Adam Jackson." The search revealed that a person named "Adam Robert Jackson" resided at 2099 Old Mountain Road in Hiddenite, North Carolina, and was twenty-two years old. In the photograph, Adam Jackson had shoulder length brown hair and brown eyes.

On 31 January 2013, Detective Jurney contacted Deputy Kelly Ward of the Narcotics Division of the Alexander County Sheriff's Office. Because the address was located in Alexander County, Detective Jurney notified Deputy Ward of all of the information that had been relayed to her by the informant. On that same day, Detective Jurney and Deputy Ward applied to the Alexander County Magistrate for a search warrant for Defendant's residence. As part of the warrant application, Deputy Ward submitted an affidavit in which he attached a statement by Detective Jurney detailing the information that the confidential informant had relayed to her. Deputy Ward's affidavit stated that in addition to receiving information from Detective Jurney, he had "received information on several occasions throughout the past year from concerned citizens in the area of the premise to be searched, about drug traffic mainly [m]arijuana at the premise to be searched." Deputy Ward also noted that he had searched Defendant's criminal history and discovered that Defendant was charged with possession of marijuana in December 2012[2] in Alexander County.

An Alexander County Magistrate issued a search warrant for Defendant's residence, which law enforcement officers executed the same day. The search revealed "indoor grow equipment," marijuana, and "plants," which officers seized.

On 24 June 2013, Defendant was indicted for possession with intent to manufacture, sell, and deliver marijuana; manufacturing marijuana; felony possession of a Schedule VI controlled substance; and maintaining a vehicle/dwelling/place for a controlled substance.[3] On

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2. Deputy Ward's affidavit indicates that Defendant was charged with possession of marijuana on 22 December 2013 – nearly a year in the future from the date of the warrant application. However, at the hearing on Defendant's motion to suppress, Deputy Ward testified that this was a clerical error in the application, and that the information he obtained reflected that Defendant had been charged in December 2012. Defendant's counsel acknowledged the charge and the correct date.

3. On 24 June 2013, Defendant was also indicted for driving while impaired; possession with intent to manufacture, sell, and deliver marijuana; simple possession of a Schedule VI controlled substance; and possession of drug paraphernalia. These charges stem from an incident occurring 22 December 2012.

19 November 2013, Defendant filed a motion to suppress evidence discovered as a result of the search of his residence.

Defendant's motion was heard on 9 February 2015 by Judge Joseph N. Crosswhite in Alexander County Superior Court. Deputy Ward and Detective Jurney testified at the hearing. At the conclusion of the hearing, Judge Crosswhite denied Defendant's motion to suppress, and, on 13 March 2015, entered a written order to the same effect.

Two days after the suppression hearing, on 11 February 2015, Defendant pled no contest to one count of driving while impaired and one count of manufacturing marijuana. Defendant was sentenced to 12 months imprisonment for the driving while impaired charge, and 6–17 months imprisonment for the manufacturing marijuana charge; however, both sentences were suspended for 30 months of supervised probation, subject to certain terms and conditions.

II. Petition for Writ of Certiorari

[1] We initially address this Court's jurisdiction over this appeal. On 24 February 2015, Defendant filed a Notice of Appeal stating that he "appeals the Order of the Superior Court denying Defendant's motion to suppress all physical evidence seized by law enforcement officers during the search of [] Defendant's residence on the date of the alleged offense, entered in this action." The Notice of Appeal further specified that "[t]he right to this appeal was specifically reserved as part of Defendant's guilty plea."

This Court has held that:

> [I]n order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment.

State v. Cottrell, 234 N.C. App. 736, 739–40, 760 S.E.2d 274, 277 (2014); *see also* N.C. Gen. Stat. § 15A-979(b) (2015) (providing that the denial of a motion to suppress evidence "may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilt[]").

Here, Defendant gave notice to the State that he intended to appeal the denial of his motion to suppress, and the reservation of the right was noted in the transcript of his no contest plea, which provided:

"Defendant expressly reserves the right to appeal the Court's denial of Defendant's Motion to Suppress, and his plea herein is conditioned upon his right to appeal that decision pursuant to [N.C. Gen. Stat. §] 15A-979(b)." However, Defendant's 24 February 2015 Notice of Appeal failed to indicate that he was appealing from the Judgment Suspending Sentence entered against him as a result of his 11 February 2015 plea of no contest, as is required by N.C. Gen. Stat. § 15A-979(b). Instead, Defendant's Notice of Appeal only indicated that he was appealing from the order denying his motion to suppress.

On 5 September 2015, Defendant filed a petition for writ of certiorari, asking this Court to review the Judgment Suspending Sentence. "Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, __, N.C. App. __, __,780 S.E.2d 863, 866 (2015) (citation omitted). North Carolina Rule of Appellate Procedure 21(a) provides:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21. In *State v. Cottrell*, this Court exercised its discretion and granted the defendant's petition for writ of certiorari, "because it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and because defendant has lost his appeal through no fault of his own. . . ." 234 N.C. App. at 740, 760 S.E.2d at 277. Here, applying the same reasoning as this Court imposed in *Cottrell*, we grant Defendant's petition for writ of certiorari and address Defendant's appeal on the merits.

III. Analysis

[2] Defendant contends that the trial court erred in denying his motion to suppress. We disagree.

Our standard of review on an appeal from an order denying a motion to suppress is "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. Johnson*, 98 N.C. App.

290, 294, 390 S.E.2d 707, 709 (1990) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are reviewed *de novo*. *State v. O'Connor*, 222 N.C. App. 235, 238–39, 730 S.E.2d 248, 251 (2012) (internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (internal quotation marks and citation omitted).

Whether probable cause exists to support issuance of search warrant by a magistrate is reviewed under the "totality of the circumstances" test established by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983), and adopted by the North Carolina Supreme Court in *State v. Arrington*, 311 N.C. 633, 641–43, 319 S.E.2d 254, 259–261 (1984). Under the totality of the circumstances test:

> [th]e task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Arrington, 311 N.C. at 638, 319 S.E.2d at 257–58 (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548). " '[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' " *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis omitted) (quoting *Gates*, 462 U.S. at 243 n. 13, 76 L. Ed. 2d at 552 n. 13).

Here, Defendant contests the following paragraph of the trial court's order denying Defendant's motion to suppress,

> In the present matter, this Court concludes that the search warrant was based on information from a reliable confidential informant who provided information that was both accurate and fresh. The information that was provided included a detailed description of the Defendant, where he lived, directions to his house, where the marijuana was kept, and how it was packaged. This information was verified by both officers from the Iredell County Sheriffs' [sic] Department and the Alexander County Sheriffs' [sic] Department. This Court also concludes that the statements made by the

> confidential informant were against her penile [sic] interest in that she admitted to purchasing and possessing marijuana from the Defendant in the past few days.

Defendant challenges the trial court's findings regarding the information provided by the confidential informant and the verification of that information by law enforcement officers, arguing that it is not supported by competent evidence. Defendant contends that the balance of the challenged paragraph, comprised of conclusions of law, is not supported by the findings of fact.

For the reasons discussed below, we disagree with Defendant's contentions. And although the order denying Defendant's motion to suppress omits a conclusion that the application for the search warrant supported a finding of probable cause, the trial court's findings of fact, other conclusions of law, and ultimate denial of Defendant's motion to suppress necessitate such a conclusion. Accordingly, we analyze the challenged findings and conclusions within the context of the larger issue before this Court—whether the facts and circumstances set forth in the application for the search warrant were sufficient to support a finding of probable cause.

We start by considering the reliability of the information provided in the search warrant application. "[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation omitted). The North Carolina Supreme Court has held that "great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. However, this deference is not unlimited. *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014). "[U]nder the totality of the circumstances test, a reviewing court must determine 'whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.' " *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365 (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). Therefore, "[a] reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'merely ratifying the bare conclusions of affiants.' " *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation omitted).

This Court has held:

> When probable cause is based on an informant's tip a totality of the circumstances test is used to weigh the reliability or unreliability of the informant. Several factors are used

> to assess reliability including: (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police.

State v. Green, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638 (2009) (internal quotation marks and citation omitted). We therefore assess the reliability of the information provided by the confidential informant under the totality of the circumstances test, weighing these reliability factors.

A. Confidential and Reliable Tip Standard

As an initial matter, because the affidavit of Deputy Ward is based in part on information provided to Detective Jurney from an informant unknown to Deputy Ward, "we must determine the reliability of the information by assessing whether the information came from an informant who was merely anonymous or one who could be classified as confidential and reliable." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation omitted). Information from an anonymous source is afforded less weight in the totality of circumstances than information that is confidential and reliable. *See State v. Hughes*, 353 N.C. 200, 205–06, 539 S.E.2d 625, 629 (2000).

In order for a reviewing court to weigh an informant's tip as confidential and reliable, "evidence is needed to show indicia of reliability[.]" *Id.* at 204, 539 S.E.2d at 628. Indicia of reliability may include statements against the informant's penal interests and statements from an informant with a history of providing reliable information. *Benters*, 367 N.C. at 665, 766 S.E.2d at 598. Even if an informant does not provide a statement against his/her penal interest and does not have a history of providing reliable information to law enforcement officers, the Supreme Court has suggested that "other indication[s] of reliability" may suffice. *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628.

"When sufficient indicia of reliability are wanting," a reviewing court uses the anonymous tip standard to evaluate the reliability of information provided by an informant. *Benters*, 367 N.C. App. at 666, 766 S.E.2d at 598 (citation omitted).

> An anonymous tip, standing alone, is rarely sufficient, but the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to pass constitutional muster. Thus, a tip that is somewhat lacking in reliability may still provide a basis for probable

> cause if it is buttressed by sufficient police corroboration. Under this flexible inquiry, when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information.

Id. at 666, 766 S.E.2d at 598–99 (internal quotation marks and citations omitted). The North Carolina Supreme Court has utilized the anonymous tip standard in *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000), and *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014).

In *Hughes*, a "confidential, reliable informant" provided a tip to the captain of the Onslow County Sheriff's Department regarding the defendant's possession of marijuana and cocaine. 353 N.C. at 201–02, 539 S.E.2d at 627. The captain, who received the tip by phone, relayed the information to a detective with the Jacksonville Police Department. *Id.* at 201, 539 S.E.2d at 627. The detective then relayed the information to another detective within the department. *Id.* The two Jacksonville Police Department detectives subsequently conducted an investigatory stop of the defendant and discovered drugs on his person. *Id.* at 202-03, 539 S.E.2d at 628. The North Carolina Supreme Court applied the anonymous tip standard and reversed the defendant's criminal conviction because the informant had not been used to give accurate information in the past and because the captain—the only officer who spoke with the informant—did not convey to the other officers how he knew the informant or why the informant was reliable. *Id.* at 204, 539 S.E.2d at 629. The Supreme Court further noted that the statement of the informant was not against his/her penal interest, and that "[t]he only evidence showing that the identity of this informant was known is [the captain's] conclusory statement that the informant was confidential and reliable." *Id.* at 204, 539 S.E.2d at 627. Accordingly, the Supreme Court applied the anonymous tip standard in assessing the reliability of the informant, holding that "[w]ithout more than the evidence presented, we cannot say there was sufficient indicia of reliability to warrant use of the confidential and reliable informant standard." *Id.* at 205, 539 S.E.2d at 629.

In *Benters*, after receiving a tip from an informant face-to-face, a detective with the Franklin County Sheriff's Office relayed to a lieutenant with the Vance County Sheriff's Office that a residence owned by the defendant in Vance County was being used as "an indoor marijuana growing operation." 367 N.C at 661–62, 766 S.E.2d at 596. The lieutenant who received this third-hand information then applied for a search warrant, in which he described the informant as a "confidential and reliable source of information." *Id.* at 662, 766 S.E.2d at 596. After noting that the information provided by the informant did not contain a statement

against his/her penal interest and also noting that the informant did not have a track record, the Supreme Court assessed whether the face-to-face meeting between the informant and the detective who initially received the tip provided additional indicia of reliability. *Id.* at 665–67, 766 S.E.2d at 598–99. Although that detective received the tip through a face-to-face meeting with the informant, as opposed to by phone as in *Hughes*, the Supreme Court still applied the anonymous tip standard, holding that the affiant officer had nothing more than another officer's " 'conclusory statement that the informant was confidential and reliable[.]' " *Id.* at 668, 766 S.E.2d at 600 (quoting *Hughes*, 353 N.C. at 204, 539 S.E.2d at 629). The Supreme Court explained further why the anonymous tip standard applied:

> [T]he affidavit here fails to establish the basis for [the Franklin County detective's] appraisal of his source's reliability, including the source's demeanor or degree of potential accountability. The affidavit does not disclose whether [the Franklin County detective] met his source privately, or publicly and in uniform such that the source could risk reprisal. Moreover, nothing in the affidavit suggests the basis of the source's knowledge.

Id. at 668–69, 766 S.E.2d at 600.

Turning to the case before us, in determining which standard applies to the confidential informant's tip, we note that the informant did not have a history of providing reliable information in the past. The trial court found in pertinent part:

> Detective Ward indicated that he had never met with the confidential informant and was relying upon her trustworthiness from Detective Sergeant Jurney. Detective Sergeant Jurney indicated that she had never worked with the confidential informant before, but the information she provided was detailed and accurate as to a description of the Defendant, where the marijuana was located, and where the Defendant lived.

The confidential informant's lack of a "track record" however, does not require this Court to consider the tip anonymous. "What is popularly termed a 'track record' is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause." *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433. Instead, in determining whether to apply the anonymous tip standard or the confidential and reliable tip standard, we assess whether the

information provided by the informant includes a statement against her penal interest and other indicia of her reliability.

"Whether a statement is in fact against interest must be determined from the circumstances of each case." *Williamson v. United States*, 512 U.S. 594, 601, 129 L. Ed. 2d 476, 484 (1994). Here, in the order denying Defendant's motion to suppress, the trial court concluded that "the statements made by the confidential informant were against her penile [sic] interest in that she admitted to purchasing and possessing marijuana from the Defendant in the past few days." This conclusion is supported by the following findings of the trial court that: "two days prior [to her discussion with Detective Jurney], the confidential informant had been to the home of Adam Robert Jackson and purchased marijuana[;] . . . "the confidential informant had purchased marijuana from inside the home[;] and [] the confidential informant had bought marijuana on several prior occasions from the Defendant at the same residence." These findings are supported by the search warrant application and the officers' testimony at the suppression hearing.

"Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search." *Beam*, 325 N.C. at 221, 381 S.E.2d at 330. This Court and the Supreme Court have categorized an informant's statement implicating that the informant had used and/or purchased marijuana in the past as a statement against the informant's penal interest, for the purpose of weighing reliability. *See*, *e.g.*, *State v. Witherspoon*, 110 N.C. App. 413, 418, 429 S.E.2d 783, 786–87 (1993) (categorizing an informant's statement as one against his penal interest where the informant told an officer that he had used marijuana, "thus admitting [the informant's] possession and use of a controlled substance in the past"); *Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (holding that "[t]he information supplied by the first informant establishes, against the informant's penal interest, that he had purchased marijuana from the defendant[]").

Defendant contends that the confidential informant's statement was not against her penal interest because it "was motivated by a desire to curry favor with the authorities to help her avoid conviction on her own charges." In *Arrington*, the North Carolina Supreme Court refuted this argument:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the

> form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

311 N.C. at 641, 319 S.E.2d at 259 (quoting *United States v. Harris*, 403 U.S. 573, 583–84, 29 L. Ed. 2d 723, 734 (1971)).

Here, the record evidence does not indicate that the confidential informant claimed that she was unaware that the substance that she possessed was marijuana. To the contrary, the statement of Detective Jurney, included in the search warrant application, provides that "[t]he confidential informant told Det. Sgt. Jurney that he/she, along with other individuals, had purchased marijuana from [Defendant] numerous times at that residence." Even if the confidential informant had been motivated to provide this information by a desire to curry favor with Detective Jurney and potentially help her avoid conviction, she still would have incurred the "residual risk" of having admitted purchasing, and in turn, possessing marijuana. Accordingly, we hold that the information provided was against the confidential informant's penal interest.

Noting that the confidential informant did not have a track record of providing reliable information, but did make statements against her penal interest, we consider other indicia of the confidential informant's credibility and reliability, including the face-to-face nature of the officer's encounter with her and the confidential informant's first-hand knowledge of the information.

The information that Detective Jurney relayed to Deputy Ward regarding the Defendant's criminal conduct was first ascertained during a face-to-face encounter between Detective Jurney and the confidential informant. " 'The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties.' " *Witherspoon*, 110 N.C. App. at 418, 429 S.E.2d at 785–86 (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971)). Here, Deputy Ward's affidavit did not merely rely on the information relayed by Detective Jurney. Instead, Detective Jurney accompanied Deputy Ward to apply for the search warrant and provided a written statement as part of the warrant application. The face-to-face nature of Detective Jurney's encounter with the confidential informant, outlined in her written statement, distinguishes this case from *Hughes* and *Benters*. Here, Detective Jurney had the opportunity to assess the

informant's demeanor during their initial encounter and during their drive to confirm Defendant's address. Additionally, the nature of this face-to-face conversation between Detective Jurney and the informant "significantly increased the likelihood that [the informant] would be held accountable if her tip proved to be false." *State v. Allison*, 148 N.C. App. 702, 705, 559 S.E.2d 828, 830 (2002).

The confidential informant had first-hand knowledge of the facts she provided. Detective Jurney's written statement detailed the manner in which the confidential informant came to observe the information that she then relayed, specifically acknowledging that the informant had purchased marijuana from Defendant's residence just two days prior. The informant provided detailed information, including that during this most recent purchase of marijuana, Defendant went into a bedroom located on the right side of his house, turned a key in a lock, and returned with a mason jar containing marijuana. By contrast, the applications for the search warrants at issue in *Hughes* and *Benters* failed to explain how the informants in those cases had become aware of the defendants' criminal activity. In addition to Deputy Jurney's detailed statement, Deputy Ward's affidavit explained specific circumstances underlying the search warrant application sufficient for an assessment of the confidential informant's reliability.

For the aforementioned reasons, we evaluate the reliability of the information provided by the informant under the confidential and reliable standard.

B. Police Corroboration

Another factor in assessing the reliability or unreliability of an informant is "whether information provided by the informant could be and was independently corroborated by the police." *Green*, 194 N.C. App. at 627, 670 S.E.2d at 638. As explained *supra*, information provided by the informant in this case is more reliable than a tip from an anonymous source. "On the fluid balance prescribed by the Supreme Court, a less specific or less reliable tip requires greater corroboration to establish probable cause." *Benters*, 367 N.C. at 669–70, 766 S.E.2d at 601 (citation omitted).

Both Detective Jurney and Deputy Ward corroborated the confidential informant's tip in various respects. Detective Jurney searched the CJ LEADS database for "Adam Jackson" and found a person named Adam Robert Jackson with the listed address of 2099 Old Mountain Road—the name and location provided by the informant. Detective

Jurney's database search also corroborated the informant's description of Defendant's appearance and age.

In addition to providing an address and general description of the neighborhood of Defendant's residence, the informant accompanied Detective Jurney to a mailbox marker that read 2099 Old Mountain Road, and explained that Defendant's residence was down a private driveway, located on the left side of a fork. After Detective Jurney relayed this information to the Alexander County Sheriff's Office, Captain Clarence Harris drove to the address and ventured down the private driveway, where he confirmed the exact location of Defendant's residence consistent with the confidential informant's description.

Deputy Ward, after receiving the aforementioned information from Detective Jurney, conducted a criminal record search and discovered that "Adam Robert Jackson" had been charged with possession of marijuana just over a month earlier, on 22 December 2012. Deputy Ward also noted that he had "received information on several occasions throughout the past year from concerned citizens in the area of the premise to be searched, about drug traffic mainly [m]arijuana at the premise to be searched."

Defendant challenges the trial court's finding that law enforcement officers verified information regarding where the marijuana was kept and how it was packaged. We agree that this finding does not corroborate the reliability of the information because the officers did not locate the marijuana before applying for the search warrant. In order to carry weight as corroborating evidence for the purpose of determining the reliability of a tip, information must have been presented to the magistrate who issued the search warrant. *See* N.C. Gen. Stat. § 15A-245 (2015) (providing that "information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official[]"); *see also Benters*, 367 N.C. at 673, 766 S.E.2d at 603; *Hughes*, 353 N.C. at 208–09, 539 S.E.2d at 631–32; *State v. Brown*, 199 N.C. App. 253, 258–59, 681 S.E.2d 460, 464–65 (2009); *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 23 (2001); *State v. Earhart*, 134 N.C. App. 130, 133–34, 516 S.E.2d 883, 886 (1999). However, we hold that the trial court's other findings regarding the officers' verification of Defendant's physical appearance, address, and specific directions to Defendant's residence are supported by competent evidence and are sufficient to support the trial court's conclusion that probable cause was established.

C. Freshness of Tip

We also consider the freshness of the confidential informant's information. The informant provided Deputy Ward with detailed information regarding her purchase of marijuana from Defendant just two days prior. The informant relayed specific details, including witnessing Defendant go into a bedroom located on the right side of his residence, hearing the sound of a key turning in a lock, and observing Defendant return to the room where she was waiting with a mason jar filled with marijuana. In the order denying Defendant's motion to suppress, the trial court made findings of fact encompassing all of this information.

The passage of two days between an informant's observation of criminal activity and an issuance of a search warrant bolsters the reliability of a tip. *See State v. Singleton*, 33 N.C. App. 390, 392, 235 S.E.2d 77, 79 (1977) (holding that because the affidavit "narrowed down the informant's observation to within 48 hours of the time the warrant was obtained[,] . . . the magistrate, acting upon this information, could reasonably conclude that there was probable cause to believe that the drugs were still in defendant's possession[]"). Accordingly, we hold that the timely nature of the informant's tip provides additional indicia of reliability.

For these same reasons, we hold that the conclusion of law challenged by Defendant that "the search warrant was based on information from a reliable confidential informant who provided information that was both accurate and fresh[,]" is supported by the trial court's findings of fact, which, in turn, are supported by competent evidence.

IV. Conclusion

In assessing the reliability of the information provided by the informant under the confidential and reliable tip standard, we consider that the information was obtained first-hand, that it was against the informant's penal interest, and that it was timely and not stale. Additionally, we hold that Detective Jurney and Deputy Ward's corroboration of this information was adequate to support a finding of probable cause. Accordingly, under the totality of the circumstances test, we hold that the application for the search warrant was sufficient to support the magistrate's finding of probable cause.

AFFIRMED.

Judge STEPHENS concurs.

Judge HUNTER, JR. concurs in part, dissents in part, by separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part, dissenting in part.

As an initial matter, I join the majority in granting Defendant's petition for writ of *certiorari*. However, I respectfully dissent from the majority in favor of reversing the trial court.

Reviewing the totality of the circumstances, and all of the record evidence, no probable cause existed for a warrant to issue in this case. *See State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). To uphold my "duty to ensure that a magistrate does not abdicate his or her duty by 'merely ratifying the bare conclusions of affiants,' " I detail the following record evidence of the events leading up to Deputy Ward's search warrant application. *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (internal quotation marks and citation omitted).

As the majority states, Detective Jurney spoke with the confidential informant, whom she had never met before, during a knock-and-talk on 30 January 2013. Detective Jurney performed this knock-and-talk with another Iredell County narcotics detective in connection with an unrelated criminal case. No charges were ever filed against the confidential informant, though she admitted to previously purchasing some quantity of marijuana from Defendant on a prior occasion.

The next day, on 31 January 2013, the confidential informant directed officers to Defendant's residence. She identified Defendant's home and discussed the details of her previous marijuana purchase. She described Defendant's physical appearance and age. Officers confirmed Defendant's residency and past appearance using CJ LEADS.

Thereafter, Deputy Jurney relayed the information to Deputy Kelly Ward of the Alexander County Sheriff's Office because Defendant's residence is located in Deputy Ward's jurisdiction. Deputy Ward attached Deputy Jurney's affidavit to a search warrant application to search Defendant's home.

At the suppression hearing, Detective Jurney testified she did not remember saying "[to the confidential informant] that if [she] did not cooperate . . . that [her] daughter would be removed from her custody." Detective Jurney testified the confidential informant stated she

bought marijuana from Defendant after officers "indicated . . . [that] the confidential informant [ ] was facing criminal charges herself."

According to Detective Jurney, "high school kids" contacted her "out of the blue" "on several occasions throughout [January 2012 through January 2013]." The students voiced concern about their friend who "[bought] drugs and us[ed] cocaine" from Defendant. The record discloses no information about these individuals, the number of times they contacted Detective Jurney, or the circumstances surrounding their conversations with Detective Jurney.

Prior to the search, officers knew Defendant matched the confidential informant's description of him, based upon his past photo in the CJ LEADS system. Officers also knew Defendant lived at the home the confidential informant identified because of his listed residence on CJ LEADS. They also knew Defendant was charged with possession of marijuana two months prior in December 2012. Apart from this, the officers did not corroborate the confidential informant's information about Defendant's marijuana business.

This Court, and our Supreme Court, have upheld searches of suspected drug traffickers' residences because "officers [ ] discovered some specific and material connection between drug activity and the place to be searched." *State v. Allman*, ___ N.C. App. ___, ___, 781 S.E.2d 311, 317 (2016). Examples of this include: pulling a suspect's trash that is placed at the curb and uncovering several marijuana plants, *Sinapi*, 359 N.C. at 395, 610 S.E.2d at 363; performing controlled drug buys at the suspect's residence using confidential sources, *State v. Riggs*, 328 N.C. 213, 215–16, 400 S.E.2d 429, 431 (1991); and staking out the suspect's residence and observing a high volume traffic pattern "with visitors only staying [inside] for about one minute" and observing several persons being arrested during that time period for drug possession "as they exited the suspect residence," *State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 501 (1991).

The verb "corroborate" means, "To strengthen or confirm; to make more certain." *Black's Law Dictionary* (10th ed. 2014). A witness's testimony is said to be corroborated when "it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established." *Black's Law Dictionary* 344 (6th ed. 1990). Here, the officers did not corroborate the confidential informant's information. The officers corroborated Defendant's appearance, history of marijuana possession, residence, and the confidential informant's ability to navigate to the residence. The officers did not perform

any controlled drug buys, observe a large number of visitors that is consistent with an ongoing marijuana operation, pull Defendant's trash to find marijuana or marijuana plants, or review Defendant's electricity and water consumption to corroborate any suspicion of marijuana manufacturing. Rather, the officers applied for a search warrant using a previously unknown informant's statements regarding her past behavior, which were made after the officers told her she was facing criminal charges, and were possibly made after officers threatened to take her daughter from her.

For the Fourth Amendment to have any effect, officers should corroborate the information given to them in circumstances like these. The confidential informant's information and the information in Deputy Jurney's affidavit, taken in light of the totality of the circumstances, do not provide a substantial basis for concluding that probable cause exists. *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365 (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). Accordingly, I must respectfully dissent.

STATE OF NORTH CAROLINA,
v.
WESLEY PATTERSON

No. COA15-1145

Filed 4 October 2016

Appeal and Error—challenged testimony—waiver

On appeal from defendant's convictions resulting from the theft of a laptop computer and an iPad, the Court of Appeals held that defendant had waived review of his challenges to certain testimony by a police detective regarding what she observed in surveillance footage. Even assuming error, there was no prejudice because other evidence showed that defendant was present in the office building and was seen with the computer bag in his possession.

Appeal by defendant from judgments entered 19 March 2014 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Alesia Balshakova, for the State.

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

McCULLOUGH, Judge.

Wesley Patterson ("defendant") appeals from judgments entered upon his convictions for breaking and entering, habitual larceny, and for attaining habitual felon status. For the following reasons, we find no error.

I. Background

On 27 January 2014, a Mecklenburg County Grand Jury indicted defendant in file number 14 CRS 201911 on one count of felonious larceny for stealing a laptop computer and iPad valued in excess of $1,000.00. Additional indictments returned on 31 March 2014 charged defendant for attaining habitual felon status in file number 14 CRS 12560 and for habitual larceny in file number 14 CRS 12561. Superseding indictments adding one count of felonious breaking and entering and one count of felonious possession of stolen goods in file number 14 CRS 201911 were later returned on 4 August 2014 and 8 December 2014. In total, defendant was indicted for felonious larceny, felonious breaking and entering, felonious possession of stolen goods, habitual felon status, and habitual larceny.[1]

Pretrial matters, including how the court should proceed with the habitual larceny charge, were addressed on 16 and 17 March 2015. Those pretrial matters included the State's motion to join defendant's charges for trial and defendant's motion to dismiss on the ground that the crime of habitual misdemeanor larceny subjects defendant to double jeopardy. The State's motion to join was allowed and defendant's motion to dismiss was denied. The case then proceeded to trial before the Honorable Robert T. Sumner in Mecklenburg County Superior Court on 17 March 2015.

During a break in jury selection, and prior to the jury being empaneled, defendant admitted to the prior misdemeanor larceny convictions needed to establish habitual larceny in order to keep evidence of the prior larcenies from being presented at trial.

The State's evidence at trial tended to show the following: On 14 January 2014, a man entered the offices of First Financial Services, Inc. ("First Financial"), in the Fairview One Center on Fairview Road in Charlotte (the "office building"). Brian Gillespie, a loan officer employed

1. Habitual larceny raises a misdemeanor larceny to a felony if the accused has four prior misdemeanor larcenies. *See* N.C. Gen. Stat. § 14-7 (2015).

by First Financial, observed the man, whom he had never seen before, coming out of his boss' office. Gillespie and the man made eye contact as the man surveyed the office, but they did not speak because Gillespie was on the phone with a customer. The man then left. Gillespie described the man as tall, slender, African-American, and wearing a newsboy cap with a button in the front.

Approximately thirty minutes later, David Hay, Gillespie's boss, returned to his office from a meeting. Gillespie then went to Hay's office to inquire who the man was. Hay was unaware anyone had been in his office and, at that time, noticed his computer bag containing his MacBook Air laptop and iPad was missing. Hay began searching the office building and parking garage for anyone matching the description provided by Gillespie before realizing that he could track his iPad through an application on his cell phone. Hay then used his phone to track his iPad moving on Old Pineville Road. Hay and his coworker, Neil Nichols, then drove to a strip mall across the road from the Woodlawn light rail station where the tracking application indicated the iPad was. As Hay and Nichols turned into the parking lot, Hay saw the man walking with the computer bag over his shoulder. At trial, Hay identified the man as defendant.

As defendant headed across the street towards the light rail station, Nichols called 911 while Hay flagged down a nearby police officer. That officer, Ricardo Coronel, then approached defendant, who was sitting on a bench at the Woodlawn light rail station with the computer bag next to him. Officer Coronel first asked defendant if the computer bag was his, but defendant did not respond. Officer Coronel then asked for defendant's identification. After verifying defendant's identification and that the computer bag belonged to Hay, Officer Coronel arrested defendant.

Gillespie was then summoned to the Woodlawn light rail station to identify defendant. Upon the arrival of Gillespie, the police conducted a "show-up" identification, during which Gillespie positively identified defendant as the man he had seen exiting Hay's office.

Defendant was then taken to the Wilkinson Boulevard Police Station, where he was interviewed by Officer James Crosby and Detective Tammy Post. A redacted version of the videotaped interview was published to the jury at trial. The State also published surveillance video footage from the interior of the light rail train and of the Woodlawn light rail platform. Defendant initially objected that the video lacked foundation, but after a *voir dire* examination of the light rail employee and lengthy bench conference, the objection was overruled. Ray Alan Thompson, a safety

coordinator for the Charlotte Area Transit, played the surveillance footage for the jury. Neither the State nor the Defense commented on the video.

The State then played the surveillance footage for a second time during the testimony of Detective Post. During the playing of the surveillance footage, the State asked Detective Post to indicate when she recognized someone. Without objection, Detective Post identified defendant in the surveillance footage from inside the train. When Detective Post further testified that defendant was carrying the computer bag, defendant offered a general objection that was overruled. Detective Post then continued to testify that she could tell it was defendant in the video because she was familiar with defendant and because defendant is very tall. When the State asked Detective Post if "[defendant was] wearing the same clothing [that] he was wearing when [she later] interviewed him[,]" defendant's objection on the basis of "leading" was sustained. Detective Post then continued to testify as surveillance footage of the train and platform recorded by various cameras at different angles was shown. Detective Post repeatedly identified defendant and indicated defendant was holding the computer bag in the surveillance footage. Detective Post also testified that defendant was wearing the same clothes in surveillance footage that he wore when she observed him in the back of a police car and when she interviewed him.

The following day, the State also introduced into evidence a still image showing a person exiting the office building on the day the computer bag was taken. When Detective Post was asked who the individual in the photograph was, the defense objected and the objection was overruled. Detective Post then identified defendant in the photograph. The State followed up on the identification by asking Detective Post if anything was peculiar about defendant in the picture. Again, defendant objected and the objection was overruled. Detective Post then responded that a rectangular object, consistent with the shape of the computer bag, appeared to be tucked under defendant's shirt. After this testimony, both the State and defendant rested.

On 19 March 2015, the jury returned verdicts finding defendant guilty of felonious larceny pursuant to unlawful entering, felonious entering, and felonious possession of stolen goods or property pursuant to unlawful entering. Defendant then pled guilty to attaining habitual felon status as part of a plea arrangement whereby the State agreed to consolidate defendant's convictions into a single judgment for sentencing. Upon defendant's convictions and the plea arrangement, the trial judge consolidated the breaking and entering, habitual larceny, and

habitual felon offenses and entered a single judgment sentencing defendant to a term of 110 to 144 months. The trial judge arrested judgment on the felony larceny and possession of stolen goods or property offenses. Defendant gave notice of appeal.

II. Discussion

Defendant asserts that this case turned on whether the evidence was sufficient to convince the jury that he was the person seen in the office building and that the State's evidence placing him in the office building was the weakest part of the State's case. Thus, defendant claims the State elicited identification testimony from Detective Post to bolster its case.

The sole issue on appeal is whether the trial court erred in allowing portions of Detective Post's testimony into the evidence at trial. Specifically, defendant contends the trial court erred in allowing Detective Post to (1) identify defendant in light rail surveillance footage, (2) testify that defendant could be seen holding David Hay's computer bag in the surveillance footage, and (3) identify defendant in the still image from the office building. Defendant contends that the challenged testimony of Detective Post was inadmissible and prejudicial lay witness opinion testimony because "Detective Post was in no better position than the jury to evaluate the evidence[.]"

The N.C. Rules of Evidence provide that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2015). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). But, lay opinion testimony identifying a person in a photograph or videotape may be allowed " 'where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.' " *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (quoting *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354-55 (2009), *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009)), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). In *Belk*, this Court identified the following factors as relevant in the above analysis:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

Id. Applying these factors in *Belk*, this Court held that the trial court erred by admitting an officer's lay opinion testimony identifying the defendant as the person depicted in surveillance video footage "[b]ecause [the o]fficer . . . was in no better position than the jury to identify [the d]efendant as the person in the surveillance video[.]" *Id.* at 414, 689 S.E.2d at 441. This Court further found the error to be prejudicial and remanded for a new trial. *Id.*

When a trial court's ruling on the admissibility of lay witness opinion testimony is properly preserved for appellate review, we review for an abuse of discretion. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (quotation marks and citation omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005). Thus, as this Court recognized in *Belk*, "we must uphold the admission of [an officer's] lay opinion testimony if there was a rational basis for concluding that [the officer] was more likely than the jury [to correctly] identify [the d]efendant as the individual in the surveillance footage." *Belk*, 201 N.C. App. at 417, 689 S.E.2d at 442.

Yet, as an initial matter, we must decide whether defendant preserved these issues for appeal. The State contends defendant did not.

"In 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). "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996). "Where evidence is admitted without objection, the benefit of a

prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985). Similarly, "[a] defendant waives any possible objection to testimony by failing to object to [the] testimony when it is first admitted." *State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000).

As indicated above, all the challenged testimony in the present case was elicited by the State during the testimony of Detective Post. Upon review of the transcript, it is clear that defendant waived review of his challenges to Detective Post's testimony regarding what she observed in the surveillance footage from the light rail train and light rail platform. First, there was never an objection to Detective Post's repeated identifications of defendant in the surveillance footage. Second, although defendant did object the first time Detective Post testified that defendant was carrying the computer bag in the surveillance footage, that objection was general and the same testimony was later admitted without objection. Concerning Detective Post's testimony based on the still image from the office building, we find the preservation issue to be a closer call because defendant objected to both questions about the photograph. However, those objections were general and "the evidence, considered as a whole, [is not] clear that there is no purpose to be served from admitting the evidence." *Jones*, 342 N.C. at 535, 467 S.E.2d at 20.

Nevertheless, because the preservation of the issues concerning Detective Post's identification of defendant in the still image is a close call, we feel compelled to note that even if defendant had properly preserved the issues for appellate review and the testimony was determined to be admitted in error, defendant is entitled to a new trial only if he was prejudiced by the error.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . .

N.C. Gen. Stat. § 15A-1443(a) (2015). Upon review of the evidence in this case, we hold defendant was not prejudiced by any error in allowing Detective Post's testimony. Unlike in *Belk*, where the State's case rested exclusively on the surveillance video and the officer's identification testimony from the video, 201 N.C. App. at 418, 689 S.E.2d at 443, the

State in the present case presented sufficient evidence besides Detective Post's testimony to allow the jury to determine defendant was at the office building and to identify defendant as the perpetrator.

First, the jury was afforded the opportunity to view the surveillance footage and the still image. As defendant notes in his argument that Detective Post was in no better position to identify defendant than the jury, the jury could compare defendant's appearance in the surveillance footage and the still image to the appearance of defendant in the videotaped interview conducted immediately after defendant's arrest. Second, the State presented other evidence tending to place defendant in the office building, including an identification of defendant by Gillespie. Specifically, Gillespie testified that he observed a man exit Hay's office and later identified that man as defendant. Defendant acknowledges Gillespie's testimony, but contends that the testimony by itself could be considered skeptically; and further asserts the suggestive nature of "show-up" identifications increases the potential for unreliability.

Defendant is correct that courts have criticized the use of show-up identifications because the practice of showing suspects singly to persons for the purpose of identification may be inherently suggestive. *State v. Oliver*, 302 N.C. 28, 44-45, 274 S.E.2d 183, 194 (1981). Yet, show-up identifications "are not *per se* violative of a defendant's due process rights." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citing *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140 (1977)). "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.* We have explained as follows:

> Our courts apply a two-step process for determining whether an identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.

State v. Rawls, 207 N.C. App. 415, 423, 700 S.E.2d 112, 118 (2010) (internal quotation marks and citations omitted). When determining if there is a substantial likelihood of irreparable misidentification,

> courts apply a totality of the circumstances test. For both in-court and out-of-court identifications, there are five factors to consider in determining whether an identification procedure is so inherently unreliable that the evidence must be excluded from trial: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 424, 700 S.E.2d at 118-19 (internal quotation marks and citations omitted).

In this case, Gillespie was summoned to the light rail station to identify someone detained as a suspect. That person, defendant, was then brought before Gillespie from the back of a police car for identification. This process was unduly suggestive. We, however, do not conclude that there was a substantial likelihood of irreparable misidentification in this case where Gillespie observed defendant exit Hay's office, observed defendant for several minutes and even made eye contact with defendant, was able to give a good description of defendant, did not second guess his identification, and the identification occurred within hours after he had observed him in the office building. Thus, we are not persuaded that Gillespie's testimony was insufficient to allow the jury to find that defendant was seen exiting Hay's office. Moreover, the evidence shows that Hay immediately noticed a man with his computer bag when he arrived at the strip mall while tracking his iPad and later identified that man as defendant. The evidence also shows that defendant was sitting on a bench with the computer bag containing Hay's laptop and iPad when he was approached and detained by police.

In light of the evidence presented at trial showing that defendant was present at the office building and was seen with the computer bag in his possession, even if Detective Post's testimony was admitted in error, defendant was not prejudiced because there is not a reasonable possibility that a different result would have been reached at trial.

III. Conclusion

For the reasons discussed above, we hold defendant failed to preserve the issues for appeal by proper objections at trial; but, in any event,

any error by the trial court in admitting the testimony of Detective Post was not prejudicial given the other identification evidence presented at trial.

NO ERROR.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
HAROLD LEE PLESS, JR., DEFENDANT

No. COA16-461

Filed 4 October 2016

1. Appeal and Error—guilty plea—sentence governed by N.C.G.S. § 90-95—no statutory right of appeal

Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, the Court of Appeals granted the State's motion to dismiss defendant's appeal. Pursuant to N.C.G.S. § 15A-1444(a2), because defendant's sentence was governed by N.C.G.S. § 90-95 rather than § 15A-1340.17 or § 15A-1340.23, he had no statutory right of appeal.

2. Appeal and Error—guilty plea—no statutory right of appeal for sentence—petition for writ of certiorari granted

Where defendant entered into a guilty plea for several drug offenses, was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, and had no statutory right of appeal, the Court of Appeals granted defendant's petition for writ of certiorari to reach the merit of his appeal.

3. Sentencing—sentence not authorized under statute—judgment vacated and plea agreement set aside

Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he

committed the offenses, the Court of Appeals vacated the judgment entered against defendant and set aside the plea agreement.

Appeal by defendant from judgment entered 16 November 2015 by Senior Resident Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kristin J. Uicker, for the State.

Joseph P. Lattimore for defendant-appellant.

ZACHARY, Judge.

Harold Lee Pless, Jr. (defendant) appeals from judgment entered upon his pleas of guilty to sale of heroin, trafficking in opium, possession of oxycodone with intent to sell or deliver, and driving while impaired. On appeal, defendant argues that the terms of the plea bargain required him to be sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed these offenses. We agree.

I. Factual and Procedural Background

On 10 December 2012, the Iredell County Grand Jury indicted defendant for possession with intent to manufacture, sell, or deliver heroin; sale or delivery of heroin; trafficking by possession and by transportation of twenty-eight grams or more of opium; possession with intent to manufacture, sell, or deliver oxycodone; sale or delivery of oxycodone; and driving while impaired. The indictments alleged that defendant had committed the charged offenses in September and October of 2012.

On 9 December 2013, defendant pleaded guilty to selling heroin; trafficking by transportation of more than fourteen but less than twenty-eight grams of opium; possession with intent to manufacture, sell, or deliver oxycodone; and driving while impaired. The State dismissed other charges that were pending against defendant and agreed that defendant would serve a single consolidated sentence of 90 to 120 months for drug trafficking. Sentencing was continued until 21 January 2014. Defendant failed to appear in court on 21 January 2014 and a warrant was issued for his arrest. Defendant was later arrested, and appeared in court for sentencing on 16 November 2015. The trial court entered judgment in accordance with the plea arrangement. The court sentenced defendant to a term of 60 days imprisonment for driving while impaired

and consolidated the drug convictions into one judgment, imposing a sentence of 90 to 120 months, to run consecutively to the DWI sentence. Defendant gave notice of appeal in open court after sentencing.

II. Statutory Right to Appeal

[1] Defendant's sole argument on appeal is that the trial court erred by imposing a sentence of 90 - 120 months imprisonment. Defendant contends, and the State concedes, that for drug trafficking offenses committed in September or October of 2012, N.C. Gen. Stat. § 90-95(h)(4)b. required that defendant receive a mandatory minimum sentence of 90 - 117 months. On 13 July 2016, the State filed a motion for dismissal of defendant's appeal, on the grounds that a challenge to the sentence imposed under § 90-95 is not among the permissible statutory bases pursuant to which a defendant may appeal following entry of a guilty plea. The State is correct in its analysis of this issue.

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (citations omitted). A criminal defendant's right to appeal from judgment entered upon a plea of guilty is governed by N.C. Gen. Stat. § 15A-1444 (2015), which provides in relevant part that:

> (a2) A defendant who has entered a plea of guilty . . . to a felony . . . is entitled to appeal as a matter of right the issue of whether the sentence imposed: . . . (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

The State argues that N.C. Gen. Stat. § 15A-1444(a2) only allows a defendant to appeal a sentence whose term was "not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23," and that, because defendant's sentence was governed by N.C. Gen. Stat. § 90-95, rather than § 15A-1340.17 or § 15A-1340.23, he has no statutory right of appeal. The State is correct that the statute does not include as a basis for appeal of a sentencing issue, that the sentence was "not authorized by N.C. Gen. Stat. § 90-95." Accordingly, we grant the State's motion to dismiss defendant's appeal.

III. Defendant's Petition for Writ of Certiorari

[2] On 27 July 2016, defendant filed a petition for issuance of a writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) provides that a defendant who "is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . may petition the appellate division for review

by writ of certiorari. . . . " In this case, we elect to grant defendant's petition in order to reach the merits of his appeal.

IV. Discussion

[3] Defendant was sentenced pursuant to N.C. Gen. Stat. § 90-95(h)(4)b., which currently provides that:

> (h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article. . . .
>
> (4) Any person who sells . . . transports, or possesses four grams or more of opium or opiate . . . shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved: . . .
>
> b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison and shall be fined not less than one hundred thousand dollars ($ 100,000)[.]

This statute formerly mandated a sentence of 90 - 117 months. However, N.C. Gen. Stat. § 90-95(h)(4)b. was rewritten effective 1 December 2012, and was made applicable to offenses committed after that date. 2012 N.C. Sess. Laws 188, § 5. Because defendant committed the charged offenses in September and October of 2012, he should have been sentenced to 90 - 117 months. The State agrees that the mandatory term applicable on the date upon which defendant committed these offenses was 90 - 117 months.

Defendant has asked this Court to vacate his sentence and return him to "the same position he was in prior to entering" a plea. The State "agrees with Defendant that his entire guilty plea should be vacated[,]" citing *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). In *Rico*, this Court determined that the trial court had entered an improper sentence pursuant to defendant's plea of guilty and remanded for resentencing. Judge Steelman dissented in part on the grounds that because the defendant "had elected to repudiate a portion" of the plea arrangement, the entire plea agreement should be vacated. *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting). Our Supreme Court reversed "for the reasons stated in the dissenting

opinion[.]" Accordingly, we agree that the judgments entered against defendant should be vacated.

For the reasons discussed above, we grant the State's motion to dismiss defendant's appeal; grant defendant's petition for a writ of certiorari; vacate the judgment entered against defendant pursuant to the plea agreement; and set aside the plea agreement.

VACATED.

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
RODNEY JOHNATHAN ROSS, DEFENDANT

No. COA16-254

Filed 4 October 2016

1. Evidence—authenticity of surveillance video—store manager testimony

The trial court did not commit plain error by concluding that a store manager's testimony was sufficient to authenticate a surveillance video.

2. Burglary and Unlawful Breaking or Entering—felonious safecracking—safe combination

Defendant's conviction for felonious safecracking was vacated and remanded to the trial court for resentencing and further proceedings. The State offered no evidence that defendant "fraudulently obtained" the safe combination.

Appeal by Defendant from judgment entered 16 October 2015 by Judge Ola M. Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brian D. Rabinovitz, for the State.

Winifred H. Dillon for the Defendant.

DILLON, Judge.

Rodney Johnathan Ross ("Defendant") appeals from jury verdicts finding him guilty of several felonies including safecracking in conjunction with a breaking and entering that occurred at a fast-food restaurant in Fayetteville. For the foregoing reasons, we vacate the conviction for safecracking; we find no error with respect to the other convictions; and we remand the matter for further proceedings not inconsistent with this opinion.

I. Background

At trial, the State's evidence tended to show as follows:

On the morning of 20 August 2014, an employee arrived at the restaurant and noticed that an air conditioning unit had been removed from the rear of the building, leaving a hole in the wall. The store's surveillance system captured a video of the break-in which showed a individual pulling out the air conditioning unit and entering the restaurant. The intruder attempted to access the safe using paper that appeared to have a safe code on it. After repeatedly attempting to open the safe, the intruder returned to the opening in the rear wall of the building and appeared to converse with someone outside. The intruder then took several boxes of hamburger meat from a cooler and exited the premises.

At least two employees and the store owner testified that they believed the intruder in the video to be Defendant. The State also presented evidence that Defendant's girlfriend ("Ms. Jackson") had been employed at the restaurant as a manager; that as a manager, Ms. Jackson had access to the restaurant's safe combination; that Ms. Jackson was fired from her position as manager approximately two days before the break-in; and that coordinates from Ms. Jackson's GPS tracking bracelet (worn as a condition of her probation for an unrelated incident) showed that she was in the vicinity of the restaurant in the early morning hours when the break-in occurred.

Based on this and other evidence presented by the State, a jury found Defendant guilty of a number of felonies, including safecracking. Following the jury's verdicts, Defendant pleaded guilty to the offense of attaining habitual felon status. The trial court consolidated the charges for judgment and sentenced Defendant to an active prison term.

Defendant timely appealed; however, his notice of appeal failed to designate the court to which his appeal was being taken as required by Rule 4 of the North Carolina Rules of Appellate Procedure. Defendant

has filed a petition for a writ of *certiorari* requesting review of the judgment of the trial court. In our discretion, we allow the petition and consider the merits of Defendant's appeal.

II. Analysis

On appeal, Defendant argues that (1) the trial court committed plain error by admitting the surveillance video into evidence; and (2) the trial court erred in its jury instructions regarding the safecracking charge. We address each argument in turn.

A. Videotape Evidence

[1] In his first argument, Defendant contends that the store manager's testimony was insufficient to authenticate the surveillance video because the testimony failed to establish the reliability of the surveillance system. Because defense counsel did not object to the admission of the video at trial, we review this issue for plain error. *See State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 806-07 (1983).

We hold that the surveillance video was properly authenticated based on decisions from our Supreme Court, including its recent decision in *State v. Snead*, ___ N.C. ___, 783 S.E.2d 733 (2016).

In *Snead*, our Supreme Court held that the recordings from a store's automatic surveillance camera "can be authenticated as the accurate product of an automated process" under North Carolina Rule of Evidence 901(b)(9). *Snead*, ___ N.C. at ___, 783 S.E.2d at 736 (internal quotation marks omitted). The Supreme Court determined that a detailed chain of custody for the video need not be shown unless the video is "not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* at ___, 783 S.E.2d at 737 (internal quotation marks omitted). Rather, the proponent must simply introduce "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process." *Id.* at ___, 783 S.E.2d at 736. It is generally sufficient for the party offering the video to "satisfy the trial court that the item is what it purports to be and has not been altered." *Id.* at ___, 783 S.E.2d at 737.

The *Snead* Court concluded that the testimony of a retailer's loss prevention manager was sufficient to authenticate the store's surveillance video, although the manager was not otherwise present at the time of the theft, where the manager testified that (1) the recording equipment was "industry standard," (2) it was in proper working order on the

date in question, (3) the system contained safeguards to prevent tampering, such as a time stamp and (4) the video introduced at trial was the same video he had watched on the digital video recorder. *Id.*

In the present case, the store manager testified that: (1) the surveillance system was comprised of sixteen night vision cameras, (2) he knew the cameras were working properly on the date in question because the time and date stamps were accurate, and (3) a security company manages the system and routinely checks the network to make sure the cameras remain online. The store manager also testified that the video being offered into evidence at trial was the same video he viewed immediately following the incident and that it had not been edited or altered in any way. Guided by our *Snead* and other decisions from our Supreme Court cited therein, we hold that the store manager's testimony is sufficient to lay a foundation for the admission of the surveillance video into evidence under Rule 901.

Even assuming, *arguendo*, that the store manager's testimony was not sufficient to lay a proper foundation, we hold that any error of the video's admission into evidence did not rise to the level of plain error in this particular case. Specifically, Defendant has not made any showing that the State would not have been able to lay a proper foundation had Defendant lodged an objection or that the video was somehow flawed. *See State v. Cummings*, 352 N.C. 600, 620-21, 536 S.E.2d 36, 51-52 (2000); *State v. Jones*, 176 N.C. App. 678, 682-84, 627 S.E.2d 265, 268-69 (2006). Accordingly, this argument is overruled.

B. Jury Instruction on Safecracking Charge

[2] In his second argument, Defendant contends that the trial court erred by giving jury instructions on the safecracking charge which varied materially from the allegations contained in the indictment. *See State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (stating that "the failure of the allegations [in the indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support the resulting conviction"). Specifically, Defendant points out that the indictment charged him with committing the offense "by means of [] a *fraudulently acquired* combination to the safe," whereas the trial court instructed the jury that it could convict if it determined that Defendant obtained the safe combination "by *surreptitious means*."

Our review of this issue on appeal is for *plain* error, as Defendant failed to object to the jury instruction at trial on the basis that it varied

materially from the indictment.[1] *See State v. Francis*, 341 N.C. 156, 159-62, 459 S.E.2d 269, 270-73 (1995); *State v. Odom*, 307 N.C. 655, 660-62, 300 S.E.2d 375, 378-79 (1983). To demonstrate plain error, Defendant must not only show error, but also prejudice—that, but for the error, the jury likely would have reached a different result. *State v. Tucker*, 317 N.C. 532, 539, 346 S.E.2d 417, 421 (1986).

One essential element of the crime of safecracking is *the means* by which the defendant attempts to open a safe. In the present case, *no* evidence was presented by the State from which the jury could have concluded that Defendant attempted to open the safe by *the means* as alleged in the indictment (by means of a "fraudulently acquired combination to the safe"). The State, however, did offer evidence from which the jury could conclude that Defendant attempted to crack the safe by the means contained in the jury instruction (by using a combination obtained "by surreptitious means"). Accordingly, as more fully explained below, we reverse Defendant's safecracking conviction. *See Williams*, 318 N.C. at 631, 350 S.E.2d at 357 (holding that a variance between the indictment and the jury instruction is *fatal* where the variance concerns an offense element).

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. *State v. Barnett*, ___ N.C. ___, ___, 782 S.E.2d 885, 888 (2016) (internal quotation marks omitted). If the indictment's allegations do not conform to the "equivalent material aspects of the jury charge," this discrepancy is considered a fatal variance. *Williams*, 318 N.C. at 631, 350 S.E.2d at 357.

In the present case, Defendant was convicted of safecracking under N.C. Gen. Stat. § 14-89.1 for attempting[2] to open the restaurant safe. The elements of this crime are set forth in the statute as follows:

> (a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:
>
> (1) By the use of explosives, drills, or tools; or

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1. In his brief, Defendant acknowledges his failure to lodge a proper objection at trial to the instruction but argues on appeal for plain error review.

2. Our Supreme Court has held that N.C. Gen. Stat. § 14-89.1 makes "the completed act of safecracking and the attempted safecracking offenses of equal dignity." *State v. Sanders*, 280 N.C. 81, 88, 185 S.E.2d 158, 163 (1971).

> (2) Through the use of a stolen combination, key, electronic device, or other *fraudulently acquired implement or means*; or
>
> (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other *surreptitious means*; or
>
> (4) By the use of any other safecracking implement or means.

N.C. Gen. Stat. § 14-89.1(a)(1)-(4) (2013) (emphasis added). The *means* element which must be alleged and proven by the State is outlined in subsections (1)-(4) of the statute.

In the present case, the safecracking indictment alleged that Defendant attempted to open the restaurant safe "by means of [] a *fraudulently acquired combination to the safe*." This allegation is sufficient on its face to support a conviction under subsection (2) of N.C. Gen. Stat. § 14-89.1, which proscribes safecracking "[t]hrough the use of [some] fraudulently acquired implement or means." *Id.* § 14-89.1(a)(2).

The record shows, however, that the trial court instructed the jury that it could convict Defendant if it determined that he attempted to open the restaurant safe using a combination obtained "by *surreptitious* means," as indicated in subsection (3) of N.C. Gen. Stat. § 14-89.1. *Id.* § 14-89.1(a)(3).

The term "surreptitious" is defined in Black's Law Dictionary as "*unauthorized* and clandestine; stealthily and *usu. fraudulently done*." Black's Law Dictionary 1458 (7th ed. 1999) (emphasis added). As indicated in this definition, the term "surreptitious" undoubtedly includes fraudulent acts; however, it also encompasses other conduct, such as an "unauthorized" act *not* involving fraud.

In the context of the present case, while the "surreptitious means" jury instruction *could include* a finding that Defendant fraudulently obtained the combination (as alleged in the indictment), the instruction also allows for a conviction based on a finding that Defendant obtained the combination in an unauthorized, non-fraudulent manner. Our Court has previously held that an error of this type is harmless where essentially the same evidence is required to prove both the State's theory as contained in the indictment and the theory as contained in the erroneous instruction. *State v. Clinding*, 92 N.C. App. 555, 562, 374 S.E.2d 891, 895

(1989). However, here, we conclude that the variance is not harmless. The State offered no evidence that Defendant "fraudulently obtained" the combination. Rather, the evidence indicates that Defendant's girlfriend, Ms. Jackson, was given the combination when she worked as a manager of the restaurant but that she used the combination in an unauthorized (surreptitious) manner when she provided the combination to Defendant.

We note that the trial court recognized that the State's evidence did not support the crime as alleged in the indictment. The court *initially* instructed the jury that it could convict Defendant if it found that he "fraudulently acquired" the combination, as alleged in the indictment. However, after consulting with counsel, the trial court modified the instruction, replacing the term "fraudulently" with "surreptitious," stating that the original instruction did not "fit[] the evidence as presented in this case."

In reaching our result, we are guided by decisions from our Supreme Court. For instance, in *Williams*, our Supreme Court reversed the conviction of a defendant for forcible rape under N.C. Gen. Stat. § 14-27.21. *Williams*, 318 N.C. at 632, 350 S.E.2d at 358. Under that statute, an individual is guilty of forcible rape if he commits a rape *and* does one of three additional acts set forth in the statute. N.C. Gen. Stat. § 14-27.21 (2013). In *Williams*, the defendant was charged with the first-degree rape of his 12-year-old daughter in an indictment that alleged the rape was "by force and against her will[,]" but that did not allege that his daughter was under the age of 13 years of age, an alternate theory for the offense. *Williams*, 318 N.C. at 625, 350 S.E.2d at 354. *See generally* N.C. Gen. Stat. § 14-27.2(a)(1), (2) (2013).[3] However, the trial court instructed the jury that it could find the defendant guilty of first-degree rape if the jurors found that the defendant engaged in the act, "at the time, [the victim] was a child under the age of thirteen years." *Williams*, 318 N.C. at 630, 350 S.E.2d at 357 (internal quotation marks omitted). Our Supreme Court additionally stated:

> The requirements of a valid indictment are that it be sufficiently certain in the statement of the accusation so as to identify the offense with which the accused is charged; to protect the accused from being twice put in jeopardy for the same offense; to enable the accused to prepare for trial

3. Section 14-27.2 was re-codified as N.C. Gen. Stat. § 14-27.21 by Session Laws 2015-181, s. 3(a) effective 1 December 2015, and applicable to offenses committed on or after that date.

> and to enable the court on conviction or plea of guilty to pronounce sentence according to the rights of the case. . . . An indictment that does not accurately and clearly allege all of the elements of the offense is inadequate to support a conviction. . . . Finally, the failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction. . . .
>
> Because the jury in this case was instructed and reached its verdict on the basis of the elements set out in N.C.G.S. § 14.27.2(a)(1), whereas defendant had been charged with rape on the basis of the elements set out in N.C.G.S. § 14–27.2(a)(2) [by means of force] . . . , the indictment under which [the] defendant was brought to trial cannot be considered to have been a valid basis on which to rest the judgment. Therefore, we hold that the instructions given to the jury pursuant to N.C.G.S. § 14–27.2(a)(1) were fundamentally in error.

Id. at 630-31, 350 S.E.2d at 357 (citations omitted). *See also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422 (finding plain error where the defendant was indicted for kidnapping *by removal*, but convicted after the jury was instructed on a theory of kidnapping *by restraint*); *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 862-63 (1984) (finding plain error where the defendant was indicted for first-degree kidnapping on theories of facilitation of a felony and the victim was not released in a safe place, but the jury was instructed on the theory that the victim was terrorized and sexually assaulted). The Court therefore vacated the judgment because the defendant was never charged in the rape indictment under the only theory which the jury was instructed to consider. *Williams*, 318 N.C. at 631, 350 S.E.2d at 357. *See also State v. Taylor*, 301 N.C. 164, 270 S.E.2d 409 (1980) (vacating a kidnapping conviction, stating that "[i]t is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment"); *State v. Thorpe*, 274 N.C. 457, 164 S.E.2d 171 (1968).

The critical similarity between *Williams* and the present case is that there was *no* evidence produced at trial that would support the pertinent element alleged in the indictment, while there was evidence presented which supported the element on which the jury was instructed. It is not surprising that each jury (in *Williams* and in the present case) returned a guilty verdict after being instructed on an element supported

by the evidence produced at trial, though not alleged in the indictment. Likewise, it is clear that if instructed only on the theory alleged in the indictment, each jury, faced with a complete lack of evidence in support of the relevant element,[4] would have returned a not-guilty verdict. This is precisely the prejudice required to show plain error: that, but for the erroneous instruction, the jury likely would have reached a different result. *See Tucker*, 317 N.C. at 539, 346 S.E.2d at 421.

III. Conclusion

For the foregoing reasons, we hereby vacate Defendant's conviction for felonious safecracking and remand this matter to the trial court for resentencing and further proceedings consistent with this opinion. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (holding that when offenses are consolidated for judgment, the proper procedure is "to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated"). We find no error in Defendant's remaining convictions.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges BRYANT and STEPHENS concur.

4. The complete lack of evidence that Defendant obtained the combination by *fraud* led the trial court to stop proceedings in the middle of the jury charge, send the jury out of the courtroom, and initiate a discussion with counsel about how to instruct the jury on the safecracking charge, noting, "The [S]tate has a problem."

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 October 2016)

BATES v. GOMEZJUARDO No. 16-242	Union (15CVD1688)	Affirmed
BUNCH v. BUNCH No. 16-263	Pitt (11CVD10)	Affirmed
CAMPBELL v. CITY OF STATESVILLE No. 16-101	Iredell (15CVS1179)	Affirmed
CHATTERJEE v. IVORY No. 16-12	Halifax (14CVS28)	Affirmed in part; Vacated in part
FAGUNDES v. AMMONS DEV. GRP. No. 16-260	Wake (15CVS1191)	Dismissed
HALL v. BOOTH No. 16-123	Forsyth (12CVS4088)	Affirmed
IN RE A.M-M. No. 16-282	Buncombe (08JT366) (08JT368)	Affirmed
IN RE D.K.H. No. 16-174	Cabarrus (12JT142) (12JT143)	Affirmed
IN RE D.S. No. 16-408	Wake (13JT127)	Affirmed
IN RE E.D.D-A. No. 16-280	Buncombe (08JT34) (13JT328)	Affirmed
IN RE I.D.R. No. 16-218	Robeson (15JT63)	Affirmed
IN RE J.F. No. 16-259	Forsyth (13JT178)	Affirmed
IN RE J.S.M.O. No. 16-233	Henderson (12JT131)	Affirmed
IN RE J.W. No. 16-195	Durham (13J173-175)	Affirmed
IN RE K.W. No. 15-1357	Buncombe (15SPC799)	Affirmed

IN RE M.D. No. 16-325	Wake (14JT142)	Affirmed
IN RE N.G.F. No. 16-297	Cumberland (12JT206) (12JT402)	Affirmed
IN RE R.K.C. No. 16-354	Buncombe (12JT266) (13JT332)	Affirmed
IN RE Z.R. No. 16-204	Vance (14JT8)	Reversed
LYTLE v. N.C. DEP'T OF PUB. SAFETY No. 16-241	N.C. Industrial Commission (TA-23292)	Affirmed
MACKEPRANG v. MACKEPRANG No. 16-333	Cumberland (00CVD6036)	Affirmed
PASSMORE v. NAT'L RETAIL SYS., INC. No. 16-141	N.C. Industrial Commission (14-721937)	Affirmed
RIGGSBEE v. DURHAM CITY TRANSIT CO. No. 15-1276	N.C. Industrial Commission (13-760414) (Y91483)	Affirmed
SINGER v. STARK No. 15-1168	Iredell (13CVS591)	Dismissed
STATE v. ANDREWS No. 16-253	Edgecombe (14CRS53112) (14CRS53113) (14CRS53116)	No Error
STATE v. BENNETT No. 16-165	Rowan (11CRS55236-40)	No Error
STATE v. BLODGETT No. 16-376	Catawba (13CRS3021)	No Error
STATE v. BRADLEY No. 16-177	Jackson (14CRS50527)	No Error
STATE v. CHEKANOW No. 15-1294	Alleghany (14CRS50306) (14CRS50307)	Reversed and Remanded.

STATE v. DICK No. 15-1400	Guilford (13CRS100144) (13CRS100146) (13CRS100147) (13CRS100148) (13CRS100149) (13CRS100150) (13CRS100151) (13CRS100152) (13CRS100154) (14CRS24350)	Vacated in part and Remanded for New Trial and Resentencing
STATE v. GILLIS No. 16-226	Cabarrus (09CRS3474)	Reversed and Remanded
STATE v. LANCLOS No. 16-122	Jones (14CRS50017)	No Error
STATE v. LAWS No. 16-134	Yancey (15CRS269) (15CRS50297-99)	No Error
STATE v. LEACH No. 16-317	Iredell (11CRS52176) (11CRS52183)	Affirmed
STATE v. MANRING No. 16-130	Forsyth (14CRS55861)	No Error
STATE v. MAYS No. 16-315	Guilford (12CRS23050) (12CRS66358)	No Error
STATE v. SOOTS No. 15-1262	Catawba (14CRS2824)	No Error
STATE v. WEBB No. 16-267	Buncombe (12CRS52274) (12CRS52276) (13CRS55149)	Affirmed
STATE v. WILLIAMS No. 16-235	Pitt (14CRS57135)	Affirmed
STATE v. WRIGHT No. 16-19	Stanly (14CRS50141-42)	No Error
STATE v. YOUNG No. 15-1003	Alamance (13CRS4777) (13CRS55778)	No Error

WALTER v. WALTER No. 16-210	Macon (15CVS438)	Reversed
WATSON v. JOHNSTON CTY. EMER. SERVS. No. 15-1304	N.C. Industrial Commission (13-703221)	Affirmed
WILSON v. CURTIS No. 16-194	Durham (13CVS2727)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Challenged testimony—waiver—On appeal from defendant's convictions resulting from the theft of a laptop computer and an iPad, the Court of Appeals held that defendant had waived review of his challenges to certain testimony by a police detective regarding what she observed in surveillance footage. Even assuming error, there was no prejudice because other evidence showed that defendant was present in the office building and was seen with the computer bag in his possession. **State v. Patterson, 659.**

Failure to indicate appeal from judgment suspending sentence—petition for writ of certiorari granted—Where defendant's notice of appeal failed to indicate that he was appealing from the Judgment Suspending Sentence entered against him as a result of his plea of no contest, as was required by N.C.G.S. § 15A-979(b)—instead only indicating that he was appealing from the order denying his motion to suppress—the Court of Appeals granted defendant's petition for writ of certiorari to review the appeal on the merits. **State v. Jackson, 642.**

Guilty plea—no statutory right of appeal for sentence—petition for writ of certiorari granted—Where defendant entered into a guilty plea for several drug offenses, was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, and had no statutory right of appeal, the Court of Appeals granted defendant's petition for writ of certiorari to reach the merit of his appeal. **State v. Pless, 668.**

Guilty plea—sentence governed by N.C.G.S. § 90-95—no statutory right of appeal—Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, the Court of Appeals granted the State's motion to dismiss defendant's appeal. Pursuant to N.C.G.S. § 15A-1444(a2), because defendant's sentence was governed by N.C.G.S. § 90-95 rather than § 15A-1340.17 or § 15A-1340.23, he had no statutory right of appeal. **State v. Pless, 668.**

Interlocutory appeals—motions to dismiss for lack of jurisdiction denied—In a case arising from a Domestic Violence Protective Order, an appeal from the denial of defendant's motion to dismiss for lack of personal jurisdiction was properly before the Court of Appeals, but the appeal from the denial of the motion to dismiss for lack of subject matter jurisdiction was not. N.C.G.S. § 1-277(b) allows for the immediate appeal of the denial of a Rule 12(b)(2) motion, but not for the immediate appeal of the denial of a Rule 12(b)(1) motion. **Mannise v. Harrell, 322.**

Interlocutory orders and appeals—change of venue—statutory right—Plaintiff was allowed to appeal from an interlocutory order where the judge sua sponte changed venue. Plaintiff had a statutory right for the action to remain in Durham County, unless and until defendant filed a motion for change of venue to a proper county. **Zetino-Cruz v. Benitez-Zetino, 218.**

Interlocutory orders and appeals—motion for change of venue—substantial right—Although an appeal from the denial of a motion to change venue is from an interlocutory order, it affects a substantial right and is immediately appealable. **Heustess v. Bladenboro Emergency Servs., Inc., 486.**

Interlocutory—child custody order—not final—stay by another COA panel—issues addressed—An appeal from a child custody and child support order was interlocutory but was heard on appeal. Although the order was immediately appealable

APPEAL AND ERROR—Continued

under N.C.G.S. § 50-19.1 because an equitable distribution claim remained unresolved, the order itself was not final as required by statute since future hearings were set to determine the mother's visitation. However, another panel of the COA had stayed the order pending this appeal, and the issues were addressed. **Lueallen v. Lueallen, 292.**

Juvenile order—terms of legal custody changed—appeal proper—A juvenile order was properly before the Court of Appeals where there were multiple orders but the order from which the respondent-mother appealed changed the terms of the juvenile's legal custody. **In re M.M., 58.**

Meaningful opportunity for appellate review—lack of verbatim transcript—adequate alternative—Respondent was not deprived of the opportunity for meaningful appellate review of an involuntary commitment order and was not entitled to a new hearing based on lack of a verbatim transcript. Respondent was able to obtain an adequate alternative to a verbatim transcript of his involuntary commitment hearing and thus could not show that he was prejudiced by the absence of an actual transcript. **In re Woodard, 64.**

Motion to dismiss—failure to state a claim—argument not addressed—Although plaintiffs contended the trial court erred by granting defendants' motion to dismiss based on failure to state a claim, this argument was not addressed because the Court of Appeals already held that the trial court did not err in dismissing plaintiffs' complaint for lack of standing. **Breedlove v. Warren, 472.**

No notice of appeal—brief treated as petition for certiorari—Defendant's appellate brief was treated as a petition for a writ of certiorari and the petition was granted where defendant did not give notice of appeal from an amended judgment following the resentencing outside his presence. **State v. Briggs, 95.**

Notice of appeal—timely but imperfect—writ of certiorari—Defendant's petition for writ of certiorari to review his prior record calculation and a Satellite Based Monitoring Order was granted where his written notice of appeal was timely but imperfect. Defendant had a statutory right to appeal both issues and the petition for writ of certiorari was granted in the interest of justice. **State v. Robinson, 568.**

Preservation of issues—notice of appeal—after oral ruling, before entry of order—Defendant's notice of appeal was treated as a petition for writ of certiorari and the writ was issued where defendant filed his notice of appeal after the trial court's oral ruling, but before the written order was entered. **Mannise v. Harrell, 322.**

Pro se appearance by corporation—not permitted—An appeal by a corporation was dismissed where the corporation had appeared in the trial court pro se through its president and its pro se appeal was not perfected. A corporation cannot appear pro se in North Carolina and must be represented by an attorney licensed to practice in North Carolina, with certain exceptions not applicable here. The individual appeal of the corporate president was allowed to proceed. **HSBC Bank USA v. PRMC, Inc., 255.**

Wavier of right to appeal—motion for involuntary dismissal denied—evidence subsequently presented—Defendant waived his right to appeal from the denial of his motion for an involuntary dismissal in a Hearing on a Domestic Violence Prevention Order where he presented evidence after his motion for involuntary dismissal was denied. **Jarrett v. Jarrett, 269.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

abuse should have been granted even without State's evidence that was improperly excluded. **State v. Reed, 116.**

Permanency planning review—sufficiency of findings of fact—The trial court erred in part in a permanency planning review (PPR) by entering its findings of fact. The court improperly required respondent to pay for supervised visits without making necessary findings, waived further review hearings without making all necessary findings of fact, awarded legal custody to a non-parent without evidence to support its findings that the potential custodians understood the legal significance of the relationship, and awarded custody to a non-parent without stating that it had applied the proper standard of proof. These portions of permanency plan order were vacated. **In re E.M., 44.**

Reunification plan—concurrent plan of adoption—The trial court did not abuse its discretion in a child abuse and neglect case by implementing a concurrent plan of adoption in addition to the reunification plan. Assuming arguendo it was error, there was no prejudice. **In re L.Z.A., 628.**

Writ of certiorari—adjudication and disposition—appointed counsel—Respondent mother's petition for writ of certiorari was allowed in a neglected and dependent juveniles case for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders were vacated. The case was remanded for a new hearing on the petition filed by DSS in 15 JA 63 with regard to Carl and to hold a hearing to determine respondent's eligibility and desire for appointed counsel. **In re K.P., 620.**

CHILD CUSTODY AND SUPPORT

Adequate resources to care for children—insufficient findings—Where the trial court granted custody to the children's maternal grandmother, the trial court's findings and the evidence were insufficient to verify that the maternal grandmother had adequate resources to care appropriately for the children pursuant to N.C.G.S. § 7B-906.1(j). **In re K.B., 263.**

Findings—not mere recitations of testimony—A mother's contention that the findings in a child custody and support order were merely recitations of evidence was rejected. Overall, the findings were not simply recitations of testimony but definitively found ultimate facts. **Lueallen v. Lueallen, 292.**

Findings—supported by the evidence—Findings in a child custody and support order were adequately supported by the evidence. Although there was conflicting evidence, the trial court evaluated the credibility and weight of the evidence and made findings accordingly. **Lueallen v. Lueallen, 292.**

Order—inferences from evidence—trial court role—There was no abuse of discretion in a child custody action where the mother challenged the award of primary legal custody and primary physical custody to the father. The mother's argument asked the appellate court to re-weigh the voluminous evidence and draw new inferences, but that was the trial court's role. **Lueallen v. Lueallen, 292.**

Order—mental health evaluation and treatment—changing beliefs—The trial court erred in a child custody order by requiring the mother to undergo a mandatory mental health evaluation and therapy with requirements that she change her beliefs concerning the father's substance abuse and his behavior with the child, and that the child's therapist accept the trial court's determinations in these matters. The trial

CHILD CUSTODY AND SUPPORT—Continued

court must make findings regarding events that have happened and order actions based on those facts, but it cannot order the mother or the therapist to wholeheartedly accept or believe anything. The trial court on remand may take into account the futility of further evaluations or therapy if the mother insists on her version of the facts, which could result in more restricted visitation. **Lueallen v. Lueallen, 292.**

Order—sufficiently well organized—A mother's challenge to a child custody and support order based on it being written in a "haphazard" style was rejected where the order was reasonably well-organized. Orders are not required to have any particular style or organization, although a well-organized order is easier for everyone to understand. **Lueallen v. Lueallen, 292.**

Support—arrearage—contempt—failure to find job—bad faith—In a contempt proceeding arising from an arrearage in child support, the findings that the mother had the ability to comply with the order but willfully failed to do so were supported by the evidence. The dispute arose from the ending of the mother's temporary job filling in for a teacher out on maternity leave and her failure to find another job. **Lueallen v. Lueallen, 292.**

Support—arrearages—calculation unclear—In a child support case remanded on other grounds, it was suggested as a practical matter that the calculation of arrears be set forth in a table where the appellate court could not get the math in the findings to work. **Lueallen v. Lueallen, 292.**

Support—arrearage—upcoming payment included—The findings did not support the arrearage decree in a child support order where the arrearage included an upcoming support payment. The order may address any arrears accrued up to the last day of the trial, based on evidence presented at trial. **Lueallen v. Lueallen, 292.**

Support—calculation—not clear—A child support order was remanded where it lacked sufficient information for the calculation to be reviewed on appeal. **Lueallen v. Lueallen, 292.**

Support—imputed income—no error—While there was evidence that the mother in a child support action was seeking employment, the evidence supported the trial court's determination that she was acting in disregard of her child support obligation. The findings supported the trial court's conclusions that the mother was willfully suppressing her income in bad faith to avoid her child support obligation, and the trial court properly imputed income to the mother. **Lueallen v. Lueallen, 292.**

CHILD VISITATION

Visitation plan—memorialized in previous court order—The trial court did not abuse its discretion in a child abuse and neglect case by allegedly failing to set out a minimum visitation plan. The current visitation plan was memorialized in the trial court's previous order. **In re L.Z.A., 628.**

CHURCHES AND RELIGION

Complaint regarding church—bylaws—Where plaintiffs alleged in their amended complaint that they were members of a church and requested a declaratory judgment that numerous violations of the church's bylaws had occurred, the trial court lacked subject matter jurisdiction because plaintiffs' claims raised questions that went far beyond the consideration of neutral principles of law and would require the

WRONGFUL INTERFERENCE

Civil conspiracy—intentional interference with contract—electric cooperative bylaws—reasonable term or condition required—The business court did not err by granting summary judgment against plaintiff electric cooperative on its claims for civil conspiracy and intentional interference with contract. The cooperative's demand for a 44-foot-wide easement across defendant Stevenson's property in exchange for one dollar was not a reasonable term or condition. Thus, the bylaws did not require Stevenson to agree to that request. Because there was no breach of contract, the cooperative's claims fail as a matter of law. **Cape Hatteras Elec. Membership Corp. v. Stevenson, 11.**